**QORTI CIVILI PRIM`AWLA**
**(GURISDIZZJONI KOSTITUZZJONALI)**

**ONOR. IMHALLEF**
**JOSEPH ZAMMIT McKEON**

**Illum il-Hamis 31 ta` Ottubru 2019**

**Kawza Nru. 2**
**Ref. Kost. Nru. 50/19 JZM**

**Il-Pulizija**

***kontra***

**Joseph Pisani**

**Il-Qorti :**

## I. <u>Preliminari</u>

Rat il-provvediment li tat il-Qorti tal-Appell Kriminali (Sede Inferjuri) fit-<u>28 ta` Marzu 2019</u> li taqra hekk :–

*Il-Qorti :*

*Rat l-akkuzi dedotti kontra l-appellant John Pisani detentur tal-karta tal-identita` bin-numru 493073 (M), akkuzat quddiem il-Qorti tal-Magistrati (Malta):*

*Talli nhar id-19 ta` Mejju 2015 ghall-habta ta` 13:15 hrs kif ukoll fil-hinijiet ta` wara gewwa il-Bini tal-Qorti, Valletta*

*1. Insulentajt jew heddidt lill Claire Pisani jew jekk kont provokat, ingurjajt b` mod li hrigt mill-limitu tal-provokazzjoni.*

*2. Ikkagunajt biza li ser tintuza vjolenza kontra Claire Pisani jew kontra l-proprjeta` taghha jew kontra l-persuna jew il-proprjeta ta` xi hadd mill-axxendenti jew dixxendenti ta` l-imsemmija persuna.*

*3. Bhala persuna volontarjament ksirt il-paci pubblika u l-bon ordni b` ghajjat u storbju jew b` mod iehor.*

*4. Inqast li tosserva jew ksirt xi wahda mill-kundizzjonijiet impost fuqek minn Ordni ta` Protezzjoni, b`artikolu 412 C tal-Kapitlu 9, liema ordni inharget b`sentenza defmittiva/i datata/i 16/02/2015 mahruga mill-Onor Dr A Vella LLD.*

*Rat is-sentenza tal-Qorti tal-Magistrati (Malta) tal-21 ta` Marzu, 2016 fejn il-Qorti wara li rat l-Artikoli 251 B (1), 338 (dd), 339 (1) (e) u 412 C tal-Kapitolu 9 tal-Ligijiet ta` Malta, il-Qorti sabet l-imsemmi imputat hati tal-ewwel tlett akkuzi kif dedotti mill-Prosekuzzjoni u kkundannatu ghal tlett xhur prigunerija u lliberatu mir-raba` akkuza.*

*Il-Qorti fissret fi kliem car, il-portata ta` din is-sentenza lill-imputat.*

*Rat ir-rikors tal-appellanti Joseph Pisani minnu pprezentat fit-22 ta` Marzu, 2016 fejn talab lil din il-Qorti joghgobha tilqa` l-ewwel zewg*

*aggravji tal-appell tieghu u thassar u tirrevoka s-sentenza appellata billi tiddikjara s-sentenza appellata bhala nulla u tiddisponi rninn dan l-appell skont din id-dikjarazzjoni. Altemattivament u minghajr pregudizzju f` kas li l-ewwel zewg aggravji tieghu ma jintlaqawx, tilqa` l-aggravji l-ohra tieghu u joghgobha tikkonfermaha f`dik il-parti fejn ma sabitux hati tar-raba irnputazzjoni migjuba fil-konfront tieghu u thassarha u tirrevokaha ghal bqija billi tiddikjarah mhux hati tal- ewwel tlett irnputazzjonijiet dedotti kontra tieghu u tilliberah skont il-ligi. Alternattivament u minghajr pregudizzju f`kaz li dan l-appell ma jintlaqax, joghgobha tirriformaha fil-parti tal-piena billi minflok tigi irnposta piena jew sanzjoni ohra li tkun aktar ekwa ghac-cirkostanzi tal-kaz.*

*Rat l-aggravji tal-appellanti u cioe` :-*

*Illi l-Ewwel Aggravvju huwa car u manifest in kwantu s-sentenza ta` l-Ewwel Onorabbli Qorti hija nulla ai fini u l-effetti kollha tal-ligi. Meta l-appellant talab kopja tas-sentenza mghotija fil-konfront tieghu sabiex jhejji l-appell tieghu huwa inghata biss il-kopja tal-komparixxi li fuqha kien hemm il-kliern "4- Liberat 1,2,3 - Tliet xhur prigunerija" miktubin fil-parti t` isfel ta` l-istess att. [Dok A] Illi minn harsa lejn dan id-dokument jidher ben car li dan ma jissodisfax ir-rekwiziti minirni stabilliti mil-ligi dwar x` ghandu jkun fiha sentenza [Vide Art.382 tal-Kap. 9]. Huwa minnu li fi proceduri sommarji ma hijiex rikjesta r-rigorisita` procedurali li hija stabillita fi proceduri penali ohra pero` "is-sentenza" in kwistjoni bir-rispett jigi sottomess li hija estremament ekonomika u sibiljana;*

*2. Illi minghajr pregudizzju ghall-premess, it-Tieni Aggravju huwa car u manifest in kwantu bir-rispett jinghad li s-sentenza ta` l-Ewwel Onorabbli Qorti hija nulla ai fini u l-effetti kollha tal-ligi. Minn imkien mis-sentenza ma jirrizulta ta` liema akkuzi partikolari nstab hati l-esponent appellant. Dan qieghed jinghad partikolarment ghal dak li jirrigwarda l-ewwel imputazzjoni li kif redatta kienet tikkontempla zewg reati distinti minn xulxin kif ukoll reat bi skuzanti o meno kontemplata fil-ligi. Ghalhekk mis-sentenza in kwistjoni ma jirrizulta minn imkien jekk l-esponent nstabx hati li nsulenta lill-martu sic et simpliciter, jew instabx hati li hedded lill-martu izda ma nsulentahiex, jew kemm nsulenta kif ukoll hedded lill-martu, jew jekk insulta jew hedded dan ghamlu ghax provokat izda minkejja l-provokazzjoni hareg il-barra mill-limiti tal-*

*provokazzjoni. F` dan is-sens l-esponent appellant ghadu sal-lum ma jafx ta` xhiex ezattament gie misjub hati.*

*3. Illi minghajr pregudizzju ghall-premess, it-Tielet Aggravju huwa car u manifest in kwantu l-esponent bir-rispett jirrileva li s-sejbien ta` htija tieghu mill-Ewwel Onorabbli Qorti fuq l-ewwel dett imputazzjonijiet rnigjuba kontrih hija wahda unsafe and unsatisfactory. Waqt id-depozizzjoni taghha, mart l-appellant lanqas setghet tiftakar meta sehh l-allegat incident u x-xhieda kollha li tressqu kienu biss jikkostitwixxu hearsay evidence ghaliex kienu affidavits ta` pulizija stazzjonati gewwa l-Ghassa tal-Belt li rrakontaw dak li qaltilhom l-kollega taghhom mill-Ghassa taz-Zejtun fuq dak li rraportat lilha l-istess Claire Pisani. Inoltre l-ewwel Onorabbli Qorti ammettiet bhala prova kopja ta` verbal allegatament tas-seduta tal-perizja ta` dak il-jurn, li la kien awtentikat u lanqas kienet kopja ufficjali;*

*Rat l-atti kollha tal-kawza.*

*Semghet it-trattazzjoni tal-partijiet dak li gie verbalizzat minnhom fis-seduta tal-14 ta` Frar 2019.*

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

*Ikkunsidrat:*

*Rat dak li gie verbalizzat minn Dr Franco Galea nhar l-14 ta` Frar, 2019 fejn ippremetta u ddikjara s-segwenti:-*

*"Dr. Franco Galea ghall-appellant qieghed jitlob referenza kostituzjonali fir-rigward tal- Kostituzzjonalita o meno tas-sentenza moghtija mill-ewwel Qorti kif ukoll tal-fatt li l-artikolu 382 tal-kap 9 ma jindikax b`mod espress li s-sentenza moghtija mill-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali fi proceduri hekk imsejha sommarji ghandu jkun fiha xi forma ta` motivazzjoni."*

*Illi rat dak li wiegeb Dr Charles Mecieca ghall-Avukat Generali u cioe:-*

*"Dr Charles Mercieca ghall-Avukat Generali jiddikjara li qieghed joggezzjona ghal din ir-referenza u dan a bazi tal-fatt illi l-Qrati Maltin fil-vesti taghhom kriminali, gja taw pronunzjament taghhom wara s-sitwazzjoni identifka bhal dik odjerna senjatament fil-kaz il-Pulizija vs Emmanuel Zammit datata 16 ta` Jannar 1986".*

*Ikkunsidrat:*

*Din il-Qorti ezaminat is-sentenza moghtija minn din il-Qorti diversament preseduta u cioe dik citata mill-Avukat Generali fl-ismijiet **il-Pulizija vs Emmanuel Zammit** u nnotat li f`dik is-sentenza giet trattata l-kwistjoni jekk meta sentenza tkun miktuba fuq ic-citazzjoni li fuqha jkun hemm riprodotti l-fatti kif gara fil-kaz in desamina, u mis-sentenza kif redatta ma jkunx hemm dubbju dwar liema fatti l-akkuzat jkun gie misjub hati fejn dik il-Qorti sahhet li s-sentenza ghandha tigi salvata ghaliex ma hemmx post il-formalizmu.*

*Hawnhekk pero` l-appellant mhux qed ighid hekk izda qed imur pass oltre u jispjega li skond l-artikolu 382 tal-Kap. 9 l-ligi ma jirrikjedix li akkuzat jinghata raguni `l ghala jinstab hati ad differenza ta` akkuzat li jidher quddiem Qorti Kriminali jew quddiem il-Qorti tal-Appelli Kriminali (artikolu 662(2) tal-Kap. 9) fejn dawk il-Qrati huma marbuta jaghtu r-ragunijiet taghhom u jimmotiva is-sentenza taghhom. Il-ligi tipprovdi is-segwenti:-*

***Artikolu 382:-***

*"Il-qorti, meta taghti s-sentenza kontra l-imputat, ghandha tghid il-fatti li taghhom dan ikun gie misjub hati, taghti l-piena ussemmi l-artikolu ta` dan il-Kodici jew ta` kull ligi ohra li tkuntikkontempla r-reat"*

***Artikolu 662(2):-***

*"Kull decizjoni tal-Qorti tal-Appell Kriminali u tal-Qorti Kriminali li biha tigi deciza kwistjoni ta` ligi, ghandu jkun fiha qabel kollox ir-ragunijiet li jkunu wasslu l-qorti ghal dik id-decizjoni":*

*Din il-Qorti taghmel referenza ghas-sentenza fl-ismijiet* ***Il-Pulizija (Spettur S. Tanti) Vs Omissis*** [1] *fejn saret referenza ghas-sentenza fl-ismijiet* ***Il-Pulizija vs. Joslann Brignone***[2] *intqal is-segwenti:-*

*"Din il-Qorti diga` kellha okkazzjoni li tesprimi ruha dwar nuqqasijiet simili fejn intqal Illi din mhux l-ewwel darba li minn din l-awla partikolari tal-Qrati tal-Magistrati qed jigu quddiemha sentenzi fuq kawzi dwar reati serjissimi privy mill-icken ombra ta` motivazzjoni w kellha okkazzjoni tirrimikarka avversament fuq din il-prassi u b`rinkrexximent kbir ser ikollha terga tirrepeti dak li rriteniet fl-appell kriminali "****Il-Pulizija vs. Joslann Brignone****" fejn gie ritenut li :-*

*".....din il-Qorti thossha ……fid-dmir li taghmel l-osservazzjoni segwenti. Qed jigri ta` spiss fil-Qrati tal-Magistrati - w partikolarment fl-awla li minnha emanat isKopja sentenza appellata - li kawzi ta` certa portata w gravita` qed jigu decizi bla ebda motivazzjoni kwalsiasi. Illi hu minnu li, kif inhi l-ligi - bl-emendi kollha bis-sulluzzu li saru fil-Kodici Kriminali f`dawn l-ahhar tlitt decenni w li mhux dejjem saru b` koerenza mall-hsieb inizjali tal-Kodici kif kien koncepit - in-nuqqas ta` motivazzjoni ma jgibx per se in-nullita` expressis verbis ta` tali sentenzi ghax il-motivazzjoni mhix wahda mir-rekwiziti mehtiega ad validitatem fl-art. 382 tal-Kodici Kriminali.*

*Dan ghaliex meta saru dawn l-emendi kollha, ma saret ebda emenda li tkopri l-kontenut ad validitatem ta` sentenzi u f` kawzi fejn l-akkuzi jkunu johorgu mill-kompetenza tal-Qorti tal- Magistrati bhala Qorti ta` Gudikatura Kriminali, kif kontemplata fl-art. 370 tal-istess Kodici w partikolarment fejn jew l-Avukat Generali jkun ta` l-kunsens tieghu biex jigu decizi bi proceduri sommarji jew fejn, wara li l-atti tal-kumpilazzjoni jigu rimessi lilu, jipprezenta n-nota bl-artikoli li tahthom jidhirlu li tista` tinstab htija biex il-kaz, fl-assenza ta` oggezzjoni tal-imputat, jigi gudikat minn dik il-Qorti.*

[1] Appell Kriminali Numru. 372/2006 deciz 21 ta' Gunju 2007
[2] Appell Kriminali deciz fit-8 ta' Frar 2007

*Jidher li hemm lok li ssir emenda li biha jkun rikjest li ssir xi forma ta` konsiderazzjoni, hsieb jew moitivazzjoni f` dawn is-sentenzi. Pero` mhux l-ewwel darba li - kif gara f` dan il-kaz – f` din l-Awla partikolari, kawzi serjissimi qed jigu decizi bla ebda motivazzjoni w cioe`, wara li jigi rikapitulati l-akkuzi, il-Qorti tghid :-*

*"Ikkonsidrat"*

*"….issib jew ma ssibx htija skond l-akkuzi.*

*"Illi tali stezura, ……. zgur li hija ghal kollox karenti minn dak li hu mistenni ordinarjament mill-gudikant meta jkun qed jiddeciedi kawzi bhal dawn u taghmilha difficli kemm ghall-parti vincitrici li ssostni w tiddefendi s-sentenza appellata kif ukoll ghall-parti sokkombenti li tintavola appell kontra motivazzjoni fantomatika, li forsi tkun tezisti biss f` mohh il-gudikant. Inoltre fejn il-Qorti tal-Appell thoss li jkun il-kaz li tikkonferma s-sejbien ta` htija w l-piena erogata, jkollha ta` spiss taghmel ix-xoghol tal-Qorti tal- Magistrati hi stess billi timmotiva ghall-ewwel darba ta` sejbien ta` htija w piena. Din il-prattika ghalhekk hija wahda rregolari w trid tigi evitata ghax qed twassal ghal stultifikazzjoni tal-operat tal-Qorti involuta." (ara ukoll App. Krim. "**Il-Pulizija vs. James Grima**[3]")*

*Referenza ukoll f`dan ir-rigward hija lejn is-sentenza fl-ismijiet **il-Pulizija vs Paul Chetcuti Caruana**[4] fejn inghad li:-*

*Jibda biex jinghad illi l-appellant tressaq il-Qorti fuq procedura sommarja fid-distrett tal-Mosta f`liema kaz allura l-Qorti tal-Magistrati biex tissodisfa l-vot tal-ligi kien ikun bizzejjed li taghmel riferenza ghall-fatti kif esposti fic-citazzjoni, tindika l-artikoli tal-ligi u taghmel id-dikjarazzjoni ta` htija o meno u jekk ikun il-kaz, il-piena. M`ghandhiex ghalfejn terga` tirrepeti b`mod aktar dettaljat il-fatti kif jidhru fil-bidu tac-citazzjoni peress illi jekk ippruvati, l-Qorti tista` taghmel pjena riferenza ghalihom u xejn aktar.*

*F`dan il-kaz il-Qorti hekk ghamlet u teknikament ma hemm xejn hazin fis-sentenza tal-Qorti tal-Magistrati.*

[3] Appell Kriminali deciz 8 ta' Marzu 2007
[4] Appell Kriminali deciz 19 ta' Frar 2014

*Però din il-Qorti tirrileva illi mhux il-kawzi kollha sommarji ghandhom jimxu bl-istess mod peress illi certa kawzi ghad illi jkunu bdew bi procedura sommarja jkunu ta` certa importanza u tajjeb illi tinghata motivazzjoni ghar-ragunament tal-Qorti. F`dan il-kaz il-motivazzjoni hija nieqsa kompletament u hawnhekk din il-Qorti thoss illi ghandha ticcensura `l-Qorti tal-Magistrati peress illi f`kawza bhal din kien jimmerita motivazzjoni u konsiderazzjonijiet u mhux taqbad u tiddeciedi fuq il-htija o meno minghajr ma taghmel l-icken motivazzjoni jew konsiderazzjoni. Il-Magistrat ghandha taghraf tiddistingwi l-importanza ta` kawza minn ohra u fejn normalment forsi jkollha ragun illi ma jkollhiex ghalfejn tidhol fil-motivazzjoni, certa kawzi però min-natura taghhom stess jirrikjedu aktar studju, motivazzjoni u konsiderazzjonijiet, u dina hija proprja wahda minnhom fejn il-Qorti imissha tat aktar importanza ghas-serjetà ta` din il-kawza u l-konsegwenzi taghha. Hi x`inhi, però, bhal ma già inghad, teknikament l-ewwel Qorti kienet korretta bil-mod kif kitbet is-sentenza u ma tistax din il-Qorti tilqa` t-talba ta` nullità tal-appellant*

***Illi ghalhekk in vista tad-diversi sentenzi li inghataw minn din il-Qorti diversament presjeduta minkejja li tali nuqqas ta` motivazzjoni ma tammontax ghan-nullita`ta` sentenza stricto sensu jista` jaghti l-kaz li jimpingi fuq id-dritt tal-akkuzat ghal-smigh xieraq sabiex ikun jaf ir-raguni li fuqha instab hati jew gie liberat.***

***Pero`, sakemm issir emenda opportuna, ma hux il-kaz li sentenzi ta` din ix-xorta jigu annullati u ghalhekk sa hawn tista` tasal din il-Qorti fir-rigward tal-aggravju ta` nuqqas ta` motivazzjoni f`sentenza u ghalhekk it-talba tal-appellant sabiex tali ilment jigi mistharreg mill-Prim Awla tal Qorti Civili Sede Kostituzzjonali jimmerita li tigi approfondita minn dik il-Qorti u konsegwentement qeghda tibghat l-atti quddiem dik il-Qorti sabiex l-ilment tal-appellant jigi hekk msitharreg minnha.***

(enfasi ta` din il-qorti)

Rat ir-risposta li pprezenta l-Avukat Generali fl-10 ta` Mejju 2019 li taqra hekk :–

1. *Illi ghalkemm il-Qorti tal-Appell Kriminali (Inferjuri) ma indikatx l-artikolu tal-Kostituzzjoni u/jew tal-Konvenzjoni Ewropea li jrid jigi mistharreg f`din ir-referenza, jidher li l-mistoqsija kostituzzjonali li hija tenuta twiegeb din l-Onorabbli Qorti hija dwar jekk is-sentenza li inghatat mill-Qorti tal-Magistrati u l-artikolu 382 tal-Kap 9 jivvjolawx il-jedd ghal-smigh xieraq. B`mod specifiku l-ilment li qajjem Joseph Pisani huwa li l-artikolu 382 tal-Kodici Kriminali ma jsemmiex li s-sentenza ghandha tkun motivata.*

2. *Illi bhala fatti fil-qosor jigi rilevat li Joseph Pisani gie akkuzzat quddiem il-Qorti tal-Magistrati (Bhala Qorti ta` Gudikatura Kriminali) li wettaq reati fil-konfront ta` Claire Pisani. Permezz ta` sentenza datata 21 ta` Marzu 2016 il-Qorti tal-Magistrati sabet lir-rikorrenti hati ta` tliet akkuzi u gie ikkundannat tliet xhur prigunerija. Minn din is-sentenza sar appell quddiem il-Qorti tal-Appell Kriminali, liema appell ghadu ma giex deciz definittivament.*

3. *Illi jibda biex jinghad li l-kompitu ta` din l-Onorabbli Qorti ai termini tar-referenza hija li tistabilixxi jekk sehhietx vjolazzjoni tad-dritt ghal smigh xieraq. M`hijiex il-funzjoni ta` din l-Onorabbli Qorti li tara jekk is-sentenza li inghatat fil-konfront ta` Pisani mill-Qorti tal-Magistrati tal-21 ta` Marzu 2016 hijiex wahda valida jew le jew hijiex skont il-ligi ghaliex ghal dak hemm il-Qorti tal-Appell Kriminali. Il-Qorti tal-Appell Kriminali esprimiet ruhha li s-sentenza in kwistjoni hija valida u m`ghandiex tigi annullata.*

4. *L-artikolu 382 jghid is-segwenti :*

*Il-qorti, meta taghti s-sentenza kontra l-imputat,* ***ghandha tghid il-fatti li taghhom dan ikun gie misjub hati****, taghti l-piena u ssemmi l-artikolu ta` dan il-Kodici jew ta` kull ligi ohra li tkun tikkontempla r-reat.*

*Illi fl-umli fehma tal-esponent l-artikolu 382 jaghmilha cara li l-Qorti fis-sentenza ghandha issemmi il-fatti li taghhom dan gie misjub hati u bl-ebda mod ma jeskludi li Qorti taghti r-ragunijiet ghas-sejbien ta` htija. Naturalment jispetta imbaghad lil gudikant li jassigura li l-fatti li waslu ghas-sejbien ta` htija isemmihom fis-sentenza pero` il-ligi kif inhi zgur li mhijiex kontra l-jedd ghal-smigh xieraq. Il-fatti li dwarhom akkuzat gie misjub hati ghandhom jitqiesu li huma r-ragunjiet ghas-sejbien ta` htija.*

5. *Illi minghajr pregudizzju ghas-suespost ir-rikorrent Pisani ma garrab l-ebda pregudizzju fil-kaz in kwistjoni galadarba hu appella mis-sentenza u ghalhekk jekk dehrlu li l-Qorti tal-Magistrati kienet zbaljata ghax ma semmietx ir-ragunijiet tas-sejbien ta` htija, r-rikorrent seta` dejjem jappella dwar dan il-punt kif fil-fatt ghamel. Fl-ahhar mill-ahhar il-funzjoni ta` Qorti ta` Appell hija wkoll li tirrevedi u fejn ikun hemm bzonn tirrimedja ghal-izbalji li jsiru mill-Qrati tal-Ewwel Istanza. Ghalhekk f`dan l-istadju hija l-Qorti tal-Appell Kriminali li ghandha tiddeciedi jekk ir-rikorrent ghandux jinstab hati jew le u taghti r-ragunijiet.*

6. *Illi l-jedd ghal-smigh xieraq irid jigi ezaminat fit-totalita` tal-proceduri kriminali u dan ghalissa ma jistghax isir peress li l-proceduri in dizamina ghadhom mhux konkluzi.*

7. *Illi ghalhekk m`hemm l-ebda vjolazzjoni tad-dritt ghal-smigh xieraq.*

8. *Salv eccezzjonijiet ulterjuri.*

9. *Bl-ispejjez.*

Rat il-verbal tal-udjenza quddiem din il-Qorti tal-14 ta` Mejju 2019 fejn *inter alia* nghad hekk :

*Dr Galea jikkjarifika illi l-ilment tal-patrocinat tieghu huwa fis-sens li s-sentenza moghtija fil-konfront tieghu mill-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali fil-21 ta' Marzu 2016 hija lesiva tad-drittijiet*

*kostituzzjonali tieghu mharsa mill-Artikolu 39 tal-Kostituzzjoni ta' Malta u l-Artikolu 6 tal-Konvenzjoni Ewropea, u inoltre l-fatt li l-legislatur fl-Artikolu 382 tal-Kap 9 tal-Ligijiet ta' Malta ma pprovdiex ghall-fatt illi tali sentenzi moghtija fi proceduri sommarji ghandu jkun fihom xi forma ta' motivazzjoni, hija lesiva ta' l-istess drittijiet imsemmija. Ghalhekk din il-Qorti qeghda tintalab twiegeb ghal dan l-ilment ghalkemm fit-termini ndikati fis-sentenza tal-Qorti tal-Appell (Sede Inferjuri) tat-28 ta` Marzu 2019 ma tirrizultax id-domanda li qeghda ssir lil din il-Qorti.*

*Dr Cordina ghall-Avukat Generali filwaqt li jikkontesta l-fondatezza tal-ilment kostituzzjonali u konvenzjonali sollevat bil-kwesit tal-kontroparti, u nbla pregudizzju ghad-difiza li gab l-Avukat Generali, jaqbel li dak huwa l-kwesit li trid twiegeb din il-Qorti fil-kompetenza kostituzzjonali u konvenzjonali taghha.*

Rat illi fl-istess udjenza kien dikjarat mill-partijiet li ma kellhomx provi xi jressqu ghajr ghall-inkartament relattiv ghal din ir-referenza.

Semghet is-sottomissjonijiet bil-fomm li saru mid-difensur ta` Joseph Pisani.

Rat illi l-procediment thalla ghal provvediment ghal-lum bil-fakolta` li l-Avukat Generali jipprezenta n-nota ta` osservazzjonijiet tieghu.

Rat in-nota ta` osservazzjonijiet li pprezenta l-Avukat Generali.

Rat l-atti l-ohra ta` dan il-procediment kif ukoll l-atti tal-kawza fl-ismijiet *Il-Pulizija vs Joseph Pisani.*

## II. <u>Dritt</u>

**Ir-rikorrent qieghed jilmenta li garrab ksur tal-jedd tieghu ghal smigh xieraq hekk kif dan il-jedd huwa mhares bl-Art. 6 tal-Konvenzjoni u bl-Art 39. tal-Kostituzzjoni.**

Il-parti tal-**Art 6(1) tal-Konvenzjoni** li hija rilevanti ghall-kaz tal-lum taqra hekk :–

> *Fid-decizjoni tad-drittijiet civili u ta` l-obbligi tieghu jew ta` xi akkuza kriminali kontra tieghu, kulhadd huwa ntitolat ghal smigh imparzjali u pubbliku fi zmien ragonevoli minn tribunal indipendenti u imparzjali mwaqqaf b`ligi.*

Il-partijiet tal-**Art. 39 Kostituzzjoni** li ghandhom rilevanza ghall-kaz tal-lum huma s-subartikolu (1) u (2) li jipprovdu hekk :-

> *(1) Kull meta xi hadd ikun akkuzat b`reat kriminali huwa ghandu, kemm-il darba l-akkuza ma tigix irtirata, jigi moghti smigh xieraq gheluq zmien ragonevoli minn qorti indipendenti u mparzjali mwaqqfa b`ligi.*
>
> *(2) Kull qorti jew awtorità ohra gudikanti mwaqqfa b`ligi ghad-decizjoni dwar l-ezistenza jew l-estensjoni ta` drittijiet jew obbligi civili ghandha tkun indipendenti u imparzjali ; u meta l-proceduri ghal decizjoni bhal dik huma mibdija minn xi persuna quddiem qorti jew awtorità ohra gudikanti bhal dik, il-kaz ghandu jigi moghti smigh xieraq gheluq zmien ragonevoli.*

## III. L-ilmenti

Quddiem il-Qorti tal-Appell Kriminali (Sede Inferjuri) Joseph Pisani ressaq zewg ilmenti sabiex isostni t-talba ghal referenza :-

1. Illi s-sentenza li tat il-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali fil-21 ta' Marzu 2016 fil-kawza fl-ismijiet "Il-Pulizija vs Joseph Pisani" kienet lesiva ghall-jedd tieghu ghal smigh xieraq hekk kif dan huwa tutelat bl-Art 39 tal-Kostituzzjoni u bl-Artikolu 6 tal-Konvenzjoni.

2. Illi l-fatt li fil-kuntest ta` proceduri sommarji, l-Art 382 tal-Kap 9 ma jaghmilx il-motivazzjoni tas-sentenza rekwizit *ad validitatem* huwa leziv ghall-jedd tieghu ghal smigh xieraq.

## IV. **Intempestivita`**

Ghalkemm l-Avukat Generali mhuwiex qieghed formalment jeccepixxi l-intempestivita` tat-talba li saret minn Joseph Pisani, fin-nota ta' sottomissjonijiet tieghu jaghmel l-osservazzjoni li l-fondatezza tal-ilment kellha tkun mistharrga fil-kuntest tal-process kriminali fit-totalita' tieghu. Ghalhekk ladarba sar appell mis-sentenza tal-Ewwel Qorti zbalji jew nuqqasijiet ta` dik il-Qorti setghu jigu trattati quddiem fil-Qorti tat-Tieni Grad. Ghalkemm jirrizulta li l-kawza quddiem il-Qorti tal-Appell ghadu mhuwiex mitmum, il-Qrati taghna diga` ppronunzjaw ruhhom dwar il-materja sollevata mill-Avukat Generali anke jekk dan sar fin-nota ta` osservazzjonijiet.

Inghad mill-qrati taghna illi ghalkemm huwa minnu li l-kwistjoni ta` jekk kienx imhares il-jedd ghal smigh xieraq tista` tigi evalwata meta jittiehed kont tal-procediment fl-assjem tieghu, u ghalhekk jista` jkun prematur li wiehed jiddeciedi dwar il-kwistjoni fi stadju bikri tal-process, meta jkun jirrizulta li diga` hemm ragunijiet bizzejjed li fuqhom il-qorti tkun tista` tistharreg hemmx lezjoni, hija m`ghandhiex toqghod lura u tistenna sakemm jintemm il-kaz kollu sabiex tippronunzja ruhha jew addirittura tistenna li attwalment jinkiser il-jedd sabiex tippronunzja ruhha. Dan ghaliex jista` jinqala` l-kaz illi jkun tard wisq li l-qorti tintervjeni jew li l-persuna tibqa` minghajr rimedju.

Fis-sentenza li tat fil-25 ta` Marzu 2011 fil-kawza fl-ismijiet **David sive David Norbert Schembri vs Avukat Generali**, il-Qorti Kostituzzjonali ghamlet referenza ghal dak li qalet l-Ewwel Qorti meta din sostniet illi :-

> *"kellha tqis il-process kollu, u mhux episodju wiehed mehud wahdu. Ghalkemm dwar id-decizjoni fuq jekk ir-rikorrent ghandux jigi msejjah biex iwiegeb ghall-akkuza ma hemmx*

*rimedju ordinarju iehor, ghax dik id-decizjoni hija finali, dwar id-decizjoni fuq l-akkuza nfisha il-process ordinarju ghadu ghaddej, u ghalhekk ir-rikorrent ghadu jista` jinqeda bir-rimedji li taghtih il-ligi ordinarja. Dan huwa relevanti ghax il-jedd imhares taht l-Artikolu 6 huwa dwar id-decizjoni fuq l-akkuza kriminali, u mhux dwar iddecizjoni fuq jekk ir-rikorrent ghandux jigi msejjah biex iwiegeb ghall-akkuza. Fil-kaz tal-lum id-decizjoni illi l-kawza kriminali kontra r-rikorrent ghandha titmexxa `l quddiem, fiha nfisha u wehedha, ma tolqot ebda jedd fondamentali mhares taht l-artikolu tal-Konvenzjoni li fuqu qieghed jistrieh ir-rikorrent".*

Il-Qorti Kostituzzjonali osservat illi l-appellant ma kienx qabel mal-Ewwel Qorti dwar il-kwistjoni illi kellu jitqies il-process kollu u mhux episodju wiehed.

L-appellant ghamel l-argument illi :-

*" … l-ghoti ta` rimedju jista` jigi anticipat jekk ikun se jinkiser dritt. Fis-sentenza tal-Qorti ta` Strasbourg fil-kaz fl-ismijiet Imbroscia v. Switzerland jinghad li :*

*`The manner in which article 6(1) and 3(c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. In order to determine whether the aim of Article 6 – a fair trial – has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case.`*

*Kif tikteb Karen Reid fil-ktieb "A Practitioner`s Guide to the European Convention on Human Rights", 3 rd Edition page 70*

*"While the conformity of a trial with the requirements of Article 6 must be assessed on the basis of the trial as a whole, a particular incident may assume such importance as to constitute a decisive factor in the general appraisal of the trial overall".*

Minkejja dan l-argument, il-Qorti Kostituzzjonali kkonfermat dak li kien deciz mill-Ewwel Qorti.

Fid-decizjoni li tat fit-22 ta` Frar 2013 dwar Referenza li kienet saret mill-Qorti Kriminali fil-kawza : **Repubblika ta` Malta vs Carmel Camilleri** : il-Qorti Kostituzzjonali osservat illi mhuwiex necessarjament il-kaz illi l-Ewwel Qorti tistenna sakemm jintemm il-process kriminali qabel ma tqis ilment dwar ksur tal-jedd ghal smigh xieraq sabiex dak il-jedd jigi *"evalwat fir-rigward tat-totalità tal-procedura"*, kif irid l-Avukat Generali.

Inghad :-

> *"Tassew illi l-gurisprudenza generalment hija kif ighid l-Avukat Generali. Ukoll fil-kaz ta` Imbrioscia v. l-Isvizzera (Q.E.D.B. 24 ta` Novembru 1993, rikors 13972/88.4), li wkoll kien dwar id-dritt ghall-ghajnuna ta` avukat waqt l-interrogazzjoni, il-Qorti Ewropeja qalet illi kellha taghmel "a scrutiny of the proceedings as a whole" . Dan huwa principju generali li japplika ghall-jedd ghal smigh xieraq u ma jidhirx li hemm xi raguni ghala fil-kuntest tal-jedd ghall-ghajnuna ta` avukat ghandu jkun differenti.*
>
> *Madankollu, kif qalet din il-qorti fil-kaz ta` Il-Pulizija v. Alvin Privitera (Q. Kost. 11 ta` April 2011) , jista` jigri illi episodju wiehed ikun determinanti ghall-ezitu tal-process kollu u ghalhekk ma jkunx il-kaz illi l-qorti tistenna sakemm jintemm il-kaz. Dan jista` facilment jigri fil-kaz ta` ammissjoni ta` htija. Huwa minnu illi, jekk ikollha raguni ghax tahseb illi dik l-ammissjoni ma jkollhiex mis-sewwa, il-qorti tista` ma toqghodx fuqha. Ma jistax ma jinghadx, izda, illi stqarrija ta` htija aktar iva milli le tkun determinanti.*
>
> *Din il-qorti ghalhekk ma tarax illi hemm ragunijiet bizzejjed biex tiddisturba din il-konkluzjoni li waslet ghaliha l-Ewwel Qorti, u li wasslitha biex taghti decizjoni qabel ma jkun intemm il-process penali.*

*Barra minn hekk, dan il-kaz inbeda b`referenza mill-Qorti Kriminali, li waqqfet is-smigh quddiemha sakemm ikollha t-twegiba ghal dik ir-referenza. Ma setghetx ghalhekk l-Ewwel Qorti ma twegibx ghar-referenza billi tistenna sakemm jinghalaq il-process kriminali.*

*Safejn irid illi l-qorti tqis it-"totalità tal-procedura" qabel ma twiegeb ghar-referenza, l-aggravju huwa ghalhekk michud."*

Fid-decizjoni li tat fis-26 ta` April 2013 fir-Referenza li kienet saret mill-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali fil-kawza fl-ismijiet **Il-Pulizija vs Dr Melvyn Mifsud**, il-Qorti Kostituzzjonali osservat illi hija l-gurisprudenza kostanti taghha u tal-ECtHR illi l-ezami dwar jekk ikunx hemm vjolazzjoni tad-dritt ghal smigh xieraq irid isir billi jittiehed qies tal-procedimenti kollha fl-assjem taghhom u li ghalhekk dan l-ezercizzju, fil-principju, huwa ndikat li jsir biss fi tmiem il-procedimenti u mhux qabel.

Il-Qorti rrilevat hekk :-

*"Dan hu ugwalment applikabbli meta din il-Qorti jkollha tikkunsidra jekk x`aktarx tkunx ser issehh tali vjolazzjoni. Huwa minnu li kemm din il-Qorti kif ukoll l-organi ta` Strasburgu kkoncedew li in linea eccezzjonali xi fattur partikolari tal-proceduri jista` jkun tant determinanti ghad-dritt ghal smigh xieraq li ma jkunx mehtieg li l-Qorti tistenna sa tmiem il-proceduri sabiex tiddeciedi jkunx hemm vjolazzjoni tad-dritt in kwistjoni (Ara inter alia Repubblika ta` Malta v. Carmel Camilleri, ibid) izda dan ma hux il-kaz li ghandha l-Qorti quddiemha llum.*

*Fil-kaz tal-lum anki kieku kien minnu li naqsu xi notamenti bil-miktub li kienu xi darba jifformaw parti mill-atti - haga li, kif inghad, ma tirrizultax pruvata f`dawn il-proceduri mill-appellant fil-grad li trid il-ligi - il-Qorti ta` kompetenza kriminali tkun ghad trid tevalwa r-relevanza ta` dik il-kitba allegatament nieqsa tenut kont tal-fatt li l-appellant jallega li jehtieg dik il-prova sabiex isostni l-eccezzjoni tieghu tal-preskrizzjoni filwaqt li l-prosekuzzjoni ssostni li r-reat li bih*

*huwa akkuzat l-appellant huwa wiehed ta` natura permanenti u li bhala konsegwenza jgib mieghu il-fatt li t-terminu preskrittiv anqas biss jibda jiddekorri sakemm jibqa` jissusisti l-fatt projbit mil-ligi u cioe` fil-kaz de quo n-nuqqas tal-pagament tal-ammonti allegatament dovuti lill-avukat Dr. Carmelo Grima; il-Qorti riferenti jista` jehtigilha tipprovdi jekk ghandhiex tammetti xi prova sekondarja in sostituzzjoni ta` xi prova primarja u tkun ghad trid tiddetermina jekk il-prosekuzzjoni intentax l-azzjoni penali fiz-zmien previst mil-ligi u jekk tkunx ippruvat il-htija talakkuzat sal-grad previst mil-ligi penali u cioe` oltre ddubbju ragjonevoli; u eventwalment, fid-dawl ta` dan kollu, tkun trid tiddeciedi dwar il-htija o meno tal-appellant.*

*Ikunx hemm vjolazzjoni tad-dritt ghal smigh xieraq, ghalhekk, jiddependi minn kif il-Qorti riferenti tittratta u tiddisponi mid-diversi kwistjonijiet u tappi processwali appena elenkati, fost ohrajn, li jistghu jitqieghdu quddiemha fil-kors tal-process u ghalhekk certament il-fatt wahdu previst mill-appellant sabiex fuqu jsostni t-talba tieghu ghal riferenza lil din il-Qorti ma hux wahdu determinanti tal-kwistjoni minnu sollevata li ghalhekk hi ghal kollox intempestiva u prematura u daqstant intempestiva u prematura hi r-referenza tal-Qorti referenti."*

Fid-decizjoni li tat fis-16 ta` Marzu 2011 fil-kawza **Morgan Ehi Egbomon vs Avukat Generali** il-Qorti Kostituzzjonali accettat dak li kienet qalet l-Ewwel Qorti illi sabiex il-qorti tkun tista` tiddeciedi dwar allegazzjoni ta` nuqqas ta` smigh xieraq hemm bzonn illi jsir apprezzament tal-process kriminali kollu. Ladarba f`dak il-kaz il-process kriminali kien ghadu mhux mismugh u mitmum, kien ghadu mhux maghruf kif u taht liema cirkostanzi jistghu joperaw ir-regoli illi l-appellant qieghed jilmenta dwarhom.

Inghad :

*"Ghalhekk, sewwa qalet l-ewwel qorti illi, qabel ma jkun sar u ntemm il-process penali, ikun prematur illi jsir minn din il-qorti l-ezercizzju li jrid l-Appellant, kemm ghax l-Appellant*

*ghad ghandu ghad-dispozizzjoni tieghu r-rimedji u l-mezzi ta` harsien kollha li jaghtih il-process penali – u ghalhekk ghad ghandu rimedji taht il-ligi ordinarja – u kif ukoll ghax din il-qorti ghadha ma tistax tqis il-process penali kollu kemm hu – ghax ghadu ma sarx – biex tkun tista` tghid kienx hemm ksur tal-jeddijiet fondamentali, mhux f`episodju izolat, izda fil-kuntest tal-process meqjus kollu kemm hu u bl-applikazzjoni in concreto tad-dispozizzjoniiet tal-ligi attakkati."*

Fil-Pag 140-141 tal-ktieb : **A Commentary on the Constitution of Malta** : Dr Tonio Borg ighid hekk :-

*The trial or proceedings had to be seen as a whole and one incident or irregularity does not necessarily vitiate the entire proceedings. (See Anthony Zarb et vs Minister for Justice (CC) (16 October 2002) (729/99): "For the question to be decided whether a fair hearing took place or not, according to the previously mentioned articles of the Constitution, one cannot and should not simply focus one`s attention on a part only of the proceedings before a court and if one finds any shortcoming, whatever it may be, one comes to the inexorable conclusion that the entire proceedings are therefore vitiated. On the other hand, for one to arrive at the conclusion whether there was a breach of the fundamental right of a fair hearing, it is necessary that the entire iter of the judicial proceedings be analysed. The assessment has to be based on the entirety of all the elements which form the judicial proceedings since it is only through such a comprehensive assessment that one can reasonably decide whether there was any violation of the said fundamental right" (see also Dr L Pullicino vs Prime Minister et (CC) (18 August 1998) (kollezzjoni Vol LXXII.1.159) where though some irregularities in the jury trial had occurred, the trial as a whole had been fair; see also Josephine Calleja vs Attorney General et (465/94) and Gregorio Scicluna vs Attorney General et (463/94) (both decided by the (CC) on 15 October 2003). See also Victor Lanzon et noe vs Commissioner of Police (CC) (29 November 2004) (15/02) where the interview by Police of a*

*minor in absence of lawyer was not by itself deemed to be in breach of Article 6. See also Police vs Carmelo Ellul Sullivan et (CC) (25 September 2015) (29/10) where the fact that a new magistrate had been appointed who had not heard the witnesses viva voce was not per se considered to be in breach of Article 6 because the trial had not yet been concluded, and the defence would have the right to cross-examine the witnesses before the new magistrate, and the trial had to be seen as a whole; and George Pace v Attorney General et (CC) (31 October 2014) (56/11): "The right to a fair hearing is granted so that after a hearing within a reasonable time, a person who is innocent is not given a guilty verdict, and such person is given all the necessary means for such purpose; and also so that guilty persons do not evade the consequences of their actions."*

(ara wkoll : **Malcolm Said vs Avukat Generali et** : 24 ta` Gunju 2016)

Fid-decizjoni li tat fis-7 ta` April 2003 fil-kawza fl-ismijiet **Glenn Bedingfield vs Kummissarju tal-Pulizija et** il-Qorti Kostituzzjonali tat tifsira ghall-kliem : "*x`aktarx ser jigi miksur*" :

*"Kwantu ghat-tieni aggravju, huwa veru li s-subartikolu (1) ta` l-Artikolu 4 tal-Kap. 319 jitkellem dwar allegazzjoni ta` dak li jkun li xi dritt fondamentali tieghu "x`aktarx ser jigi miksur", izda din l-espressjoni qatt ma giet interpretata, sia fil-kuntest ta` l-imsemmi Artikolu 4 u sia fil-kuntest tad-disposizzjoni analoga fil-Kostituzzjoni, li l-Prim Awla (fil-gurisdizzjoni kostituzzjonali taghha) jew din il-Qorti ghandhom jiddeciedu kwistjonijiet jew fl-astratt jew fl-ipotesi li tavvera ruhha xi kontingenza partikolari. Biex wiehed jista` jallega li "x`aktarx ser jigi miksur" xi dritt fondamentali il-fatti jridu jkunu tali li jistghu jwasslu ragjonevolment ghal stat ta` fatt determinat, liema stat ta` fatt ikun jikkozza ma xi wiehed jew aktar mid-drittijiet fondamentali tal-bniedem."*

(ara wkoll : QK : 30 ta` Mejju 2003 : **Joseph Hili maghruf bhala Nadia Hili vs Avukat Generali et)**

Fid-decizjoni li tat fit-12 ta` Frar 2016 fil-kawza fl-ismijiet **General Workers` Union vs L-Avukat Generali**, il-Qorti Kostituzzjonali spjegat illi :

> *"Dwar jekk l-azzjoni hijiex intempestiva l-Avukat Generali jilmenta li l-ewwel Qorti kienet zbaljata meta ma ikkonsidratx li f`kuntest ta` allegata lezjoni tad-dritt ghal smigh xieraq l-azzjoni ttentata mill-union hija wahda intempestiva peress li l-proceduri li minnhom qed tilmenta l-istess Union (GWU v. l-Enemalta Corporation – fuq tilwima tax-xoghol dwar allegazzjoni ta` ksur ta` ftehim li kien iffirmat bejn il-partijiet fis-sena 2002 fir-rigward ta` Stephen Leonardi, membru tal-union,) ghadhom pendenti.*
>
> *L-Avukat Generali jargumenta li stharrig dwar allegazzjoni ta` ksur tad-dritt tas-smigh xieraq jitlob li l-evalwazzjoni tal-procedura li minnha jkun qed isir lament titqies fit-totalita` taghha. Jghid li huwa inkoncepibbli li f`dan l-istadju ssir l-evalwazzjoni necessarja tal-garanziji kostituzzjonali u konvenzjonali peress li tali evalwazzjoni tista` ssir biss meta l-process ikun mitmum ladarba l-evalwazzjoni trid issir b`riferenza ghall-process fl-intier tieghu … Waqt illi taht il-Konvenzjoni l-Qorti Ewropea tad-Drittijiet tal-Bniedem ma ghandhiex is-setgha illi tqis allegazzjoni dwar ksur ta` drittijiet fondamentali qabel ma min iressaq l-ilment ikun inqeda bir-rimedji domestici kollha, taht il-Kostituzzjoni u taht l-Att dwar il-Konvenzjoni Ewropea il-Prim`Awla tal-Qorti Civili "tista`, jekk tqis li jkun desderabbli li hekk taghmel, tirrifjuta li tezercita s-setghat taghha ... f`kull kaz meta tkun sodifatta li mezzi xierqa ta` rimedju ghall-ksur allegat huma jew kienu disponibbli ... skont xi ligi ohra".*
>
> *Huwa ghalhekk imholli fid-diskrezzjoni tal-Prim`Awla – dejjem fil-parametri stabbiliti fil-gurisprudenza – li taghzel "li tezercita s-setghat taghha" wkoll meta min iressaq l-ilment ikollu jew kellu mezzi ohra ta` rimedju, u meta l-*

*Prim`Awla taghzel li tinqeda bis-setghat kostituzzjonali taghha l-Qorti Kostituzzjonali bhala regola ma tiddisturbax dik l-ghazla hlief meta tkun manifestament hazina jew meta hekk ikun mehtieg biex il-proceduri kostituzzjonali ma jigux trivalizzati.*

*Din il-Qorti tapprezza illi jkun ta` ostakolu ghall-efficjenza tal-gustizzja u tal-amministrazzjoni pubblika jekk, malli titressaq kawza b`allegazzjoni li l-process quddiem tribunal jew korp imwaqqaf b`ligi huwa bi ksur tal-jedd ghal smigh xieraq, dak it-tribunal jew korp ma jkunx jista` jibda jwettaq id-dmirijiet tieghu qabel tinqata` dik il-kawza jekk il-Prim`Awla wisq facilment taghzel li tinqeda bis-setghat kostituzzjonali taghha flok tistenna li jintemmu l-proceduri quddiem dak it-tribunal jew korp biex tqis il-process fl-intier tieghu.*

*Madankollu, il-Qorti tifhem ukoll illi fic-cirkostanzi tal-kaz tal-lum ikun aktar xieraq illi l-aggravju dwar rimedju ordinarju ma jintlaqax, u illi l-appell jinstema` wkoll fil-meritu, partikolarment billi d-difett allegat fl-istruttura tat-Tribunal jibqa` jipperdura jkun xi jkun l-ezitu tal-proceduri quddiem it-Tribunal u wkoll ghax ma jkunx ghaqli illi jitkompla process meta hemm sentenza ta` qorti ta` gurisdizzjoni kostituzzjonali li tghid illi dak il-process huwa bi ksur ta` jeddijiet fondamentali. Dan l-aggravju huwa ghalhekk michud."*

Fil-kawza fl-ismijiet **<u>Av Dr Samuel Azzopardi vs L-Avukat Generali et</u>** deciza fl-4 ta` Lulju 2017 minn din il-Qorti kif diversament presjeduta (u konfermata b`sentenza tal-Qorti Kostituzzjonali moghtija fis-26 ta` Jannar 2018) inghad hekk :-

*"Illi l-intimati eccipew l-intempestivita` tat-talbiet odjerni fil-kuntest tal-artikolu 6(1) tal-Konvenzjoni u tal-artikolu 39(2) tal-Kostituzzjoni billi hu pacifiku fil-gurisprudenza taghna li l-Qorti tinvestiga l-proceduri fl-assjem taghhom.*

*Illi kif gie ritenut mill-Qorti Kostituzzjonali fil-kaz* ***Victor Lanzon et v Kummissarju tal-Pulizija*** *(Q. Kost. dec. fid-29 ta` Novembru 2004).*

*"Huwa principju accettat kemm fil-gurisprudenza ta` Strasbourg kif ukoll f`dik ta` din il-Qorti li, biex wiehed jiddeciedi jekk kienx hemm nuqqas ta` smigh xieraq wiehed irid jara u jezamina l-procedura gudizzjarja kollha kemm hi fit-totalita` taghha. " (Ara wkoll ad.ezempju l-kaz Van Mechelen and Others v. The Netherlands, dec. 23 April 1997 – para. 50).*

*Illi l-Avukat Generali eccepixxa l-intempestivita` tal-proceduri odjerni permezz tal-ewwel eccezzjoni tieghu billi l-kaz pendenti quddiem il-Qorti tal-Magistrati (Ghawdex) ghadu mhuwiex deciz. Ghalhekk jghid li biex tinsab lezjoni skont l-artikoli ccitati, jehtieg li l-process gudizzjarju jigi ezaminat fil-kumpless totali tieghu. Kwindi talab li din il-Qorti ma tezercitax is-setghat kostituzzjonali u konvenzjonali taghha. L-intempestivita` ta` din l-azzjoni hija wkoll sollevata mill-intimat Dr. Anton Refalo fir-raba` paragrafu tar-risposta tieghu.*

*Illi qabel xejn jigi senjalat li skont il-Kostituzzjoni kif ukoll skont il-Konvenzjoni Ewropea kif addottata fl-ordinament guridiku taghna permezz tal-Kap 319 tal-Ligijiet ta` Malta, kull persuna tista` tfittex harsien fejn id-drittijiet u l-libertajiet fondamentali tieghu/taghha mhux biss qed jigu miksura imma anke jekk x`aktarx ser jigu miksura.(art.46(1) tal-Kostituzzjoni u 4(1) tal-Kap 319 tal-Ligijiet ta` Malta).*

*Illi l-art.39(2) tal-Kostituzzjoni jiddisponi li "Kull qorti jew awtorità ohra gudikanti mwaqqfa b`ligi ghad-decizjoni dwar l-ezistenza jew l-estensjoni ta` drittijiet jew obbligi civili ghandha tkun indipendenti u imparzjali; u meta l-proceduri ghal decizjoni bhal dik huma mibdija minn xi persuna quddiem qorti jew awtorità ohra gudikanti bhal dik, il-kaz ghandu jigi moghti smigh xieraq gheluq zmien ragonevoli."*

*Ukoll fl-artikolu 6(1) tal-Konvenzjoni Ewropea "Fid-decizjoni tad-drittijiet civili u tal-obbligi tieghu jew ta` xi akkuza kriminali kontra tieghu, kulhadd huwa ntitolat ghal smigh imparzjali u pubbliku fi zmien ragonevoli minn tribunal indipendenti u imparzjali mwaqqaf b`ligi...."*

*Illi izda, kontrarjament ghal dak sottomess mill-intimati, l-artikoli sucitati ma jimpedux lill-Qorti milli tinvestiga allegat ksur (attwali jew potenzjali) anke qabel ma jigu konkluzi l-proceduri pendenti quddiem il-Qorti tal-Magstrati (Ghawdex).*

*Illi skont l-awturi Harris, O`Boyle & Warbrick , fil-ktieb* ***"Law of the European Convention on Human Rights"***

*"A number of specific rights have been added to Article 6(1) through the medium of its `fair hearing` guarantee. The first of these to be established were ` equality of arms` and the right to a hearing in one`s presence. A breach of such a specific right may itself amount to a breach of the right to a `fair hearing` without any need to consider other aspects of the proceedings. As noted, in cases not involving a breach of a specific right, the Court may nonetheless find a breach of the right to a `fair hearing on a `hearing as a whole` basis".*

*Dan gie rikonoxxut u applikat mill-Qorti Ewropea, ad esempju, fil-kaz fl-ismijiet* ***Arrigo and Vella v Malta*** *fejn gie ribadit li :*

*"The Court recalls that the question whether or not court proceedings satisfy the requirements of Article 6 § 1 of the Convention can only be determined by examining the proceedings as a whole, i.e. once they have been concluded. However, it is not impossible that a particular procedural element could be so decisive that the fairness of the proceedings could be determined at an earlier stage (see R.D. v. Spain, no. 15921/89, Commission decision of 1 July 1991, Decisions and Reports (DR) 71, pp. 236, 243-244). The Court, noting that the criminal proceedings in question have not yet been completed, finds that the applicants`*

*submissions do not disclose any such circumstances (see Putz v. Austria, no. 18892/91, Commission decision of 3 December 1993, DR 76-A, pp.51, 64).*

*…*

*Hekk ukoll ad ezempju fil-kaz aktar recenti fl-ismijiet* ***Federation of Estate Agents v Direttur Generali(Kompetizzjoni)*** *- QK 3/05/2016, il-Qorti Kostituzzjonali sabet li kienu jezistu tali cirkostanzi. Il-fatt li kien hemm gja sentenza ta` Qorti ta` gurisdizzjoni kostituzzjonali kien ifisser li ma kienx ghaqli "illi jitkompla l-process quddiem id-Direttur meta hemm sentenza ta` qorti ta` gurisdizzjoni kostituzzjonali li tghid illi dak il-process huwa bi ksur ta` jeddijiet fondamentali u dik is-sentenza ghalkemm ghadha mhix finali tkun thassret mhux ghal ragunijiet ta` meritu izda minhabba punt procedurali."*

*Il-kwistjoni li trid tindirizza din il-Qorti hija jekk fil-kaz odjern, jezistu cirkostanzi tali li jimmeritaw konsiderazzjoni minnkejja li l-proceduri kienu ghadhom kemm jitwieldu.*

Fil-kaz ta` **Dimech vs Malta**, li kien deciz mill-ECtHR fit-2 ta` April 2015, il-Gvern Malti kien ghamel l-argument illi l-ilment kien prematur billi qal :-

*The Government submitted that the applicant`s complaint was premature as the trial by jury had not yet taken place. It was thus possible that the applicant would not be found guilty, in which case he could not be considered a victim in terms of the Convention (they referred to Bouglame v. Belgium (dec.), no. 16147/08, 2 March 2010). The Government contended that examining the applicant`s complaint at this stage would not enable the Court to assess the basis of the applicant`s "conviction", which had not yet taken place. The Government further noted that the constitutional jurisdictions had not "opted" to take cognisance of the case, but simply could not decline the exercise of jurisdiction given that the applicant`s referral request had been accepted by the Criminal Court.*

L-ECtHR accettat it-tezi tal-Gvern Malti :-

*The Court accepts the Government`s argument that the constitutional jurisdictions had no choice but to take cognisance of the case according to the functioning of the domestic system. However, the Court notes that those jurisdictions did not take cognisance of the case only to find later that the claim was inadmissible. In fact, the constitutional jurisdictions did not reject the case as being premature despite the fact that the proceedings were still pending. Nor did they reject it for non-exhaustion of ordinary remedies on the ground that the applicant had not asked for a lawyer (admittedly, as established in domestic case-law (see paragraph 31 above), there would have been little point in so doing given the inexistence of such a right in Maltese law at the time). On the contrary, the constitutional jurisdictions took cognisance of the case, opting to examine it on the merits and give judgment accordingly.*

*The Court notes that according to its constant case-law the question whether or not court proceedings satisfy the requirements of Article 6 § 1 of the Convention can only be determined by examining the proceedings as a whole, that is, once they have been concluded. However, the Convention organs have also held that it is not impossible that a particular procedural element could be so decisive that the fairness of the proceedings could be determined at an earlier stage (see, inter alia, X. v. Norway, Commission decision of 4 July 1978, Decisions and Reports (DR) 14, p. 228; Bricmont v. Belgium, 7 July 1989, Series A no. 158; Papadopoulos v. Greece, (dec.), no. 52848/99, 29 November 2001; Arrigo and Vella v. Malta (dec.), no. 6569/04, 10 May 2005 and Pace v. Malta (dec.), no. 30651/03, 8 December 2005). At the same time, the Convention organs have also consistently held that such an issue can only be determined by examining the proceedings as a whole, save where an event or particular aspect may have been so significant or important that it amounts to a decisive factor for the overall assessment of the proceedings*

*as a whole – pointing out, however, that even in those cases it is on the basis of the proceedings as a whole that a ruling should be made as to whether there has been a fair hearing of the case (see, inter alia, X v. Switzerland, no. 9000/80, Commission decision of 11 March 1982, DR 28, p. 127; B v. Belgium, Commission decision of 3 October 1990, DR 66, p. 105; Cervero Carillo v. Spain, (dec.), no. 55788/00, 17 May 2001; Mitterrand v. France (dec.) no. 39344/04, 7 November 2006 and more recently, De Villepin v. France (dec.), no. 63249/09, 21 September 2010).*

*The Court observes that it has found a number of violations of the provisions at issue, in different jurisdictions, arising from the fact that an applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see, for example, Salduz, cited above, § 56; Navone and Others v. Monaco, nos. 62880/11, 62892/11 and 62899/11, §§ 81-85, 24 October 2013; Brusco v. France, no. 1466/07, § 54, 14 October 2010; and Stojkovic v. France and Belgium, no. 25303/08, §§ 51-57, 27 October 2011). A systemic restriction of this kind, based on the relevant statutory provisions, was sufficient in itself for the Court to find a violation of Article 6 (see, for example, Dayanan v. Turkey, no. 7377/03 §§ 31-33, 13 October 2009; Yeşilkaya v. Turkey, no. 59780/00, 8 December 2009; and Fazli Kaya v. Turkey, no. 24820/05, 17 September 2013). The same situation appears to obtain in the present case.*

*Nevertheless, unlike in the above mentioned examples, the criminal proceedings in the present case have not come to an end. Thus, despite the peculiar interpretation of the Court`s case-law by the Constitutional Court, and although it may be unlikely, it cannot be entirely excluded that the courts of criminal jurisdiction, before which the case is heard, hear the case in the same circumstances that would have existed had the right to legal assistance during pre-trial stage not been disregarded, namely by expunging from the records the relevant statements. The Court notes that, if, because of the limitations of the applicable criminal procedural law, it is not possible given the stage reached in*

*the pending proceedings, to expunge from the records the relevant statements (whether at the request of the applicant or by the courts of criminal jurisdiction of their own motion), it cannot be excluded that the legislature take action to ensure that a procedure is made available at the earliest opportunity for this purpose.*

*Furthermore, even assuming that the above scenario would not come to be, the Court considers that it cannot be excluded that the applicant be eventually acquitted or that proceedings be discontinued.*

*The Court observes that applications concerning the same subject matter as that at issue in the present case were rejected as premature when the criminal proceedings were still pending (see, Kesik v. Turkey, (dec.), no. 18376/09, 24 August 2010 and Simons v. Belgium (dec.), no. 71407/10, 28 August 2012) and, where the applicant had ultimately been acquitted, the complaint was rejected on the ground that the applicant had no victim status (see Bouglame v. Belgium (dec.), no. 16147/08, 2 March 2010).*

*The Court finds no reason to deem otherwise in the present case. Without prejudice to the applicant`s possibility of bringing new proceedings before this Court in the event of a conviction by the domestic courts, as matters stand to date, given that the criminal proceedings against the applicant are currently pending before the domestic courts, the Court finds this complaint to be premature. Consequently, this part of the application must be rejected, pursuant to Article 35 §§ 1 and 4 of the Convention, for non-exhaustion of domestic remedies.*

Fil-kaz ta` **Tyrone Fenech and others vs Malta** deciz fil-5 ta` Jannar 2016, l-ECtHR qalet hekk :-

*The Government submitted that the applicants` complaint was premature as their criminal proceedings were still pending. It was thus possible that the applicants would not be found guilty in which case they could not be considered*

*victims in terms of the Convention (they referred to Bouglame v. Belgium (dec.), no. 16147/08, 2 March 2010). The Government contended that examining the applicants` complaint at this stage would not enable the Court to assess the basis of the applicants` "conviction", which had not yet taken place.*

*The applicants` observations were submitted outside the time-limit set by the Court and no explanation was submitted as to why they had remained outstanding. The President of the relevant Section, thus decided that they should not be included in the case-file for consideration by the Court.*

*The Court notes that according to its constant case-law the question whether or not court proceedings satisfy the requirements of Article 6 § 1 of the Convention can only be determined by examining the proceedings as a whole, that is, once they have been concluded. However, the Convention organs have also held that it is not impossible that a particular procedural element could be so decisive that the fairness of the proceedings could be determined at an earlier stage (see, inter alia, Papadopoulos v. Greece (dec.), no. 52848/99, 29 November 2001; Arrigo and Vella v. Malta (dec.), no. 6569/04, 10 May 2005 and Pace v. Malta (dec.), no. 30651/03, 8 December 2005). At the same time, the Convention organs have also consistently held that such an issue can only be determined by examining the proceedings as a whole, save where an event or particular aspect may have been so significant or important that it amounts to a decisive factor for the overall assessment of the proceedings as a whole – pointing out, however, that even in those cases it is on the basis of the proceedings as a whole that a ruling should be made as to whether there has been a fair hearing of the case (see, inter alia, Mitterrand v. France (dec.) no. 39344/04, 7 November 2006 and more recently, De Villepin v. France (dec.), no. 63249/09, 21 September 2010).*

*In the present case the criminal proceedings concerning the applicants have not come to an end. Thus, although the*

*constitutional jurisdictions have already decided the matter, the Court considers that it cannot be excluded that, inter alia, the applicants be eventually acquitted or that proceedings be discontinued (compare, Dimech, cited above, § 46).*

*The Court observes that applications concerning the same subject matter as that at issue in the present case were rejected as premature when the criminal proceedings were still pending (see, Dimech, cited above, § 48, Kesik v. Turkey, (dec.), no. 18376/09, 24 August 2010 and Simonsv. Belgium (dec.), no. 71407/10, 28 August 2012) and, where the applicant had ultimately been acquitted, the complaint was rejected on the ground that the applicant had no victim status (see Bouglame v. Belgium (dec.), no. 16147/08, 2 March 2010).*

*The Court finds no reason to deem otherwise in the present case. Without prejudice to the applicants` possibility of bringing new proceedings before this Court in the event of a conviction by the domestic courts, as matters stand to date, given that the criminal proceedings against the applicants are currently pending before the domestic courts, the Court finds this complaint to be premature.*

*Consequently, this part of the application must be rejected, pursuant to Article 35 §§ 1 and 4 of the Convention, for non-exhaustion of domestic remedies."*

**Minn din ir-rassenja ta` gurisprudenza johrog illi meta l-proceduri li fil-kuntest taghhom isir l-ilment ikunu ghadhom mhux mitmuma, u ma jkunx ghadu maghruf kif se jkun zvantaggjat ir-rikorrent, il-procediment kostituzzjonali jitqies intempestiv. Ilment waqt proceduri li jkunu pendenti jista` jinghata konsiderazzjoni jekk id-dritt lamentat ikun x`aktarx ser jigi vjolat u l-ksur ikun wiehed reali u imminenti.**

**Din il-Qorti hasbet fit-tul dwar kif din il-gurisprudenza tista` jew ghandha ssib applikazzjoni fil-kuntest tal-fatti u cirkostanzi tal-procediment odjern.**

Il-gurisprudenza taghmel car il-punt illi hija fid-diskrezzjoni tal-qorti illi tevalwa jekk rimedju ordinarju li jista` jkun disponibbli ghar-rikorrent ikunx tajjeb, effettiv u bizzejjed sabiex jindirizza l-ilment tieghu.

Il-Qorti tifhem u tapprezza li ghall-appellant Pisani l-kwistjoni ghadha mhijiex mitmuma ghaliex fl-appell li pprezenta ghad ghandu l-opportunita' illi jsostni l-ilment tieghu u jitlob revizjoni tad-decizjoni li nghatat fl-ewwel istanza.

Il-Qorti qieset ukoll l-osservazzjonijiet li ghamlet il-Qorti tal-Appell Kriminali u li wasslu lil dik il-qorti sabiex taghmel din ir-referenza.

Mir-ricerka li ghamlet din il-Qorti, jirrizulta illi l-Qorti tal-Appell Kriminali ta` spiss tkun rinfaccjata b`ilmenti varji dwar it-thaddim tal-Art 382 tal-Kap 9 mill-Qorti tal-Magistrati bhala Qorti ta` Gudikatura Kriminali. Jidher illi l-applikazzjoni tad-disposizzjoni tiddependi bil-bosta mill-konsiderazzjoni tal-gudikant li jkun. Hemm min jaghzel li jkun xott u jmur mill-ewwel ghall-punt meta tinkiteb is-sentenza, u hemm min jidhol f`dettall. Sentenza fejn ma tinghatax motivazzjoni tqieghed lill-hati fi zvantagg sostanzjali hdejn persuna ohra li tinghata sentenza motivata.

**Fil-kaz tal-lum, bir-referenza li talab, Pisani ma jidhirx li qieghed jattakka l-legalita` tal-Art 382 tal-Kap 9.**

**Li jidher li qed jittenta jaghmel huwa li jqieghed in diskussjoni l-mod kif kienet applikata d-disposizzjoni fil-konfront tieghu fil-kaz fejn kien akkuzat.**

**Wara li rat l-atti tal-procediment kriminali kontra Joseph Pisani, li jikkostitwixxu l-unika prova li ghandha fil-procedura**

**odjerna, hija l-fehma konsiderata taghha li fil-kaz tal-lum, anke jekk l-appell ghandu mhux mitmum, jehtieg li tintervjeni sabiex taccerta ruhha abbazi tal-kwesit li sarilha jekk l-applikazzjoni tal-Art 382 tal-Kap 9 jikkozzax mad-dritt ta` Pisani ghal smigh xieraq.**

## V. L-Art 382 tal-Kap 9

Kif tajjeb kien osservat mill-Qorti tal-Appell Kriminali fil-provvediment fejn ghamlet ir-referenza odjerna, it-thaddim ta' l-Art 382 tal-Kap 9 kien mertu ta' diversi sentenzi moghtija mill-Qorti tal-Appell Kriminali.

Il-Qorti rat il-gurisprudenza kollha li kienet citata mill-Qorti tal-Appell Kriminali, kif ukoll dik citata minn Pisani, u mill-Avukat Generali.

Il-Qorti ghamlet ukoll ir-ricerka taghha dwar l-applikazzjoni tad-disposizzjoni de qua, u sejra tirreferi referenza ghall-gurisprudenza *in materia* l-aktar ricenti li tirrifletti wkoll il-pozizzjoni illi hadu l-qrati taghna tul is-snin.

## VI. Gurisprudenza tal-Qorti ta` l-Appell Kriminali

Fis-sentenza li tat fit-28 ta` Frar 2018 fil-kawza fl-ismijiet **Il-Pulizija vs George-Michael Spiteri**, il-Qorti tal-Appell Kriminali ddikjarat illi s-sentenza appellata kienet tissodisfa r-rekwiziti kollha stabbiliti fl-Art 382 tal-Kap 9. Tenniet illi ghalkemm in-nuqqasijiet riskontrati fis-sentenza appellata ma kienux igibu n-nullita`sostanzjali tas-sentenza, dawk in-nuqqasijiet setghu kienu ta' pregudizzju ghall-appellant meta gie biex ifassal l-appell tieghu.

Fis-sentenza taghha il-Qorti tal-Appell Kriminali esprimiet il-hsieb taghha dwar il-motivazzjoni tas-sentenzi.

Qalet hekk :-

> *"Illi fuq nota finali din il-Qorti tiehu l-okkazzjoni ghal darb'ohra tirrimarka illi ghalkemm il-ligi ma tirrikjediex ad validitatem fil-kamp penali illi d-decizjoni tkun wahda motivata, madanakollu meta si tratta tal-liberta' tal-individwu li hu wiehed mid-drittijiet fondamentali tieghu wara d-dritt ghal hajja, kull persuna li tinsab rinfaccjata bil-periklu li titlef dik il-liberta ghandha il-jedd tkun taf ir-raguni li wassal lill-Qorti sabiex itellifha dak il-jedd sagrosant salvagwardjat kemm mill-Kostituzzjoni kif ukoll mill-Konvenzjoni dwar id-Drittijiet tal-Bniedem. Illi fil-fehma umli ta' din il-Qorti il-motivazzjoni hija l-essenza ta' kull gudikat li ghalkemm ma hemmx ghalfejn li tkun xi wahda elaborata u tista' tkun anke skematika, specjalment fil-kawzi sommarji, madanakollu b'hekk mhux biss tigi assigurata t-trasparenza tal-gudizzju imma wkoll biex tkun tista' tigi verifikata l-gustizzja tal-gudikat b'mod specjali fejn ser ikun hemm id-deprivazzjoni tal-liberta'. Din il-motivazzjoni ghandha tinghata minnufih mal-qari tad-decizjoni anke jekk kif inghad fi ftit kliem, izda b'tali mod illi l-persuna ikkundannata tkun tista' tifhem ir-raguni li wassal ghal dik ilkundanna. Maghdud dan, izda kif inghad, billi ma tirrizulta ebda vjolazzjoni ta' dak dispost fil-ligi, dan il-pregudizzjali ma jistax jigi milqugh."*

Fil-kawza fl-ismijiet **<u>Il-Pulizija vs Nazzareno Zarb</u>** li kienet deciza mill-Qorti tal-Appell Kriminali fid-29 ta` Novembru 2018, inghad hekk :

> *Permezz ta' dan l-aggravju sollevat l-appellant qieghed isostni li s-sentenza appellata hija nulla u dan ghaliex ma gewx osservati r-rekwiziti rikjesti ad validitatem fl-artikolu 382 tal-Kapitolu 9 tal-Ligijiet ta' Malta meta l-Ewwel Qorti ma semmietx il-fatti li fuqhom kienet qed tigi imsejsa l-kundanna kontra l-appellant.*
>
> *Illi l-artikolu 382 tal-Kodici Kriminali li jittratta specifikament x'ghandu jkun fiha sentenza ad validatem jiddisponi s-segwenti :*

*"**Il-Qorti, meta taghti s-sentenza kontra l-imputat, ghandha tghid il-fatti li taghhom dan ikun gie misjub hati, taghti l-piena u ssemmi l-artikolu ta' dan il-Kodici jew ta' kull ligi ohra li tkun tikkontempla r-reat**".*

*Illi jekk wiehed janalizza l-korp tas-sentenza in kwistjoni jidher illi l-ewwel Qorti rriproduciet l-akkuzi kif debitament migjuba kontra l-appellant u sussegwentement wara li ddikjarat li rat id-dokumenti kollha ezebiti, l-atti kollha tal-kawza u li semghet il-partijiet, ipprocediet sabiex tikkwota l-artikoli talligi applikabbli ghall-akkuzi mertu tal-kaz, sewgieta imbaghad bid-decide. Is-sentenza hija nieqsa mill-motivazzjonijiet li madanakollu ma ghandhomx jigu imfixxkla mal-fatti tal-kaz imsemmija flartikolu tal-ligi hawn fuq iccitat.*

*Issa kif jirrizulta mill-gurisprudenza nostrana kopjuza fuq dan is-suggett partikolari, it-tifsira li lartikolu 382 jaghti ghall-fatti ma tirreferix ghall-mertu per se jew ghal taqsira tal-fatti bhalma nsibu fir-rekwiziti tal-appell skond dak dispost fl-artikolu 419 tal-Kap 9 tal-Ligijiet ta' Malta, izda tirreferi aktar specifikament ghall-htiega tan-ness car bejn il-fatti u d-dikjarazzjoni tas-sejbien ta' htija jew ta' liberazzjoni. Allura dak li huwa rikjest huwa li l-Ewwel Qorti tkun cara meta tippronuzja ruhha dwar fejn l-imputat ikun instab hati jew fejn ikun gie liberat u dwar liema akkuzi.*

*"**Il-fatti li l-artikolu 382 jirreferi ghalihom huma l-fatti tar-reat u mhux, kif jippretendi l-appellant, il-fatti li jiggustifikaw il-kundanna ossia l-motivazzjoni. Fis-sentenza appellata l-fatti tar-reat huma effettivament elenkati fil-bidu nett. L-ewwel Qorti mbaghad ghaddiet biex telenka l-artikoli tal-ligi relattivi ghal dawk ir-reati kollha u ddikjaratu hati wara li qalet li kienet semghet ix-xhieda kollha u ezaminat id-dokumenti esibiti. Dak li kellha f'mohha l-ewwel Qorti huwa car, cioe` li kienet qed issib il-htija ghall-imputazzjonijiet kollha peress li ma ghamlet l-ebda kwalifika, u wiehed m'ghandux ghalfejn janalizza ssentenza biex jipprova jiddetermina ta' x'hiex hija***

***kienet qed issib lill-appellant hati." (<u>Il-Pulizija vs Elton Abela</u> deciza mill-Qorti tal-Appell Kriminali fit-28 ta' Jannar 2005)***

*L-istess hsieb kellha din il-Qorti fis-sentenza fl-ismijiet Pulizija vs Keith Pace" :*

*"**Kif gie ritenut f'gurisprudenza kostanti sentenza tal-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali li ma jkunx fiha dikjarazzjoni ta' liema fatti sabet lill-imputat hati, jew meta minnha ma jirrizultax car ta' x'hiex l-appellant gie misjub hati, jew meta f' kaz ta' imputazzjonijiet alternattivi, l-Qorti tiddikjara lill-imputat hati bla ma tghid ta' liema mizzewg imputazzjonijiet hu hati u ghalhekk jigi li l-Qorti ma qalitx ta' x'hiex sabet lill-imputat hati, jew meta ma tghid xejn dwar akkuza partikolari, hija nulla u jekk il-kawza tigi appellata, il-Qorti tal-Appell tiddikjara n-nullita' tas-sentenza.***

***Meta s-sentenza originali tkun miktuba fuq ic-citazzjoni li fuqha jkun hemm riprodotti lfatti u mis-sentenza kif redatta ma jkunx hemm dubju dwar liema fatti jkun gie misjub hati l-imputat, il-formalizmu ma hemmx postu u ghandha tigi salvata s-sentenza, pero' dan ma hux il-kaz, ghax hawn si tratta ta' sentenza motivata u mhux miktuba fuq il-kopja talkomparixxi li jkollha l-Qorti bhal kif jigri kwazi dejjem fil-kawzi li jinstemghu bil-procedura sommarja, u proprju hemm id-dubji fuq imsemmija".***

*B'hekk kemm fid-dawl tal-gurisprudenza u anki fid-dawl tal-fatt li minn qari tas-sentenza appellata huwa evidenti dwar liema 'fatti' l-appellant gie misjub hati u minn liema huwa gie illiberat, u fid-dawl ukoll tal-fatt illi ma jidhirx li hemm xi rekwizit iehor mehtieg ad validatem mankanti, dan l-aggravju qed jigi michud."*

(ara wkoll: **<u>Pulizija vs Grazio Scicluna</u>** : QAK : 18 ta` Marzu 2004 ; **<u>Pulizija vs Justin Gambin</u>** : QAK : 2 ta` Lulju 2012)

Fil-kawza fl-ismijiet **Il-Pulizija vs Raymond Borg** deciza fit-3 ta' Mejju 2019 il-Qorti tal-Appell Kriminali ghamlet is-segwenti osservazzjonijiet :

> "*L-appellant preliminarjament jissolleva il-pregudizzjali dwar in-nullita' tas-sentenza appellata ghaliex din hija nieqsa minn motivazzjoni u minn apprezzament tax-xiehda u tal-provi mismugha quddiem l-Ewwel Qorti.*
>
> *Illi huwa l-artikolu 382 tal-Kodici Kriminali li jitkellem dwar dak li ghandu jkun fiha sentenza ad validatem meta hemm hekk dispost :*
>
> *"Il-Qorti, meta taghti s-sentenza kontra l-imputat, ghandha tghid il-fatti li taghhom dan ikun gie misjub hati, taghti l-piena u ssemmi l-artikolu ta' dan il-Kodici jew ta' kull ligi ohra li tkun tikkontempla r-reat".*
>
> *Illi r-ratio legis wara l-artikolu 382 huwa illi s-sentenza tkun cara fis-sens illi kemm il-persuna akkuzata kif ukoll kull min huwa parti fid-decizjoni jifhmu x'kienu dawk il-fatti li dwarhom l-persuna akkuzata tkun qed tigi misjuba hatja, taghti l-piena ghal dawk il-fatti li qed jistabilixxu ir-reita' u jissemmew id-disposizzjonijiet tal-ligi li dwarhom qed tinstab il-htija.*
>
> *Illi minn qari tas-sentenza appellata ma jidhirx illi kien hemm nuqqas ta' osservanza tal-ligi. Il-ligi ma tirrikjediex ad validitatem fil-kamp penali illi d-decizjoni tkun wahda motivata, ghalkemm jkun desiderabbli jekk l-qorti imqar fil-qosor taghti xi mottiv singolari li jkun wassalha ghad-decizjoni taghha.*"

Il-Qorti ghalhekk cahdet l-aggravju tal-appellant.

Fis-sentenza li tat fil-25 ta` Lulju 2019 fil-kawza fl-ismijiet **Il-Pulizija vs Kevin Mallia**, il-Qorti tal-Appell Kriminali ddikjarat illi s-sentenza appellata kienet karenti f'wahda mill-formalitajiet rikjesti mill-Art 382 tal-Kap 9 u ghamlet dawn il-konsiderazzjonijiet :

"*Meta fis-sentenza taghha l-Qorti ssemmi, u f'dan il-kaz tirriproduci, l-imputazzjonijiet dedotti kontra l-imputat, tkun essenzjalment qed tghid il-fatti li dwarhom huwa kien ipprocessat b'mod allura li ikun sodisfatt ir-rekwizit kontemplat fl-artikolu 382. Meta allura ma taghmilx dan, tkun qed tonqos minn wiehed mir-rekwiziti ta' sentenza valida. Il-kwistjoni ta' x'jikkostitwixxi l-fatti fis-sentenza kien mertu ta' diversi sentenzi moghtija mill-Qorti tal-Appell Kriminali fosthom Il-Pulizija vs Peter Abdilla 28.7.2010; Il-Pulizija vs Mariella Caruana 1.12.2010; Il-Pulizija vs John Tanti 24.1.2013 u l-Pulizija vs Carmelo Polidano 11.12.2013. Meta l-artikolu 382 jitlob li jissemmew il-fatti ma jkunx qed jitlob ukoll ir-ragunijiet, jew motivazzjoni li wasslu ghas-sejbien ta' htija. Il-legislatur jiddistingwi bejn il-fatti u l-motivazzjonijiet tant illi fl-artikolu 662(2) tal-Kodici Kriminali jsemmi b'mod car illi "**kull decizjoni tal-Qorti tal-Appell Kriminali u tal-Qorti Kriminali li biha tigi deciza kwistjoni ta' ligi, ghandu jkun fiha qabel kollox ir-ragunijiet li jkunu wasslu l-qorti ghal dik id-decizjoni**". Ghal fini ta' validita' ta' sentenza moghtija mill-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali, ghalhekk, indikazzjoni tal-fatti fil-forma ta' riproduzzjoni tal-imputazzjoni, li ma hi xejn ghajr il-fatt imputat, tissodisfa r-rekwizit ravvizat fl-artikolu 382.*"

(ara wkoll: **Pulizija vs Albert Caruana** : QAK : 30 ta` Jannar 2017)

Fis-sentenza li nghatat fil-kawza fl-ismijiet **Il-Pulizija vs John Tanti** fil-31 ta` Lulju 2019, il-Qorti tal-Appell Kriminali rrimarkat :

"*Illi jekk wiehed janalizza l-korp tas-sentenza in kwistjoni jidher illi l-ewwel Qorti rriproduciet l-akkuzi kif debitament migjuba kontra l-appellant u sussegwentement wara li ddikjarat li rat id-dokumenti kollha ezebiti, l-atti kollha tal-kawza u li semghet il-partijiet, ghaddiet sabiex tikkwota l-artikoli tal-ligi ghar-reat li dwaru kienet qed tinstab il-htija u wara dan segwiet id-dikjarazzjoni ta'htija fl-appellant ghall-akkuza lilu addebitata. Illi din id-disposizzjoni tal-ligi ma*

*issemmiex illi l-motivazzjonijiet huma mehtiega fid-decizjoni ta' indoli kriminali moghtija mill-qrati inferjuri, ghalkemm huwa deziderabbli li l-persuna misjuba htaja tkun taf x'wassal lil qorti tasal ghad-decizjoni taghha biex b'hekk tkun ukoll f'posizzjoni ahjar thejja appell minn tali decizjoni jekk jidhrilha li hekk ghandha taghmel. Kwindi in-'nuqqas' f'dan is-sens tal-ewwel Qorti ma jrendix s-sentenza appellata monka. Konsegwentement, l-ewwel aggravju mressaq qed jigi michud."*

## VII. Dottrina

Fil-ktieb **"A Practioner's Guide to the European Convention on Human Rights** (Thomson, Sweet & Maxwell, 3rd Ed., 2007, pg. 187-189) **Karen Reid** tittratta l-impatt li n-nuqqas ta' motivazzjoni jkollha in relazzjoni mal-jedd ghal smigh xieraq kif dan huwa tutelat bl-Art 6 tal-Konvenzjoni.

Tghid hekk :-

"*Article 6, para. 1 has been interpreted as obliging courts to give reasons for their decisions. This has been described as justifying their activities as a State authority, demonstrating to the parties that they have been heard and affording the possibility of having the decision reviewed on appeal. A detailed answer to every argument is not required. The Convention organs' resistance to constituting a fourth instance leaves in practice little scope for attacking the adequacy of the reasons given in judgments. There has been no development under Art. 6 as in the context of Arts. 8, 9 and 10 that decisions must necessarily be supported by relevant and sufficient reasons, which requirement only comes into play where it is established that there has been an interference with a protected right. Article 6 confers primarily procedural protection based on the paramount consideration of fairness. It does not guarantee as such the "right" result and on the current approach by the Court reasoning of a decision is only likely to disclose a violation*

*where there is clear arbitrariness or gross inconsistency on the part of the domestic courts concerned or where a court has exceeded the limits of reasonable interpretation in such a way as to undermine legal certainty*."

Fil-ktieb **"<u>Law of the European Convention on Human Rights</u>",** l-awturi **<u>Harris, O'Boyle u Warbrick</u>** (OUP, 4th Ed., 2018, Pg. 431-432) josservaw illi:

"*The requirement of a fair hearing supposes that a court will give reasons for its judgment, in both criminal and non-criminal cases. Whereas national courts are allowed considerable discretion as to the structure and content of their judgments, they must 'indicate with sufficient clarity the grounds on which they base their decision' so as to allow a litigant usefully to exercise any available right of appeal. Further justifications for the need for a reasoned judgment are the duty of the court under Article 6 'to conduct a proper examination of the submissions, arguments and evidence adduced by the parties and the interest of the public in a democratic society in knowing the reasons for judicial decisions given in its name.*

*Precisely what is required will depend upon the nature and circumstances of each case. It is not necessarily for the court to deal with every point raised in argument. If, however, a submission would, if accepted, be decisive for the outcome of the case, it may require a 'specific and express reply' from the court in its judgment, although an 'implied rejection' may be sufficient if clear. Merely stating that a party has been grossly negligent where such negligence is crucial to the decision without explaining why this is so is unlikely to comply with Article 6. Likewise, giving a reason for a decision that is not a good reason in law or on the facts will not do so. There was inadequate reasoning in breach of Article 6 where a court did not address inconsistencies in witness evidence and the mental condition of a key witness in its judgment. In the absence of exceptional circumstances, the requires reasons for the judgment must be given by the trial judge.*

*…*

*The right to a reasoned judgment applies to appellate, as well as lower court, decisions, although an appellate judgment may not have to be fully reasoned. It may be sufficient for an appeal court that agrees with the reasoning of the trial or lower appel court simply to incorporate that reasoning by reference, or otherwise indicate its agreement with it."*

## VIII. Gurisprudenza tal-ECtHR

Fil-**Guide on Article 6 of the European Convention on Human Rights – Right to a Fair Trial (Criminal Limb)**, kif aggornat sat-30 ta` April 2019, u mahrug mill-ECtHR, jinghad hekk :-

### *3. Reasoning of judicial decisions*

*162. According to established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based (**Moreira Ferreira v. Portugal (no. 2) [GC], § 84; Papon v. France (dec.)**).*

*163. Reasoned decisions serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part. In addition, they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. National courts should indicate with sufficient clarity the grounds on which they base their decision. The reasoned decision is important so as to allow an applicant to usefully exercise any available right of appeal (**Hadjianastassiou v. Greece**). However, the extent of the duty to give reasons varies according to the*

*nature of the decision and must be determined in the light of the circumstances of the case (**Ruiz Torija v. Spain, § 29**).*

*164. While courts are not obliged to give a detailed answer to every argument raised (**Van de Hurk v. the Netherlands, § 61**), it must be clear from the decision that the essential issues of the case have been addressed (**Boldea v. Romania, § 30**) and that a specific and explicit reply has been given to the arguments which are decisive for the outcome of the case (**Moreira Ferreira v. Portugal (no. 2) [GC], § 84; S.C. IMH Suceava S.R.L. v. Romania, § 40**, concerning contradictions in the assessment of evidence). Moreover, in cases relating to interference with rights secured under the Convention, the Court seeks to establish whether the reasons provided for decisions given by the domestic courts are automatic or stereotypical (**Moreira Ferreira v. Portugal (no. 2) [GC], § 84**). In sum, an issue with regard to a lack of reasoning of judicial decisions under Article 6 § 1 of the Convention will normally arise when the domestic courts ignored a specific, pertinent and important point raised by the applicant (**Nechiporuk and Yonkalo v. Ukraine, § 280; see, in this context, Rostomashvili v. Georgia, § 59; Zhang v. Ukraine, § 73**).*

*165. With regard to the manner in which the domestic judicial decisions are reasoned, a distinct issue arises when such decisions can be qualified as arbitrary to the point of prejudicing the fairness of proceedings. However, this will be the case only if no reasons are provided for a decision or if the reasons given are based on a manifest factual or legal error committed by the domestic court, resulting in a "denial of justice" (**Moreira Ferreira v. Portugal (no. 2) [GC], § 85; Navalnyy and Ofitserov v. Russia, § 119**, concerning a politically motivated prosecution and conviction; and **Navalnyy v. Russia [GC], § 83**).*

Il-motivazzjoni tas-sentenzi, u l-implikazzjoni li nuqqas ta` motivazzjoni jista` jkollu vis-à-vis l-jedd tal-persuna ghal smigh xieraq kienet it-tema ta` ghadd ta` sentenzi li tat l-ECtHR.

Fil-kaz ta` **Hadjianastassiou v. Greece** li kien deciz fis-16 ta' Dicembru 1992, l-ECtHR osservat illi :

> *"33. The Contracting States enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6 (art. 6). The national courts must, however, indicate with sufficient clarity the grounds on which they based their decision. It is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him. The Court's task is to consider whether the method adopted in this respect has led in a given case to results which are compatible with the Convention."*

Fil-kaz ta` **Ruiz Torija v. Spain**, li kien deciz fid-9 ta` Dicembru 1994, l-ECtHR tenniet :

> *29. The Court reiterates that Article 6 para. 1 (art. 6-1) obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument (see the Van de Hurk v. the Netherlands judgment of 19 April 1994, Series A no. 288, p. 20, para. 61). The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 (art. 6) of the Convention, can only be determined in the light of the circumstances of the case.*

Fil-kaz ta` **Moreira Ferreira v. Portugal (no. 2) [GC]** li kien deciz fil-11 ta' Lulju 2017 l-ECtHR sostniet :

> *84. The Court also reiterates that according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see García Ruiz v. Spain [GC], no. 30544/96, §26, ECHR 1999-I). Without requiring a detailed answer to every argument advanced by the complainant, this obligation presupposes that the parties to judicial proceeding can expect to receive a specific and explicit reply to the arguments which are decisive for the outcome of those proceedings (see, among other authorities Ruiz Torija v. Spain, 9 December 1994, §§ 29-30, Series A no. 303-A, and Higgins and Others v. France, 19 February 1998, §§42-43, Reports of Judgments and Decisions 1998-I). Moreover, in cases relating to interference with rights secured under the Convention, the Court seeks to establish whether the reasons provided for decisions given by the domestic courts are automatic or stereotypical (see, mutatis mutandis, Paradiso and Campanelli v. Italy [GC], no. 25358/12, § 210, ECHR 2017).*
>
> *85. It transpires from the above-mentioned case-law that a domestic judicial decision cannot be qualified as arbitrary to the point of prejudicing the fairness of proceedings unless no reasons are provided for it or if the reasons given are based on a manifest factual or legal error committed by the domestic court, resulting in a "denial of justice".*

Fil-kaz ta' **Rostomashvili v. Georgia** li kien deciz fit-8 ta` Novembru 2018 l-ECtHR osservat :

> *58. The Court reiterates that it is not its task to review the manner in which forensic and witness evidence is assessed by the domestic courts. Nor is the Court called upon to rule*

*on the guilt or innocence of a person convicted by the domestic courts, that matter being within the competence of the domestic courts (see, mutatis mutandis, Rohlena v. the Czech Republic [GC], no. 59552/08, § 55, ECHR 2015, and Popov v. Russia, no. 26853/04, § 188, 13 July 2006). In addition, the Court recognizes that, in a case such as this, a trial court, which relies on witness statement for the accused's conviction, is able to base itself on direct contact with the witness, the reliability of whose statement it must nevertheless properly assess. However, it is within the Court's jurisdiction to assess whether the proceedings as a whole, including the obligation of the domestic courts to give reasons for their judgments, were in compliance with the Convention. It is against this background that the Court will proceed with its assessment of the applicant's complaint under Article 6 § 1 of the Convention.*

*59. The Court is of the opinion that the two arguments raised by the applicant before the domestic courts (see paragraph 57 above) related to the core of the criminal case against him and called for a specific and explicit reply. However, none of the domestic judicial authorities addressed them. The generic response given by the domestic courts that "all the evidence available in the case file" was sufficient to convict the applicant cannot be regarded as an explicit and specific reply to the latter's principal arguments before them. Such an answer, on the facts of the present case, amounts to a manifest lack of reasoning on the part of the domestic courts as in fact, no piece of forensic evidence had implicated the applicant, and the sole eyewitness statement was subjected to repeated reasoned yet unanswered challenges questioning its veracity and probative value. Accordingly, the domestic courts failed to address, in any manner, the applicant's reasoned arguments (see Fomin, cited above, § 30, and contrast Kuparadze v. Georgia, no. 30743/09, §§ 72-73, 21 September 2017).*

*60. In these circumstances, the Court concludes that the domestic courts adjudicating the applicant's criminal case failed to fulfil one of the requirements of a fair hearing,*

*namely to provide adequate reasons for their decisions. There has accordingly been a violation of Article 6 § 1 of the Convention*.

Fil-kaz ta` **Zhang v. Ukraine** li kien deciz mill-ECtHR fit-13 ta` Novembru 2018 inghad :-

*59. The Court emphasises that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly true for the guarantees enshrined in Article 6, in view of the prominent place held in a democratic society by the right to a fair trial with all the guarantees under that Article (see, for a recent reference among many other authorities, Shuli v. Greece, no. 71891/10, § 27, 13 July 2017). In order for the right to a fair trial to remain sufficiently "practical and effective", Article 6 § 1 must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States (see, mutatis mutandis, Brumărescu v. Romania [GC], no. 28342/95, § 61, ECHR 1999-VII). Thus, no provision of domestic law should be interpreted and applied in a manner incompatible with the State's obligations under the Convention (see, for example, Tsalkitzis v. Greece (no. 2), no. 72624/10, § 54, 19 October 2017).*

*…*

*61. Lastly, according to the Court's established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see Moreira Ferreira v. Portugal (no. 2) [GC], no. 19867/12, § 84, 11 July 2017). In examining the fairness of criminal proceedings, the Court has held in particular that by ignoring a specific, pertinent and important point made by the accused, the domestic*

*courts fall short of their obligations under Article 6 § 1 of the Convention (see Nechiporuk and Yonkalo v. Ukraine, no. 42310/04, § 280, 21 April 2011).*

## IX. Konsiderazzjonijiet ta` din il-Qorti

**Abbazi ta` l-Art 382 tal-Kap 9 tlieta huma r-rekwiziti *ad validitatem* sabiex sentenza moghtija mill-Qorti tal-Magistrati bhala Qorti ta` Gudikatura Kriminali ma tkunx nulla : a) ghandhom jinghataw il-fatti li fuqhom tinstab htija ; b) ghandha tinghata l-piena ; u c) ghandhom jirrizultaw id-disposizzjonijiet tal-ligi li abbazi taghhom tkun instabet il-htija u tkun inghatat il-piena. Mela l-fatt li sentenza ma tkunx motivata ma jaghmilx is-sentenza nulla ghall-finijiet u effetti tal-Kap 9.**

Ferm il-premess, huwa evidenti li l-gurisprudenza taghna hija favur li sentenzi jkunu motivati, specjalment fil-kaz ta` decizjonijiet li jinghataw minn qrati ta` gurisdizzjoni kriminali fejn tkun imposta piena karcerarja. B`dan il-mod mhux biss tkun assigurata trasparenza, izda anke jghin b`mod determinant sabiex il-partijiet ikollhom fiducja fil-process gudizzjarju. Kull parti fil-procediment ghandha titqieghed f`pozizzjoni illi tifhem sewwa r-ragunijiet li jkun wasslu ghall-ghoti ta' sentenza sabiex tkun f`qaghda ahjar illi tiddeciedi ghandhiex tinterponi appell fil-kaz li d-decizjoni tkun sfavorevoli *in toto* jew *in parte* ghal dik il-parti.

**Jidher illi l-linja traccjata mill-ECtHR fil-gurisprudenza taghha testendi `l hinn mil-linja li hadu l-qrati taghna fis-sens illi ghall-Qorti ta` Strasbourg sentenza ghandha dejjem tkun motivata, u meta ma tkunx, dak in-nuqqas ikun jikkostitwixxi ksur tal-Art 6(1) tal-Konvenzjoni.**

**Dan allura jfisser illi ghalkemm skont l-Art 382 tal-Kap 9, sabiex is-sentenza tkun valida ghall-finijiet u effetti kollha tal-ligi l-qorti mhijiex obbligata timmotiva s-sentenza, l-obbligu li sentenza tkun motivata, anke jekk ma jirrizultax fid-**

**disposizzjonijiet tal-Kap 9, jissussisti bis-sahha tal-Art 6 tal-Konvenzjoni, kif interpretat mill-ECtHR fis-sentenzi taghha, <u>liema Konvenzjoni taghmel parti mill-*corpus juris* taghna bis-sahha tal-Kap 319 tal-Ligijiet ta` Malta</u>.**

**Ghall-finijiet tal-applikazzjoni tal-Art 39 tal-Kostituzzjoni, tghodd l-istess linja ta` hsieb.**

Fil-kaz tal-lum is-sentenza appellata kienet "skeletrika" u xotta ghall-ahhar. Fiha jinghad x`kienu l-imputazzjonijiet. Jinghad illi l-qorti rat id-dokumenti kollha esebiti u l-atti tal-kawza. Jinghad li semghet lill-partijiet. Jirrizultaw id-disposizzjonijiet tal-ligi li abbazi taghhom instabet il-htija tal-akkuzat dwar l-ewwel tlett imputazzjonijiet. Tirrizulta l-liberazzjoni tal-akkuzat mir-raba' imputazzjoni. U fl-ahhar nett, l-imposizzjoni ta` piena ta` tliet xhur prigunerija. Is-sentenza ma taghmel l-ebda rassenja tax-xiehda. Lanqas ma fiha xi konsiderazzjoni dwar l-attendibilita` jew il-konsistenza tal-persuni li xehdu. Lanqas ma ma hemm il-kopnsiderazzjonijiet li wasslu lill-qorti sabiex teroga l-piena li erogat.

**<u>Fil-kuntest tal-mertu tal-procediment odjern</u>**, din il-Qorti ssib li hemm fondament fl-ilment ta` l-appellant Pisani illi, riferibbilment ghall-ewwel imputazzjoni li tikkontempla zewg reati distinti kif ukoll reat bi skuzanti, mis-sentenza appellata ma jirrizultax dwar liema parti ta' din l-imputazzjoni kien misjub hati.

Tajjeb jinghad illi ghalkemm l-Art 382 tal-Kap 9 baqa` dak li kien sa mill-bidu li kien promulgat il-Kodici Kriminali fl-1854, jibqa` l-fatt illi matul iz-zmien zdiedet il-kompetenza tal-Qorti tal-Magistrati bhala Qorti ta` Gudikatura Kriminali. Skont l-Art 370(1)(b) tal-Kap 9, fil-kompetenza originali taghha, dik il-qorti tista' teroga piena sa massimu ta' sentejn prigunerija. A tenur tal-Art 370(3)(a), fil-kompetenza estiza taghha, dik il-qorti tista' teroga piena karcerarja sa massimu ta' tnax il-sena. Inoltre dik il-qorti, skont l-Art 370(2), ghandha wkoll kompetenza li tiggudika dwar :

*ir-reati msemmijin fis-subartikolu (1) jibqghu ta' kompetenza tal-qorti fuq imsemmija ghad illi, minhabba l-konkors ta' reati u ta' pieni, minhabba r-recidiva jew minhabba l-applikazzjoni tad-dispozizzjonijiet tal-artikolu 18, ikun hemm lok li tinghata piena akbar minn dawk imsemmijin f'dak is-subartikolu.*

Dan ifisser illi partikolarment fil-kaz tal-konkors tar-reati, il-piena karcerarja li taghti l-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali tista' addirittura taqbez it-12-il sena prigunerija.

**Tenut kont ta` dan kollu, il-htiega li sentenzi jkunu motivati huwa vitali sal-punt li bil-fatt ma jkunux motivate kif fuq inghad tinholoq jew x`aktarx tinholoq vjolazzjoni tal-jedd ghal smigh xieraq tal-persuna, anke jekk *strict jure* ma jirrizultax l-obbligu tal-motivazzjoni fl-Art 382 tal-Kap 9.**

Fit-twettieq tal-kompiti u tal-mansjonijiet tieghu, il-gudikant ghandu jkun **tarka ghall-harsien** tal-jeddijiet fondamentali tal-persuna fil-milja taghhom. Reg 46 tal-**Bangalore Principles of Judicial Conduct** ighid illi :-

*"46. This high standard of judicial conduct requires the observance of the minimum guarantees of a fair trial. For example, a judge must recognize that a party has the right to :*

*…*

*(g) have a decision rendered without undue delay and as to which the parties are provided adequate notice thereof and the reasons therefor;"*

**Il-Bangalore Principles of Judicial Conduct huwa l-mudell li fuqu kien imfassal il-Kodici ta' Etika ghall-Membri tal-Gudikatura ta` Malta.**

Reg 2 tal-Kodici ta` Etika jghid :-

> *2. Members of the Judiciary shall decide cases assigned to them within a reasonable time, according to the means and resources placed at their disposal by the State and to the volume of work assigned to them. They are to ensure that justice be done by giving each party a fair hearing according to law.* ***Furthermore, they are to ascertain that their decisions shall, whenever required, be duly motivated so as to understand the reasoning for such a decision****.* (enfasi tal-qorti)

Lil hinn minn dak li jghid l-Art 382 tal-Kap 9, il-Qorti tirrileva li anke fl-ambitu tal-imsemmi Kodici ta` Etika, il-motivazzjoni tas-sentenzi ghandha tkun wahda mill-hiliet essenjali ta` kull gudikant.

**Ghalkemm il-process kriminali kontra l-appellant Pisani ghadu mhux mitmum, u allura l-Qorti tal-Appell Kriminali ghad trid taghmel il-konsiderazzjonijiet taghha dwar il-mertu tal-appell u tghaddi gudizzju fl-ambitu tal-kompetenza u mansjonijiet taghha, il-Qorti ssib illi s-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali kif inghatat fil-21 ta` Marzu 2016 fil-konfront ta` Joseph Pisani tikser id-dritt tieghu ghal smigh xieraq kif imhares bl-Art. 6 tal-Konvenzjoni u bl-Art. 39 tal-Kostituzzjoni.**

**Provvediment**

**Ghar-ragunijiet kollha premessi, il-Qorti qeghda twiegeb ghall-kwesit li ghamlet il-Qorti tal-Appell Kriminali bhala Qorti Referenti fl-ahhar paragrafu tal-provvediment li tat fit-28 ta` Marzu 2019 fil-kawza fl-ismijiet "*Il-Pulizija vs Joseph Pisani*" billi tiddikjara illi bil-fatt illi s-sentenza li nghatat mill-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali fil-21 ta` Marzu 2016 fl-istess kawza ma kenitx motivata jikkostitwixxi ksur tal-jedd ta` Joseph Pisani ghal smigh xieraq kif dan il-jedd huwa**

**mhares bl-Art 6. tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali u bl-Art. 39 tal-Kostituzzjoni ta` Malta.**

**Ghalhekk qeghda tibghat dan il-provvediment flimkien mal-atti lura lill-Qorti tal-Appell Kriminali sabiex tkompli bis-smigh tal-appell fl-ismijiet "Il-Pulizija vs Joseph Pisani".**

**Tordna li l-ispejjez ta` dan il-procediment jithallsu mill-Avukat Generali.**

**Onor. Joseph Zammit McKeon**
**Imhallef**

**Amanda Cassar**
**Deputat Registratur**