QORTI KOSTITUZZJONALI

IMHALLFIN

S.T.O. PRIM IMHALLEF JOSEPH AZZOPARDI
ONOR. IMHALLEF GIANNINO CARUANA DEMAJO
ONOR. IMHALLEF NOEL CUSCHIERI

Seduta ta' nhar il-Gimgha, 29 ta' Novembru, 2019

Numru 8

Rikors numru 48/17 JZM

Av. Larry Formosa ghan-nom u in rapprezentanza tal-imsiefer Daniel Gill

v.

L-Avukat Generali

Preliminari

1. Dan hu appell maghmul mill-attur minn sentenza [is-sentenza appellata] moghtija mill-Prim'Awla tal-Qorti Civili fil-kompetenza kostituzzjonali taghha fit-30 ta' April 2019, li permezz taghha dik il-Qorti laqghet l-ewwel eccezzjoni preliminari tal-konvenut u illiberatu mill-osservanza tal-gudizzju peress li l-azzjoni hija intempestiva u, filwaqt li

astjeniet milli tiehu konjizzjoni ulterjuri tal-kumplament tal-eccezzjoni rigward l-ezawriment tar-rimedji ordinarji, cahdet it-talbiet tar-rikorrenti.

2. Fir-rikors promotur l-attur kien talab sabiex l-ewwel Qorti:

> “1. Tiddikjara li l-proceduri addottati fl-Inkjesta sureferita` inkluz dak li jirrigwardja l-esperti mahtura u l-kompetenza taghhom, ir-relazzjoni minnhom redatta u kif ukoll il-gbir tal-provi ivvjolaw id-drittijiet fundamentali tar-rikorrenti senjatament l-Artikolu 6 tal-Konvenzjoni Ewropea tad-Drittijiet u Libertajiet Fundamentali tal-Bniedem u l-Artikolu 39 tal-Kostituzzjoni ta’ Malta;
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> “2. Tiddikjara u tiddeciedi in kwantu li ma hemm l-ebda mekkanizmu legali li in forza tieghu huwa seta’ jippartecipa fl-inkjesta sureferita` u jikkontesta kwalunkwe provi hemmhekk migbura jikkostitwixxi vjolazzjoni tal-Artikolu 13 tal-Konvenzjoni Ewropea fuq imsemmija;
>
> “3. Taghti dawk dawk il-provvedimenti kollha li jidhrilha xierqa sabiex l-effetti ta’ dik l-inkjesta in kwantu jammontaw ghal ksur tad-drittijiet fundamentali tieghu kif fuq inghad ma jkollhom ebda effett kontra tieghu;
>
> “4. Tipprovdi kwanlunkwe rimedju iehor li jidhrilha xieraq u opportun.”

<u>Il-Fatti</u>

3. L-attur jibbaza t-talbiet tieghu fuq il-premessi segwenti:

> “Illi fl-10 ta’ Marzu 2015 certu Petrina Bridget Alice Matthews kienet toghdos gewwa d-Dwejra Limiti ta’ San Lawrenz, Ghawdex u wara li sabet ruhha f’diffikultaijiet medici hija tilfet hajjitha.
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> “Illi sussegwentement infethet Inkjesta Magisterjali li giet maghluqa fit-30 ta’ Settembru 2015.
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> “F’din l-Inkjesta gie konkluz illi:
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> > ““Mehuda in konsiderazzjoni l-fatti suespost l-Magistrat Inkwirenti hi tal-fehma li hemm lok li jittiehdu proceduri kriminali fil-konfront ta’ Jacqueline Rio Hedley bil-karta tal-Identita` numru 69428A (Flat 9, Carvedut Court, Triq ir-Rattan, Mellieha) u Daniel Gill bil-

> passaport numru 801159683 (Solaris, Triq il-Fabbrika, Xghajra, Malta) u dan in vista tal-kontribut taghhom li wassal sabiex l-apparat proprjeta` u mmexxi minn Jacqueline Rio Hedley (Ocean Mysteries Diving, 11, Triq Sant' Elena, Mellieha) u cioe 'Cressi AC2 1st stage Pressure Reducer with XS2 Primary Demand Valve, XS2 Octopus, Uwatec Pressure Gauge and L.P. Inflator Hose; bearing serial number L 1080F02454' spicca gie uzat mill-vittma waqt id-'*dive*' li wasslet ghal mewt taghha nonostante li ma kienx tajjeb ghal tali uzu, kif ukoll ghan-nuqqas taghhom li jiehdu l-mizuri neccessarji sabiex jassiguraw li l-vittma jkollha apparat tajjeb ghall-uzu intiz waqt id-'*dive*' anzi ppermettew uzu ta' apparat li skond il-konkluzjonijiet tal-esperti mqabbda mill-Magistrat Inkwirenti kkontribwixxa ghall-mewt tal-vittma. Ghandhom ghalhekk jittiehdu proceduri kriminali fil-konfront tal-istess ai termini tas-sub-titolu IV tal-Kap. 9 tal-Ligijiet ta' malta 'Fuq l-omicidju u l-offizi involontarji fuq il-persuna'.""

"Illi sussegwentement u fid-dawl tal-konkluzjonijiet milhuqa mill-Magistrat Inkwerenti fl-Inkjesta sureferita gew istitwiti proceduri kriminali fil-konfront tal-esponenti quddiem il-Qorti tal-Magistrati (Ghawdex) bhala Qorti Istruttorja fl-Ismijiet Il-Pulizija vs Hedley Jacqueline Rio u Daniel Gill liema proceduri jinsabu pendenti.

"Illi hekk kif sejjer jigi ippruvat fil-mori tal-Kawza l-proceduri addottati fl-Inkjesta sureferita inkluz dak li jirrigwardja l-esperti mahtura u l-kompetenza taghhom, ir-relazzjoni minnhom redatta u kif ukoll il-gbir tal-provi jivvjolaw id-drittijiet fundamentali tal-esponenti senjatament l-Artikoli 6 tal-Konvenzjoni Ewropea dwar id-Drittijiet Fundamentali tal-Bniedem u l-Artikolu 39 tal-Kostituzzjoni ta' Malta.

"Illi l-esponenti jlimenta wkoll illi l-inkjesta sureferita ma tipprovdix mekkanizmu legali sabiex l-esponenti seta' jippartecipa fiha u jikkontesta kwalunkwe provi u konkluzjonijiet hemmhekk maghmulha u jirrimedja kwalunkwe nuqqas li sar fil-konfront tieghu u dana bi ksur tal-Artikolu 13 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem."

4. Il-proceduri kriminali ghadhom pendenti.

5. Ghat-talbiet attrici l-konvenut issolleva s-segwenti eccezzjonijiet: [1] li l-azzjoni hija intempestiva, kemm ghax il-proceduri kriminali ghadhom pendenti quddiem il-Qorti tal-Magistrati [Ghawdex] bhala Qorti Istruttorja, kif ukoll ghax l-attur ma ghamilx uzu mir-rimedji ordinarji senjatament ir-rimedju ta' Appell mill-eventwali sentenza tal-Qorti tal-

Magistrati; ghalhekk talab li l-ewwel Qorti tiddeklina milli tezercita s-setghat kostituzzjonali taghha; [2] li l-Artikolu 6 tal-konvenzjoni mhuwiex applikabbli ghall-proceduri fl-istadju ta' inkjesta magisterjali, kemm ghax f'dak l-istadju ma jkunx hemm akkuzat u wisq inqas ma jkun hemm xi pronunzjament ta' htija o meno, kif ukoll ghax l-ghan ahhari tal-inkjesta magisterjali hu li jigu ipprezervati l-provi relevanti ghall-incident investigat; [3] li l-attur huwa vag fl-ilment tieghu dwar ic-cirkostanzi li hu jghid li wasslu ghall-vjolazzjoni tad-dritt tieghu ghal smigh xieraq, u inoltre l-ilment tieghu dwar il-kompetenza tal-esperti nominati mill-Magistrat Inkwirenti ghandu jigi ventilat mhux quddiem din il-Qorti, izda fil-proceduri kriminali fejn l-attur ghandhu l-fakolta` li jaghmel il-kontro-ezamijiet opportuni, u jqajjem kull eccezzjoni f'dan is-sens anke quddiem il-Qorti Kriminali f'kaz ta' appell; barra minnhekk il-procedura addottata fl-inkjesti magisterjali hija regolata mill-Kodici Kriminali u fil-fehema tal-konvenut, fil-kaz odjern, in-normi procedurali relevanti kienu gew osservati skrupolozament; [4] li fil-kaz odjern ir-rekwiziti tal-Artikolu 39 tal-Kostituzzjoni ta' Malta [il-Kostituzzjoni] u tal-Artikolu 6 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali kienu gew osservati.

<u>Is-Sentenza Appellata</u>

6. L-ewwel Qorti waslet ghad-decizjoni taghha wara li ghamlet is-segwenti konsiderazzjonijiet:

"**II. <u>Fatti</u>**

"Fl-10 ta' Marzu 2015, ghall-habta ta' nofsinhar, dahal rapport fl-Ghassa tar-Rabat, Ghawdex, illi fl-inhawi tad-Dwejra limiti ta` San Larenz kienet ittellghet l-art ghaddasa mitlufa minn sensieha[1]. Il-mara nghatat l-ewwel ghajnuna fuq il-post. Ftit tal-hin wara kienet iccertifikaha mejta mit-tabib tal-ambulanza. Il-vittma kienet mara u kienet identifikata bhala Petrina Bridget Alice Matthews ta' 61 sena u ta' nazzjonalita ingliza. Kienet tinsab Malta ghal btala flimkien ma' zewgha. Irrizulta li dakinhar tal-incident, marret toghdos fl-inhawi tad-Dwejra flimkien ma' Simon Heward u Laurenn Flattery.

"Minnufih infethet inkjesta magisterjali. Il-Magistrat tal-Ghassa Dr Joanne Vella Cuschieri hatret diversi esperti biex jassistuha. Fost dawn l-esperti kien hemm it-Tabib Dr. Mario Saliba[2] u Lino Vella Brincat[3]. L-inkjesta nghalqet mill-Magistrat Inkwirenti fit-30 ta' Settembru 2015.

"Inghad hekk [4]:-

> ""*Mehuda in konsiderazzjoni l-fatti suesposti l-Magistrat Inkwirenti hi tal-fehma li hemm lok li jittiehdu proceduri kriminali fil-konfront ta' Jacquleine Rio Hedley … u Daniel Gill … u dan in vista tal-kontribut taghhom li wassal sabiex l-apparat proprjeta' ta' Daniel Gill u li kien mizmum fil-kwartieri tal-iskola/hanut tal-ghadds proprjeta' u mmexxi minn Jacqueline Rio Hedley (Ocean Myseteries Diving, 11, Triq Sant'Elena, Mellieha) u cioe 'Cressi AC2 1st stage Pressure Reducer with XS2 Primary Demand Valve, XS2 Octopus, Uwatec Pressure Gauge and L.P. Inflator Hose; bearing serial number LI 080F02454 spicca gie uzat mill-vittma waqt id-'dive' li wasslet ghal mewt taghha nonostante li ma kienx tajjeb ghat-tali uzu, kif ukoll ghan-nuqqas taghhom li jiehdu l-mizuri necessarji sabiex jassiguraw li l-vittma jkollha apparat tajjeb ghall-uzu intiz waqt id-'dive' u ppermettew uzu ta' apparat li skond il-konkluzjonijiet tal-esperti mqabbda mill-Magistrat Inkwirenti kkontribwixxa ghall-mewt tal-vittma. Ghandhom ghalhekk jittiehdu proceduri kriminali fil-konfront tal-istess ai termini tas-sub-titolu IV tal-Kap 9 tal-Ligijiet ta' Malta 'Fuq l-omicidju u l-offizi involontarji fuq il-persuna.*""

"Il-proces verbal flimkien mad-dokumenti mar ghand l-Avukat Generali.

"Fis-7 ta' Dicembru 2015 kienu stitwiti proceduri kriminali kontra Jacqueline Rio Hedley u David Gill.

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[1] Ara r-rapport tal-Ispettur Bernard Charles Spiteri a fol. 213 tal-process.
[2] Ara 'Nomina ta' Espert' a fol. 217 tal-process.
[3] Ara 'Nomina ta' Espert' a fol. 216 tal-process.
[4] Ara l-process verbal redatt mill-Magistrat Inkwirenti a fol. 205 sa 212 tal-process.

"L-akkuza kienet tghid hekk [5] :-

> *""B'nuqqas ta' hsieb, jew bi traskuragni jew b'nuqqas ta' hila fl-arti jew professjoni taghkom, jew b'nuqqas ta' tharis ta' regolamenti, nvolontarjament ikkagunajtu l-mewt ta' Petrina Bridget Alice Matthews ta' 61 sena detentrici tal-passaport Brittaniku bin-numru 206812388.""*

"Il-proceduri quddiem il-Qorti tal-Magistrati (Ghawdex) bhala Qorti Istruttorja, kif presjeduta mill-Magistrat Dr Joseph Mifsud, ghandhom pendenti.

"**III. <u>L-Istanza Odjerna</u>**

"Il-proceduri odjerni gew intavolati ghaliex ir-rikorrent jallega illi sehhew diversi nuqqasijiet waqt illi kienet qed issir l-inkjesta fuq riferita. Ir-rikorrent jilmenta minn vjolazzjoni tal-Artikolu 6 u l-Artikolu 13 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem u Libertajiet Fundamentali ("**<u>il-Konvenzjoni</u>**") u l-Artikolu 39 tal-Kostituzzjoni ta' Malta ("**<u>il-Kostituzzjoni</u>**"). Billi fil-premessi tar-rikors promotur mhuwiex specifikat fejn u kif sehhet l-allegata vjolazzjoni, kien biss minn qari tal-atti illi l-Qorti setghet tifhem sewwa sew liema, skont ir-rikorrent, kienu l-irregolaritajiet illi sehhew fil-kors tal-inkjesta. L-ilment tar-rikorrent jidher li jirrigwarda l-hatra u l-kompetenza tal-esperti teknici Dr Mario Saliba u Lino Vella Brincat, ir-relazzjoni li rredigew u pprezentaw, kif ukoll il-mod kif sar il-gbir tal-provi.

"Ir-rikorrent jesprimi thassib dwar il-kompetenza tal-esperti teknici.

"Sahansitra jattakka l-kwalifiki akkademici u l-esperjenza ta' t-Tabib Dr Mario Saliba. Kwantu ghar-relazzjoni ta` Dr Saliba, ir-rikorrent jilmenta illi dan ma kienx konvint mill-konkluzjonijiet tieghu kif bespressi fir-relazzjoni, tant illi hass il-bzonn illi jikkonsulta ruhu ma` espert barrani. Addirittura jghid illi Dr Mario Saliba ha zbalji kardinali fil-qadi tal-inkarigu tieghu anke fil-kors ta' inkjesti ohra. Dwar dan ir-rikorrent ipprezenta wkoll kopja tax-xiehda li kienet inghatat mill-istess espert fil-kawza fl-ismijiet **<u>Avukat Larry Formosa oe vs Avukat Generali</u>** li kienet deciza minn din il-Qorti diversament presjeduta fil-15 ta' Frar 2019, liema decizjoni kienet appellata u l-appell ghadu pendenti. F'dawk il-proceduri, Dr Saliba kien ukoll fil-mira tar-rikorrent fis-sens illi kienet attakkata l-hatra, il-kompetenza u l-mod kif gabar il-provi.

"Kwantu ghall-espert Lino Vella Brincat, ir-rikorrent jallega illi dan kellu konflitt ta' nteress meta nhatar bhala espert tekniku ghaliex irrizulta li huwa azzjonista maggoritarju fil-kumpannija Sub Acqua Supplies and Services Limited, li timporta prodotti ta` ditti esteri li huma kompetituri ma` dik li tipproduci t-taghmir illi kien qieghed jintuza mill-vittma fil-waqt tal-fatalita'. Ghalhekk ir-rikorrent jasal biex jaghmel l-argument illi l-

[5] Ara 'Tahrika ta' Kawza tal-Pulizija' a fol. 162 tal-process.

espert seta` kellu kull interess illi jsib difetti fl-apparat li tqieghed ghad-disposizzjoni tal-vittma dakinhar tal-mewt taghha.

“Ir-rikorrent jilmenta wkoll mill-fatt illi l-ezamijiet forensici illi saru fuq l-apparat in kwistjoni saru b’mod illegali ghaliex ma ttiehdu ebda mizuri sabiex jigi assigurat li ma jkunx hemm konflitt ta’ nteress. Jinghad inoltre li l-esperti illi ghamlu l-accertamenti fuq l-apparat ma hadu ebda gurament ghall-qadi tal-inkariku taghhom.

“Minn naha tieghu, l-Avukat Generali, apparti li jikkontesta l-pretensjonijiet tar-rikorrent fil-mertu, jikkontendi li l-azzjoni bhala tali hija ntempestiva abbazi tal-fatt illi ladarba l-process kriminali ghadu ma mhux konkluz, mhuwiex maghruf kif u ghaliex ser ikun zvantaggjat ir-rikorrent fil-kors tal-procediment kriminali. Relatata ma` din l-eccezzjoni, hemm ukoll eccezzjoni ohra fejn qed ikun eccepit illi r-rikorrenti naqas li jezawrixxi r-rimedji ordinarji. Konsegwenza ta` dan, l-Avukat Generali stieden lil din il-Qorti sabiex tiddeklina milli tezercita s-setghat kostituzzjonali taghha.

“**IV. <u>L-Intempestivita` tal-Azzjoni</u>**

“Il-kawza kriminali fl-ismijiet **<u>Il-Pulizija vs Jacqueline Rio Hedley u Daniel Gill</u>** ghadha pendenti quddiem il-Qorti tal-Magistrati (Ghawdex) bhala Qorti Istruttorja. Jirrizulta illi ghalkemm bdiet tinstema` fit-8 ta’ Marzu 2016, il-proceduri ghadhom fi stat bikri ta` smigh. Jidher li kien hemm numru ta’ differimenti ghal ragunijiet varji. Xehdu esperti li kienu mahtura fl-inkjesta.

“Ghall-iskop tal-lanjanza tar-rikorrent, il-parti rilevanti tal-**<u>Art 6(1) tal-Konvenzjoni</u>** hija dik li tghid :-

> *““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.””*

“Mill-**<u>Art 39 tal-Kostituzzjoni</u>** dawk rilevanti huma s-subartikoli (1) u (2):-

> *““(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.””*

“Il-Qrati taghna diga` ppronunzjaw ruhhom dwar l-eccezzjoni tal-intempestivita` meta l-procediment li dwaru r-rikorrent ikun qieghed jilmenta ma jkunx ghadu mitmum. Inghad illi ghalkemm huwa minnu li t-tutela tad-dritt ghal smigh xieraq tista` tigi evalwata in relazzjoni mal-assjem tal-proceduri, u ghalhekk ikun prematur jekk wiehed jiddeciedi fi stadju bikri tal-process, meta diga` jkun hemm ragunijiet bizzejjed li fuqhom il-Qorti tkun tista` ssib lezjoni, allura m`ghandhiex ghalfejn tistenna li jintemm il-kaz kollu, jew tistenna li attwalment ikun hemm lezjoni, ghaliex jista` jaghti l-kaz li jkun tard wisq jew li l-persuna tispicca minghajr rimedju.

“Fis-sentenza li tat fil-25 ta` Marzu 2011 fil-kawza “**David sive David Norbert Schembri vs Avukat Generali**” il-Qorti Kostituzzjonali ghamlet riferenza ghad-decizjoni tal-Ewwel Qorti fejn inghad 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 id-decizjoni 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”.”*

“Dwar id-decizjoni tal-Ewwel Qorti ir-rikorrent kien 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**”, 3rd 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’.”*

“Madanakollu l-Qorti Kostituzzjonali kkonfermat id-decizjoni tal-Ewwel Qorti u cahdet l-aggravju.

"Fil-kaz "**<u>Repubblika ta` Malta v Carmel Camilleri</u>**" li kien deciz mill-Qorti Kostituzzjonali fit-22 ta` Frar 2013, inghad illi ma kienx necessarjament il-kaz illi l-Ewwel Qorti kellha tistenna sakemm jintemm il-process kriminali qabel ma tqis l-ilment dwar ksur tal-jedd ghal smigh xieraq sabiex dak il-jedd jigi "*evalwat fir-rigward tat-totalità tal-procedura"*. Kien rilevat illi :-

""Tassew illi l-gurisprudenza generalment hija kif ighid l-Avukat Generali. Ukoll fil-kaz ta`* ***<u>Imbrioscia v. l-Isvizzera (</u>****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 filkuntest tal-jedd ghall-ghajnuna ta` avukat ghandu jkun differenti.

""Madankollu, kif qalet din il-qorti fil-kaz ta`* ***<u>Il-Pulizija v. Alvin Privitera</u>*** ***<u>(</u>****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 lammissjoni 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.""

"Fir-riferenza kostituzzjonali fl-ismijiet "**<u>Il-Pulizija vs Dr Melvyn Mifsud</u>**" deciza mill-Qorti Kostituzzjonali fis-26 ta` April 2013 kien rilevat illi hija gurisprudenza kostanti li l-ezami ta` jekk hemmx vjolazzjoni tad-dritt ghal smiegh xieraq irid isir billi jittiehed qies tal-procedimenti kollha fl-assjem taghhom u li ghalhekk dan l-ezercizzju, fil-principju, huwa indikat li jsir biss fi tmiem il-procedimenti u mhux qabel.

"Il-Qorti kompliet tghid li :-

""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.””

“Fil-kaz ta` “**Morgan Ehi Egbomon vs Avukat Generali**” deciz mill-Qorti Kostituzzjonali fis-16 ta` Marzu 2011, il-qorti accettat il-posizzjoni tal-ewwel qorti illi sabiex il-qorti tkun tista` tiddeciedi dwar allegazzjoni ta` nuqqas ta` smigh xieraq kien hemm bzonn illi jsir apprezzament tal-process kriminali kollu. Ladarba is-smigh ma kienx mitmum, kien ghadu mhux maghruf kif u taht liema cirkostanzi jistghu joperaw ir-regoli illi l-appellant kien 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**” l-awtur Av. Tonio Borg ighid hekk :-

““The trial or proceedngs 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.””*

“Fil-kawza “**Malcolm Said vs Avukat Generali et**” deciza fl-24 ta` Gunju 2016, il-Qorti Kostituzzjonali kellha quddiemha aggravju fejn inghad b`insistenza illi d-dritt ta` smigh xieraq kellu jkun evalwat fir-rigward tat-totalità tal-procedura fl-intier taghha u mhux fir-rigward ta` mumenti minnha, bhal ma kien qed jipprova jaghmel l-appellat. Il-Qorti Kostituzzjonali qalet hekk :-

““Madankollu, ghalkemm il-Qorti Ewropea hija marbuta bir-regola tal-esawriment tar-rimedji domestici, li kienet ir-raguni ghala sabet li l-ilment ta` Dimech kien intempestiv, din il-qorti ghandha s-setgha li taghti rimedju fejn issib li disposizzjoni li thares dritt fondamentali mhux biss “qieghda tigi” izda wkoll meta “tkun x`aktarx sejra tigi miksura”. Jekk, meta jsir uzu minn stqarrija li tkun ittiehdet minghajr ma min jaghmilha jkollu l-ghajnuna ta` avukat, dan ikun bi ksur tal-jedd ghal smigh xieraq, mela “x`aktarx” illi d-dritt ghal smigh xieraq jinkiser jekk jithalla li jsir uzu mill-istqarrija, u l-intervent ta` din il-qorti jkun mehtieg minn issa sabiex ma thallix li dan isir.

""Dan it-tieni aggravju huwa ghalhekk michud.""

"Fid-decizjoni li tat fis-7 ta` April 2003 fil-kawza "**Glenn Bedingfield vs Kummissarju tal-Pulizija et**" inghatat tifsira tal-frazi "*x` aktarx ser jigi miksur".* Inghad hekk :-

""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 taddisposizzjoni analoga fil-Kostituzzjoni, li l-Prim Awla (fil-gurisdizzjoni kostituzzjonali taghha) jew din il-Qorti ghandhom jiddeciedu kwistjonijiet jew fl-astratt jew flipotesi 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.""

"Ta` l-istess portata kienet is-sentenza tat-30 ta` Mejju 2003 fil-kawza "**Joseph Hili maghruf bhala Nadia Hili vs Avukat Generali et**".

"Fid-decizjoni moghtija fit-12 ta` Frar 2016 fil-kawza "**General Workers` Union v. L-Avukat Generali**" il-Qorti Kostituzzjonali qalet 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-diskrezzjon`i 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>Avukat Dr Samuel Azzopardi vs L-Avukat Generali et</u>** deciza fl-4 ta` Lulju 2017 minn din il-Qorti diversament presjeduta (u konfermata b`decizjoni tal-Qorti Kostituzzjonali tas-26 ta` Jannar 2018) kienet trattata l-eccezzjoni tal-intempestivita` tal-azzjoni. 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 **<u>Victor Lanzon et v Kummissarju tal-Pulizija</u>** (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-kawza fl-ismijiet "**Charles Steven Muscat vs Avukat Generali**" li kienet deciza minn din il-Qorti diversament presjeduta fl-10 ta` Ottubru 2011 sar l-argument illi sabiex tkun tista` tigi deciza kwistjoni ta` nuqqas ta` smigh xieraq kien mehtieg apprezzament tal-process kriminali fl-interezza tieghu u allura ladarba l-proceduri kriminali kienu ghadhom ma bdewx jinstemghu, u wisq anqas gew konkluzi, u dan meta l-apprezzament ta` allegazzjoni ta` nuqqas ta` smiegh xieraq kienet tirrikjedi evalwazjoni tal-process penali fl-intier tieghu, l-azzjoni kienet intempestiva.

"Il-Qorti rrilevat illi :-

"Fl-opinjoni ta` din il-Qorti hawnhekk mhux qed jigi deciz jekk ir-rikorrenti huwiex hati jew le tal-akkuzi migjuba kontra tieghu. Dan mhux il-kompitu ta` din il-Qorti, li, in effett, trid tiddeciedi jekk sehhitx lezjoni tad-drittijiet fondamentali tar-rikorrenti meta huwa rrilaxxja stqarrija waqt l-investigazzjonijiet minnhajr ma seta, qabel, jikkonsulta ma avukat.

*"Fis-sentenza fl-ismijiet **"Il-Pulizija vs Alvin Privitera"** l-Qorti Kostituzzjonali (11 ta` April 2011) gie ritenut li "meta di gia jkun hemm ragunijiet bizzejjed li fuqhom il-Qorti tkun tista ssib li hemm lezjoni, il-Qorti m`ghandhiex toqghod tistenna sakhemm jintemm il-kaz jew li jigi attwalment miksur id-dritt pretiz biex tiddeciedi jekk hemmx lezjoni jew le. Jista jaghti l-kaz li jkun tard wisq. .... Fil-fehma ta` din il-Qorti n-nuqqas ta` assistenza ta avukat fl-istadju ta` investigazzjoni hu wiehed minn dawn ic-cirkostanzi li jistghu jippregudikaw id-dritt ta` persuna akkuzata irrimedjabilment."*

"Fil-kaz deciz mill-ECtHR "**Dimech vs Malta**" tat-2 ta` April 2015, il-Gvern Malti sostna li l-ilment tar-rikorrent kien prematur :-

> *""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.””

“Il-Qorti Ewropeja accettat l-argument u qalet :-

““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. 45. 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 legalassistance 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 et vs Malta"** deciza 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.""

“**Dan premess, il-principju li jemergi minn din il-gurisprudenza huwa li meta l-proceduri jkunu ghadhom ma ntemmewx u ma jkunx ghadu maghruf kif ir-rikorrent ser jigi allegatament zvantaggjat, il-proceduri kostituzzjonali jkunu intempestivi. Ilment waqt li l-proceduri jkunu ghadhom pendenti jkun jista` jitqies, meta d-dritt lamentat jkun x`aktarx ser jigi miksur izda l-ksur ravvizat irid ikun wiehed reali u imminenti.**

“**V. <u>Risultanzi</u>**

“Din il-Qorti qieset il-gurisprudenza fuq citata, u hasbet fit-tul dwar kif ghandha tkun applikata ghall-fattispeci u cirkostanzi tal-kawza tal-lum.

“Tajjeb li jkun ribadit illi fl-essenza tieghu, l-iskop ta`procediment kostituzzjonali u/jew konvenzjonali huwa li wara li persuna tipprova li tkun garrbet jew x`aktarx sejra ggarrab ksur tal-jeddijiet fondamentali taghha, tinghata rimedju effettiv u minghajr dewmien.

“Kien osservat minn din il-Qorti diversament presjeduta fis-sentenza taghha fil-kawza fl-ismijiet **<u>Avukat Larry Formosa noe vs Avukat Generali</u>** (op. cit.) illi :-

> *““Dwar l-allegazzjonijiet li jiccirkondaw l-inkjesta magisterjali per se huwa minnu li dawn l-ilmenti setghu tqajmu wkoll quddiem Qorti ta’ gudikatura kriminali* ***li kieku*** *r-rikorrent spicca tressaq quddiem tali Qorti. Izda la fil-kaz odjern u in vista tan-nolle prosequi deciz mill-intimat Avukat Generali stess ir-rikorrent spicca qatt ma tressaq b’akkuzi quddiem Qorti ta’ Gudikatura Kriminali, ir-rikorrent ma kellux a dispozizzjoni tieghu rimedju ordinarju effettiv u effikaci li permezz tieghu seta’ jivventila l-ilmenti tieghu dwar l-inkjesta magisterjali in kwistjoni. Ghalhekk fil-fehma tal-Qorti ma hemm ebda lok li huwa jigi prekluz milli almenu jressaq ilment kostituzzjonali dwar din l-istess inkjesta quddiem din il-Qorti fil-vesti kostituzzjonali taghha. Dan naturalment indipendentement minn jekk ghandux ragun jew le fil-mertu dwar dawn l-istess lanjanzi.””*

“Skont il-ligi taghna, il-Magistrat Inkwirenti ghandu s-setgha li jahtar esperti, jisma` xhieda u jaghmel kull ma jehtieg sabiex jaccerta c-cirkostanzi kollha tal-kaz. Il-Magistrat Inkwirenti ghandu l-obbligu li jesprimi l-konkluzjoni tieghu u l-*proces verbal* li jirredigi u jiffirma jista` jittiehed bhala prova. Fl-istess waqt, il-*proces verbal* mhuwiex xi decizsjoni finali ; *tutt`altro* minn hekk.

“Fil-kaz tal-lum, l-esitu tal-*proces verbal* wassal sabiex ittiehdu proceduri kriminali kontra l-mandant tar-rikorrent u haddiehor. Daqstant huwa a tenur ta` dak li tghid il-ligi. Il-mandant tar-rikorrent huwa akkuzat ghax wiegeb li mhuwiex hati tal-akkuzi dedotti kontra tieghu. Dan ifisser illi ghandu favur tieghu l-prezunzjoni tal-innocenza. U jibqa`

jgorr favur tieghu din il-presunzjoni sakemm ma tinghatax sentenza li tghid li huwa hati.

"Fil-kors tal-prosediment li ghaddej minnu llum il-mandant tar-rikorrent, kull naha ghandha l-jeddijiet taghha tutelati u garantiti, mill-bidu sal-ahhar. Kull persuna li tkun tat ix-xiehda taghha waqt l-inkjesta (kif ukoll l-esperti) tista` tingieb waqt il-kawza sabiex twiegeb *viva voce* ghal domandi li jsiru kemm mill-Prosekuzzjoni kif kif ukoll mid-Difiza. Illum il-process penali li ghaddej minnu l-mandat tar-rikorrent ghadu miftuh, anzi jinsab fi stadju bikri. Ghandu ghad-dispozizzjoni tieghu r-rimedji u s-salvagwardji kollha illi jippermettu u jiggarantixxu s-smigh ikun xieraq.

"Fl-istadju li tinsab fih il-kawza kriminali stitwita kontra l-mandant tar-rikorrent, ghadu bil-wisq prematur li jinghad kienx hemm diga` jew x`aktarx ikunx hemm lezjoni tal-jeddijiet fondamentali tal-akkuzat. Sal-lum, fil-kors tas-smigh tal-kawza, din il-Qorti ma rriskontratx fatti li jesigu l-intervent taghha anke llum. Stharrig ghall- finijiet ta` t-tutela ta` jeddijiet konvenzjonali u/jew kostituzzjonali ikun jista` jsir meta jkun evalwat il-procediment fl-intier tieghu. Mhuwiex dan kaz fejn jekk din il-Qorti ma tintervjenix, allura l-persuna tispicca sprovvista minn rimedju effettiv.

"Din il-Qorti hija tal-fehma illi l-lanjanzi ndikati mir-rikorrent jistghu u ghandhom jigu trattati u ndirizzati fil-kors tal-procediment li huwa pendenti jew bil-kontroezami tax-xhieda li tressaq il-Prosekuzzjoni, inkluzi l-esperti li kienu mahtura fl-inkjesta, jekk ikun il-kaz bix-xiehda tal-akkuzati, u/jew bi provi ohra li taghzel li ggib id-Difiza. Terga` u tghid il-Qorti tal-Magistrati (Ghawdex) ghadha sal-lum ma kellhiex l-opportunita` li taghmel evalwazzjoni tal-provi sabiex fuqhom imbaghad taghmel il-konsiderazzjonijiet taghha.

"Ma jkunx ghalhekk la xieraq u lanqas opportun li din il-Qorti, bhala qorti ta` gurisdizzjoni kostituzzjonali u konvenzjonali, tippronunzja ruhha billi tixref fil-mertu tal-kawza l-ohra, kif kjarament qed jigi propost mir-rikorrent li ghandha taghmel, qabel ma l-Qorti tal-Magistrati (Ghawdex) ikollha l-opportunita` li, wara li taghmel l-apprezzament tal-provi, biz-zewg nahat ighidu taghhom bi trattament indaqs, taghmel il-pronunzjament taghha. *Una volta* illi dik il-Qorti tkun ippronunzjat ruhha, jibqa` d-dritt tal-appell skont il-ligi. Inoltre xejn ma jzomm lil dik il-Qorti illi jekk fil-kors tal-procediment tinsorgi kwistjoni ta` xejra kostituzzjonali u/jew konvenzjonali, u tkun tal-fehma li l-kwistjoni ma tkunx frivola jew vessatorja, allura tista` taghmel referenza.

"**Din il-Qorti ssib illi fil-kwadru ta` l-ewwel eccezzjoni preliminari, l-azzjoni tar-rikorrent noe hija ntempestiva.**

"**Ghalhekk fic-cirkostanzi ma tarax il-htiega li, fl-ambitu tal-istess eccezzjoni, tidhol fil-kwistjoni ta` jekk ir-rikorrent noe ezawriex ir-rimedji ordinarji tieghu.**"

L-Appell

7. L-attur prezenta appell fl-20 ta' Mejju 2019 li ghalieh irrisponda l-konvenut b'risposta prezentata fil-31 ta' Mejju 2019.

8. L-attur qed jibbaza l-appell tieghu fuq l-aggravju li mhuwiex minnu li l-azzjoni imressqa minnu f'dawn il-proceduri hija intempestiva, u abbazi ta' hekk, huwa qed jitlob li l-appell tieghu jigi milqugh, is-sentenza appellata tigi revokata u t-talbiet tieghu jigu milqugha, bl-ispejjez taz-zewg istanzi kontra l-konvenut appellat.

9. L-attur jghid li huwa "fil-prezent qed jigi zvantaggjat u ostakolat milli jressaq difiza tajba u ma hemmx bzonn sabiex jigi konkluz il-process kriminali sabiex isir maghruf kif u ghaliex sejjer ikun zvantaggjat." Wara li ccita mis-sentenza tal-Qorti Ewropea fil-kaz ***Vera Fernandez-Huidobro v Spain***[6] in sostenn tat-tezi tieghu li l-Artikolu 6 huwa applikabbli anke fil-procedura tal-investigazzjoni immexxija minn "investigating judge", ikompli jfisser hekk l-aggravju tieghu:

> "Illi kemm il-pulizija taht l-Artikolu 46 u anke l-Qorti inkwirenti ghandhom l-obbligu li jigbru kwalunkwe prova li tirrizulta, kemm dik kontra u anke dik favur persuni susspettati. Huwa risaput li certu provi jistghu jingabru biss a tempo vergine u dana peress li l-moghdija taz-zmien jeqridhom. Fil-kaz odjern il-provi relatati mal-kundizzjoni tal-apparat fil-mument tal-incident setghu jingabru biss fil-mument tal-incident. Dana peress li llum il-gurnata l-kundizzjoni tal-apparat ma ghadix dik li kienet fil-jum tal-incident. Din hija wahda mill-provi kardinali li trid issir u dana peress

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li l-konkluzjonijiet tal-Inkjesta jduru mal-kondizzjoni tal-apparat li intuza. L-istess jinghad ghall-gbir tat-testimonjanzi tax-xhieda stante li llum il-gurnata certu fatti zgur li intesew.

"Fil-kaz tal-Inkjesta, gja la darba din tinghalaq, il-process verbal jista' jingab bhala prova ai termini tas-subartikolu 646 (4) tal-Kap. 9. Is-Subartikolu 550 (1) tal-Kap. 9 jghid:

> ""Il-process verbal maghmul regolarment, jista' jinghata bhala prova fis-smigh tal-kawza u x-xhieda, il-periti jew persuni ohra li jkunu dehru fl-access jew xehdu matul l-inkjesta Magisterjali ma jistghux jingiebu biex jaghtu xiehda quddiem il-Qorti tal-Magistrati bhala qorti istruttorja matul-il-kumpilazzjoni.""

"Il-process verbal jista' jitressaq bhala prova kemm mill-akkuzat u anke mill-prosekuzzjoni. Fil-kaz odjern **l-appellant ma jistax jressaq il-process verbal bhala prova favur tieghu u dana peress li l-istess process verbal huwa monk**. B'herkk huwa evidenti li fil-prezent l-appellant huwa diga zvantaggat u dana peress li ma jistax iressaq il-process verbal bhala prova.

"Illi fid-dawl ta' dan huwa evidenti li l-appellant diga qieghed isofri ksur tal-jeddijiet fundamentali tieghu u ma hemm l-ebda htiega sabiex jitkomplew il-proceduri kriminali sabiex dan il-fatt jigi affermat u stabbilit.

"Illi l-esponenti lanqas ma jaqbel mal-Ewwel Qorti meta inghad li l-lanjanzi ghandhom jigu trattati u indirizzati fil-kors tal-procediment kriminali. Il-procediment huwa fil-fatt ghaddej u l-esponenti ma jistax jifhem ghalfejn l-appellanti ghandu jitratta l-lanjanzi tieghu quddiem il-Qorti tal-Magistrati li qed tisma' l-proceduri kriminali fil-prezent, sabiex eventwalment terga' tibghat l-istess kwistjoni quddiem l-istess Qorti u dana peress li l-Qorti tal-Magistrati ma ghandha l-ebda setgha li tiddeciedi kwistjonijiet ta' natura kostituzzjonali. B'hekk dan l-ezercizzju ma huwa sejjer iservi xejn hlief ghal telf ta' zmien u spejjez.

"Illi bid-dovut rispett lejn l-Ewwel Qorti l-fatt li l-appellant jista' jressaq lil persuni li ppartecipaw fl-inkjesta in kontro-ezami ma jtaffix il-fatt li l-provi ma gewx migbura skond il-ligi. Dan ma huwiex ta' solljev ghalih u dana peress li kif inghad aktar 'il fuq, certu provi li l-appellant xtaq li jingabru u jingabu (inkluz evidenza li turi li l-apparat kien fil-fatt jahdem tajjeb) illum il-gurnata ma jistax igibhom.

"Illi nonostante dan kollu, anke jien dina l-Onorabbli Qorti kellha issib li fil-prezent l-appellant mhux qed isofri ebda pregudizzju, zgur illi wiehed ghandu jsib "x'aktarx" sejjer isofri pregudizzju."

10. Min-naha tieghu l-konvenut jghid li l-ilmenti tal-attur huma naxxenti minn diversi allegazzjonijiet fiergha u bla bazi, senjatament dawk relattivi

ghall-kompetenza tal-esperti nominati mill-Magistrat Inkwirenti. Huwa jissottometti li l-proceduri kriminali ghadhom pendenti u mhux car kif l-attur ser jigi imcahhad mid-dritt ta' smigh xieraq f'dan l-istadju meta l-proceduri ghadhom mhux konkluzi defenittivament mill-Qorti Kriminali. Ghalhekk l-ezitu tal-proceduri ghadu incert u mhux maghruf kif l-attur ser jigi zvantaggjat. Ikompli jispjega:

> "Illi kif tajjeb osservat l-Ewwel Onorabbli Qorti, l-ilment li qajjem l-appellant ma jimmeritax li jkunu ezaminati f'dan l-istadju ghaliex f'dan l-istadju ma gara xejn li b'xi mod juru li sehhet vjolazzjoni tal-jedd ghal-smigh xieraq. Illi r-rikorrent ghandu kull dritt ma jaqbilx mal-konkluzjonijiet tal-esperti pero` l-esperti kull m'ghamlu hu li espletaw inkarigu moghti lilhom mill-Magistrati Inkwirenti. L-appellant ghandu l-ghodda kollha permissibbli mill-ligi sabiex jikkontesta l-konkluzjonijiet tal-esperti u dawn id-drittijiet procedurali bl-ebda mod ma gew pregudikati jew mittiefsa. L-inkarigu tal-espert inghata mill-Magistrat Inkwirenti f'ambitu ta' Inkjesta Magisterjali li finalment huwa responsabbli ghaliha l-istess Magistrat Inkwirenti.
>
> "……
>
> "Il-hatra ta' espert jew esperti mill-Magistrat Inkwirenti, skont il-htiega, hija l-prerogattiva esklussiva tal-istess Magistrat Inkwerenti a tenur tal-poteri moghtija lilu bis-sahha tad-disposizzjonijiet tat-Titolu II, Taqsima II tat-Tieni Ktieb tal-Kodici Kriminali (Kap. 9 tal-Ligijiet ta' Malta). Huwa ghalhekk l-istess Magistrat li, qabel ma jahtar espert, jevalwa l-hila u l-kompetenza mehtiega minnu sabiex l-inkarigu ntiz ghalih jigi espletat skont l-abiltajiet u l-kwalifiki tieghu fil-qasam relattiv li dwaru huwa, mehtieg li jirrelata. Inoltre, il-gurisdizzjoni ta' din il-Qorti fil-vesti kostituzzjonali taghha hija ntiza li tistabilixxi jekk sehhx jew le ksur tad-drittijiet fundamentali tal-Bniedem. Ghalkemm ghal dan il-ghan hija ghandha poteri wiesgha, dawn certament ma jestendux ghall-poter li tuzurpa l-funzjoni moghtija mill-legislatur lill-Magistrat Inkwirenti sabiex tiddetermina hi jekk tali espert kellux il-kompetenza mehtiega biex jespleta l-inkarigu tieghu.
>
> "Illi ghalhekk jekk wiehed jezamina l-Artikolu 6 tal-Konvenzjoni u l-Artikolu 39 tal-Kostituzzjoni flimkien mal-gurisprudenza relattiva ghal dawn iz-zewg artikoli johrog bic-car li dak li qed jillamenta minnu r-rikorrenti ma jsib l-ebda suffragju. Illi dawn iz-zewg artikoli jahsbu biss ghall-garanziji ta' natura procedurali u fl-ebda punt ma jidhlu fis-sustanza tal-mertu fis-sens jekk l-inkarigu ta' espert giex espletat b'mod tajjeb jew le.

> "Illi l-appellant jibbaza l-appell tieghu fuq premessa totalment zbaljata u cioe` li l-process verbal huwa monk. Il-procerss verbal ma huwa monk xejn ghaliex l-ghan tieghu huwa li l-Magistrat Inkwirenti jigbor ix-xhieda, jippreserva dak kollu li huwa relevanti mix-xena tad-delitt, jinhatru esperti biex jassistu u finalment isiru dawk il-konkluzjonijiet kollha li l-Magistrat ihoss li huma necessarji biex tinstab il-verita`. F'dan il-kaz dak li gara.
>
> "Il-konkluzjonijiet fl-inkjesta m'humiex decizjoni finali dwar il-htija o meno tal-akkuzat. Jekk l-appellant ma jaqbilx mal-konkluzzjonijiet tal-esperti mahtura fl-inkjesta l-forum adegwat biex iressaq l-ilmenti tieghu huwa dak tal-Qrati ta' gurisdizzjoni penali f'liema forum l-appellant ghadu igawdi minn principji bazilari tal-ordinament guridiku Malti fosthom li l-prosekuzzjoni trid tipprova l-kaz taghha minghjar dubju dettat mir-raguni, l-prezunzjoni tal-innocenza u l-*audi alteram partem*.

11. Abbazi tal-premess, il-konvenut qed jitlob li l-appell tal-attur jigi michud u s-sentenza appellata tigi konfermata, bi spejjez taz-zewg istanzi kontra l-attur appellant.

<u>Konsiderazzjonijiet tal-Qorti</u>

12. Bazikament l-aggravju tal-attur jikkonsisti fis-segwenti lanjanzi: [1] li hu qed jigi zvantaggjat u ostakolat milli jressaq difiza tajba, u li ma hemmx bzonn jigi konkluz il-process kriminali sabiex dan jigi maghruf; [2] li l-pulizija ghandha l-obbligu li tressaq kwalunkwe prova li tirrizulta, kemm kontra kif ukoll favur is-suspettat, u l-magistrat inkwirenti ghandu l-obbligu li jipprezerva tali provi; [3] li l-kondizzjoni tal-apparat uzat mill-mejta, illum m'ghadux fil-kondizzjoni li kien fil-jum tal-incident; [4] li t-testimonjanza tax-xhieda kellha tingabar kollha fl-istadju tal-inkjesta, "stante li illum il-gurnata certu fatti zgur li intnesew,"; [5] li hu ma jistax iressaq favur tieghu

l-process verbal peress li dan huwa monk u li, [6] il-fatt li provi fl-inkjesta ma gewx migbura skont il-ligi, ma jigix sanat bil-fatt li skont il-ligi l-attur ghandhu d-dritt li jikkontroezamina x-xhieda li nstemghu matul l-inkjesta. Ghalhekk jghid li d-dritt tieghu ghal smigh xieraq x'aktarx li ser jigi lez.

13. Din il-Qorti tibda bl-osservazzjoni li fir-rikors tal-appell tieghu l-attur ma jispjegax b'mod car ghaliex, fil-fehma tieghu, il-process verbal huwa monk. Jghid li bil-produzzjoni tal-process verbal huwa kien qed jigi zvantaggjat, kemm ghax ma kellux l-opportunita` jippartecipa fl-investigazzjoni, kemm ghax il-kondizzjoni tal-apparat, li hija prova determinanti fil-proceduri kriminali, m'ghadhiex li kienet fil-mument tal-incident, kif ukoll ghax ma ngabrux il-provi kollha matul l-inkjesta, inkluz it-testimonjanza tax-xhieda u li llum "certu fatti zgur li intnesew". Jissenjala li skont l-Artikolu 550 [1] tal-Kodici Kriminali, ghalkemm il-process verbal jista' jigi ezebit, ma jistghux jergghu jingiebu bhala xhieda fil-kumpilazzjoni l-persuni li xehedu matul l-inkjesta.

14. Din il-Qorti, apparti milli tosserva li l-ilmenti kollha formanti parti mill-agravvju tal-attur huma ta' natura li ghandhom jigu indirizzati lill-Qorti li quddiemha qed jitmexxew il-proceduri kriminali, taghmel is-segwenti konsiderazzjonijiet.

15. Fl-ewwel lok, mhu minnu xejn li l-attur ma thalliex jippartecipa fl-inkjesta. Dan hu evidenzjat mill-fatt li, skont l-espert forensiku Dr. Mario Saliba huwa kien ta x-xhieda tieghu. Inoltre, tenut kont li l-attur kien jaf li qed issir inkjesta magisterjali huwa dejjem seta' jitlob lill-Magistrat Inkwirenti sabiex jaghti xhieda ulterjuri anke dwar l-apparat uzat. Izda mill-atti ma jirrizultax li kienet saret talba simili.

16. Fit-tieni lok, mill-atti tal-inkjesta magisterjali jirrizulta manifest li l-apparat li kien qed jintuza' mill-mejta kien gie adegwatament ezaminat mill-espert tekniku Lino Vella Brincat u inoltre, sabiex tinghata *'second opinion'*[7] ir-regolatur formanti parti mill-apparat in kwistjoni kien intbaghat ghall-ezamijiet ulterjuri fi Franza, wara li t-talba tieghu kienet intlaqghet b'digriet tal-Magistrat Inkwirenti li ordnat li l-apparat jinbaghat sigillat Franza lil Gilbert de Corliolis permezz ta' courier akkreditat u jintbaghat lura bl-istess mod u issigillat, flimkien mal-konkluzjonijiet iffirmati mill-istess Gilbert de Corliolis. Ghalhekk, mhux talli l-appart kien gie ezaminat mill-espert lokali *a tempo vergine*, izda talli ttiehdet mizura sabiex isir ezami ulterjuri minn espert barrani. Fid-dawl ta' dan ftit taghmel sens il-lanjanza tal-attur li l-apparat kellu jigi ezaminat meta sar l-incident u li issa huwa tard wisq sabiex jerga' jigi ezaminat. Mill-provi jirrizulta l-kuntrarju, u issa jispetta lill-qrati kriminali li jezaminaw tali prova u jigi deciz x'valur probatorju ser jaghtu lill-provi rigwardanti l-apparat in dizamina. Inoltre,

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ma hemm xejn fil-ligi li jzomm milli l-espert barrani jigi prodott bhala xhud fil-proceduri kriminali.

17. Fit-tielet lok, rigwardanti l-ilment tal-attur dwar dak li jghid is-sub inciz [1] tal-Artikolu 550 tal-Kodici Kriminali citat minnu fir-rikors tal-appell, din il-Qorti tissenjala dak li jghidu s-sub incizi [2] u [3] tal-istess artikolu, jigifieri li l-attur, allura persuna mixlija,

> "(2) ………..jista' wkoll iġġib lil kull min trid minn dawk il-persuni [li xehedu fl-inkjesta] bil-għan li jsirilha kontro-eżami.
>
> "(3) Il-qorti għandha wkoll is-setgħa li tordna, għall-istesseffett, li jinġieb kull wieħed mill-periti jew mix-xhieda l-oħra limill-proċess verbal ikun jidher li ġie mismugħ fl-aċċess; u, għaldaqshekk, dan il-perit jew xhud għandu, fil-każijiet kollha ta'kompetenza tal-Qorti Kriminali, jiġi mdaħħal fil-lista tax-xhieda tal-Avukat Ġenerali, sabiex jiġi mismugħ, jekk ikun hemm bżonn."

18. Ghalhekk din il-Qorti ma tistax tara kif fic-cirkostnazi d-dritt ta' smigh xieraq mill-perspettiva tal-*equality of arms* gie jew x'aktarx ser jigi lez kif sostnut mill-attur.

19. Fir-raba' lok, il-Qorti tosserva li, ghalkemm huwa jghid li matul l-inkjesta ma ngabux il-provi kollha, inkluz dawk li skont hu huma favur tieghu, hija gratuwita stante li ma indikax x'inhuma dawn il-provi li qed jirreferi ghalihom. Apparti minnhekk, huwa ghad ghandu l-fakolta` li jressaq dawn il-provi quddiem il-qrati kriminali. Hija wkoll gratuwita t-tezi tieghu li *"illum certu fatti zgur li intnesew"* u, tenut kont tas-sitwazzjoni tragika li sehhet, huwa inverosimili li min kien involut qatt ser jinsa' dak li

ra, izda, anke hawn, din hi konsiderazzjoni primarjament rizervata ghad-decizjoni mill-qrati kriminali.

20. Fil-hames lok, rigward is-sottomossjoni tal-attur li ma jistax jifhem ghalfejn il-lanjanzi tieghu ghandhom jigu sollevati quddiem il-Qorti tal-Magistrati li qed tisma' l-kaz kriminali kontra l-attur, din il-Qorti tissenjala li, tenut kont tan-natura taghhom, dawn il-lanjanzi huma sollevabbli fil-proceduri kriminali u ma hemmx lok li f'dan l-istadju jigu invokati l-qrati kostituzzjonali sabiex jiddeciedu dwar dak li ghandu jigi deciz quddiem il-qrati ordinarji li min-naha taghhom, ghandhom jikkonducu l-proceduri quddiemhom fid-dawl tad-dritt ta' smigh xieraq tal-attur, allura akkuzat, u, jekk tqum il-htiega, il-Qorti tal-Magistrati dejjem ghandha l-fakolta` li taghmel referenza kostituzzjonali ghal kwezit li jista' jitqajjem.

21. Finalment hija korretta l-ewwel Qorti fil-konkluzjoni taghha li l-proceduri odjerni huma intempestivi. Dan qed jinghad tenut kont, kemm tal-principju identifikat mill-gurisprudenza lokali u dik Ewropea li allegata vjolazzjoni ta' dritt ta' smigh xieraq ghandha tigi ezaminata fid-dawl tal-proceduri kkonsidrati fit-totalita` taghhom, jigifieri wara li l-kaz ikun konkluz defenittivament, kif ukoll ghax fil-kaz odjern ma giex provat li jezisti jew sehh episodju matul l-*iter* tal-proceduri li jista' jkun determinanti ghad-difiza tal-attur b'mod li l-ilment jiggustifika li jigi ezaminat pendenti l-proceduri kriminali.

Fid-dawl tal-premess, il-lanjanzi kollha formanti l-aggravju tal-attur mhumiex gustifikati u ghalhekk l-aggravju qed jigi michud.

Decide

Ghar-ragunijiet premessi tiddeciedi billi tichad l-appell u tikkonferma s-sentenza appellata salv li, fejn fil-parti tad-decide hemm li l-ewwel Qorti cahdet it-talbiet kollha tal-attur, din tigi revokata u, minflok, jitnizzel li l-konvenut jigi liberat mill-osservanza tal-gudizzju; bl-ispejjez taz-zewg istanzi jkunu a kariku tal-attur.

Joseph Azzopardi Prim Imhallef	Giannino Caruana Demajo Imhallef	Noel Cuschieri Imhallef

Deputat Registratur
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