Qorti tal-Appell Kriminali

Onor. Imhallef Dr. Edwina Grima

Appell Numru: 69/2014

Appell Numru: 79/2014

Il-Pulizija

vs

Daniel Lanzon

iben Alexander, imwieled Pieta' fit-30 ta' Settembru, 1985, detentur tal-karta ta' l-identita' numru 567485(M)

U

Joseph Zaffarese

iben Simon, imwieled Cospicua, fil-11 ta' Jannar, 1974, detentur tal-karta ta' l-identita' numru 102274(M)

Illum, 08 ta' Jannar 2020

Il-Qorti,

Rat l-akkuzi dedotti kontra l-appellanti Danel Lanzon u Joseph Zaffarese akkuzati quddiem il-Qorti tal-Magistrati (Malta) talli b'diversi atti, ukoll jekk fi zminijiet differenti, li jiksru l-istess disposizzjoni tal-Ligi u li gew maghmula b'risoluzzjoni wahda, u cioe':

1. Nhar is-16 ta' Awwissu, 2005 u t-8 ta' Novembru, 2006, fil-Gzira, f'Marsascala, fil-Fgura, u f'inhawi ohra differenti f'dawn il-Gzejjer, xjentement laqghu ghandhom jew xtraw hwejjeg misruqa, mehuda b'qerq, jew akkwistati b'reat, sew jekk dan sar f'Malta jew barra minn Malta, jew xjentement b'kull mod li jkun indahlu biex ibieghuhom jew imexxuhom, u li jikkonsistu f'vettura gdida fjamanta tal-marka BMW Series 116 li kienet ghadha bla numru tar-registrazzjoni u li ghandha numru tax-chassis jaqra WBAUF12080PW27617 li hi rapurtata misruqa, liema serq kien jeccedi l-elf lira Maltin (Lm1,000.00);

2. U aktar talli fl-istess data, lok, hin u cirkostanzi, malli saru jafu li xi haga li kienet fil-pussess taghhom kienet haga misruqa jew haga mehuda b'qerq jew akkwistata b'reat, naqsu li jgharrfu lill-pulizija b'dak il-fatt fi zmien gimgha minn meta kienu hekk saru jafu;

3. U aktar talli **Daniel Lanzon wahdu** fl-istess data, lok, hin u cirkostanzi, ikkommetta serq ta' vettura gdida fjamanta tal-marka BMW Series 116 li kienet ghadha bla numru tar-registrazzjoni u li ghandha numru tax-chassis jaqra WBAUF12080PW27617, liema serq hu kkwalifikat bil-valur li jeccedi l-elf lira Maltin (Lm1,000.00), bil-lok, u bix-xorta tal-haga misruqa, ghad-detriment tal-kumpanija Muscat Motors Ltd tal-Gzira;

4. U aktar talli kiser il-provvediment tal-Artikolu 5 tal-Kapitolu 152 tal-Ligijiet ta' Malta, b'sentenza datata 12 ta' Marzu, 2003, moghtija mill-Magistrat Dr A Mizzi LL.D., fejn kien gie misjub hati ta' diversi reati u gie lliberat bil-kundizzjoni li ma jaghmilx reat iehor fi zmien tlitt(3) snin;

5. U aktar talli Daniel Lanzon u Joseph Zaffarese flimkien, fl-istess data, lok, hin u cirkostanzi, saqu vettura tal-marka BMW Series 116 li kienet ghadha bla numru tar-registrazzjoni u li ghandha numru tax-chassis jaqra WBAUF12080PW27617, minghajr licenzja tal-Kummissarju tal-Pulizija jew tal-Awtorita' dwar it-Trasport ta' Malta, jew saqu l-imsemmija vettura minghajr ma kellhom licenzja specifikata biex isuqu l-imsemmija vettura, u b'hekk ma kinux koperti b'licenzja jew polza tal-assigurazzjoni ghar-riskji ta' terzi persuni;

6. U aktar talli Daniel Lanzon sar recidiv ai termini tal-Artikoli 49, 50, 289 tal-Kapitolu 9 tal-Ligijiet ta' Malta, wara li gie misjub hati ta' diversi sentenzi

moghtija mill-Qrati ta' Malta, liema sentenzi saru definittivi u ma jistghux jigu mibdula.

Rat is-sentenza tal-Qorti tal-Magistrati (Malta) tad-19 ta' Frar, 2014 fejn il-Qorti sabet lil Daniel Lanzon hati tar-reati lilu addebitati, wara li rat l-Artikoli 49, 50, 261, 267, 271(g), 279(b), 280(1), 281, u 289 tal-Kapitolu 9 tal-Ligijiet ta' Malta; u kif ukoll l-Artikolu 15 tal-Kapitolu 65 tal-Ligijiet ta' Malta, illiberatu pero mill-effetti tar-reat taht l-Artikolu 3 tal-Kapitolu 104 tal-Ligijiet ta' Malta in kwantu ma jirrizultax kif kienet inxurjata l-vettura misjuqa minnu. Sabet lil Joseph Zaffarese wahdu, hati tar-reat ta' ricettazzjoni kkontemplat fl-Artikolu 334 tal-Kapitolu 334 tal-Ligijiet ta' Malta. Dwar il-piena, fil-konfront ta' Lanzon, rat l-Artikolu 17 tal-Kapitolu 9 tal-Ligijiet ta' Malta u ikkundannat lil Daniel Lanzon ghal piena karcerarja effettiva ta' sentejn u nofs (2 ½). Irrakkomandat illi l-istess Daniel Lanzon jinzamm, minhabba l-problemi li ghandu kif riprodotti minn Dr Joseph Spiteri, gewwa l-Forensic Unit, u li jinghata kull kura necessarja biex tghinu fil-kundizzjoni tieghu. Fil-konfront ta' Joseph Zaffarese, considerando anke li hu kkopera mal-pulizija, kkundannatu ghal piena karcerarja ta' tmintax(18)-il xahar sospizi ghal tlitt(3) snin, u dan wara li rat l-Artikolu 28A tal-Kapitolu 9 tal-Ligijiet ta' Malta.

Rat ir-rikors tal-appellant Daniel Lanzon minnu pprezentat fit-3 ta' Marzu, 2014 fejn talab lil din il-Qorti tikkonferma li mhux hati minn Artikolu 3 tal-Kap 104 u tilliberah mill-akkuzi l-ohra, kif ukoll tirreferri l-lanjanzi kostituzzjonali hawn fuq indikati fil-Prim Awla tal-Qorti Civili (Sede Kostituzzjonali) u fin-nuqqas taghti sentenza aktar ekwa u gusta.

Rat ir-rikors tal-appellanti Joseph Zaffarese minnu pprezentat fit-3 ta' Marzu, 2014 fejn talab lil din il-Qorti joghgobha tirriforma s-sentenza fl-ismijiet Il-Pulizija vs Daniel Lanzon u Joseph Zafferese moghtija mill-Onorabbli Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali nhar id-19 ta' Frar 2014 billi tirrevoka dik il-parti fejn sabet illi-appellant hati ta' ricetazzjoni u minflok tillibera lill-appellant mill-akkuzi kollha kif

dedotti kontra tieghu; jew Tirriforma s-sentenza fl-ismijiet Il-Pulizija vs Daniel Lanzon u Joseph Zafferese moghtija mill-Onorabbli Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali nhar id-19 ta' Frar 2014 billi tnaqqas il-piena nflitta fuq l-appellant sabiex tinfliggi piena aktar addattata ghac-cirkostanzi tal-kaz.

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

> Illi l-Ewwel Qorti ma ghamiltx bir-rispett kollu apprezzament tajjeb tal-fatti kif jirrizultaw mill-provi prodotti. L-uniku prova li kien hemm kontra l-appellant kienet ix-xhieda tal-ko-akkuzat Joseph Zaffarese u l-istqarrija ta' l-appellant stess. Kif qalet ben tajjeb il-Qorti fi pagna 9 tas-sentenza, l-istqarrija ta' Zaffarese jaghmel prova ghalih biss u mhux ghall-ko-akkuzat. B'hekk il-fatt li Zaffarese, li kien biegh vettura lil Carmel Debono, kien qal li l-appellant kien gab il-BMW 116 mhix prova kontra l-istess appellant. Xhud iehor Martin Xuereb li kien biegh vettura BMW lil certu Daniel. Is-Sur Xuereb ma gharafx lil dan Daniel Lanzon fl-awla. B'hekk baqa' l-istqarrija ta' l-appellant. L-Ewwel Onorabbli Qorti kkwotat mis-sentenza ta' Il-Pulizija -v- Paul Cutajar fit-18 ta' Gunju 2013 fejn il-"Qorti ghandha tara jekk l-istqarrija hix korroborata minn xhieda ohra u kemm l-akkuzat huwa persuna vulnerabbli illi seta facilment ikun impressjonat jew influwenzat mill-fatt illi kien qieghed jigi interrogat mill-pulizija". Bla dubju ta' xejn l-appellant hija persuna vulnerabbli kif xehed Dr Joseph Spiteri dwar il-problemi medici u anki mill-Ewwel Qorti rrakkomandat li li jigi mizmum il-Forensic Unit. Izda l-Ewwel Qorti ben konsapevoli li waqt l-istqarrija mhux assistit kienet persuna vunerabbli, qalet li l-istqarrija mhix l-unika prova, izda hija korroborata minn xhieda ta' Muscat Motors u mill-ko-akkuzat Zafferese.
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> Illi l-esponent jissottometti li l-fatt li l-pulizija interrogaw l-appellant, li hija persuna vulerabbli hija bi ksur tad-dritt fundamentali tal-bniedem kif sancit fl-Artikolu 39 tal-Kostituzzjoni u l-Artikolu 6 tal-Konvenzjoni Ewropeja u b'hekk qieghed jitlob referenza kostituzzjonali;
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> Illi minghajr pregudizzju ghas-suespost, il-piena mhix ekwa u gusta l-ko-akkuzat Joseph Zaffarese inghata 18-il xahar prigunerija sospizi ghal tlett snin minhabba l-ko-operazzjoni tieghu mal-pulizija. L-appellant ukoll ikkopera mal-pulizija inghata sentejn u nofs prigunerija effettiva. Il-Qorti ma hadietx in konsiderazzjoni li dan il-kas allegatament sehh 8 snin ilu u dan il-fatt mhix rifletta fis-sentenza.

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

1. **L-ewwel aggravju**:- Illi preliminarjament is-sentenza appellata hija nulla u dan peress illi l-proceduri tal-prim'istanza kienu lezivi tad-dritt tal-appellant ghal smiegh xieraq hekk kif sancit fl-Artikolu 39 tal-Kostituzzjoni ta' Malta u l-Artikolu 6 tal-Konvenzjoni Ewropeja fuq id-Drittijiet Umani.

Illi d-dritt ghall-assistenza legali huwa wiehed mill-garanziji minimi ta' smiegh xieraq, u d-dritt ghal tali assistenza johrog b'mod car u esplicitu mill-Artikolu 39 tal-Kostituzzjoni u l-Artikolu 6(3)(c) tal-Konvenzjoni Ewropeja. Dan id-dritt ghall-assistenza legali fi proceduri kriminali huwa rikonoxxut u protett fil-maggior parti tal-pajjizi fil-komunita internazzjonali u huwa sancit f'kull strument internazzjonali ta' drittijiet umani, inter alia, l-Konvenzjoni Ewropeja ghad-Drittijiet Umani, il-Konvenzjoni Inter-Amerikana ghad-Drittijiet Umani, il-Konvenzjoni Afrikana ghad-Drittijiet Umani u tal-Popli u l-Konvenzjoni Internazzjonali tad-Drittijiet Civili u Politici, fejn id-dritt tal-assistenza legali huwa meqjus bhala element essenzjali tad-dritt ta' smiegh xieraq.[1] Anke skont l-Artikolu 1 tal-United Nations Resolution on Basic Principles on the Role of Lawyers, '*all persons are entitled to receive legal assistance of a lawyer of their choice in order to protect and establish their rights and to defend them in all stages of criminal proceedings*.'

Illi permezz ta' zviluppi fil-gurisprudenza tal-Qorti ta' Strasbourg rigward id-dritt ghall-assistenza legali qabel l-interogazzjoni ta' suspettat, gie rikonoxxut illi individwu ghandhu dritt illi jikkonsulta ma' avukat qabel ma' jigi interrogat mill-pulizija. Fis-sentenza moghtija fil-kaz ta'Salduz, il-Qorti ta' Strasbourg irriteniet illi '[*t]he rights of the defense will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction*.'[2] Ghalhekk, dik il-Qorti kkonkludiet illi ghandu jkun hemm dritt ghall-assistenza legali qabel ma persuna tigi interrogata, u li l-unika eccezzjoni ghal dan id-dritt tezisti meta jkun hemm '*compelling reasons*' illi jiggustifkaw restrizzjoni ghal dan id-dritt.

Illi l-posizzjoni li hadet il-Qorti ta'Strasbourg f'Salduz, hija ccarata f'decizjoni moghtija mill-istess Qorti xi sena wara. Fid-decizjoni moghtija fil-kawza Dayanan, il-Qorti qalet b'mod kategoriku illi '*[i]n the instant case it is not disputed that the applicant was not assisted by a lawyer when he was in custody, as such assistance was not allowed by the law in force at the relevant time. In itself, such a*

[1] Vide inter alia, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, The African Commission on Human and People's Rights.

[2] Salduz v. Turkey, ECHR Grand Chamber (27 ta' Novembru 2008)§55.

systematic restriction based on relevant statutory provisions warrants the conclusion that the requirements of Article 6 have not been met, irrespective of the fact that the applicant remained silent throughout his custody.'[3]

Illi l-principju li, salv fl-ezistenza ta'cirkostanzi eccezzjonali, it-tehid ta' staqqarija ta' persuna li ma tkunx inghatat id-dritt li tikkonsulta ma'avukat qabel l-interrogazzjoni huwa minnu nnifsu ksur tad-dritt ta' smiegh xieraq johrog car daqs il-kristall mid-decizjoni moghtija mill-Qorti ta' Strasbourg fis-sentenza Pavlenko v. Russia. Hawnhekk, il-Qorti kkonkludiet illi '*[i]n any event, no further findings are required...in the present case since having found that the pre-trial restriction on the applicant's right to counsel had no justification the Court does not need to consider further what effect that restriction had on the overall fairness of the criminal proceedings against the applicant.*'[4]

Illi l-appellant umilment jissottometti illi huwa car mill-gurisprudenza suesposta li l-Ewwel Onorabbli Qorti ghamlet zball fil-ligi meta uzat l-istqarrija rrilaxxata minnu minghajr ma kien inghata l-opportunita li jikkonsulta ma' avukat bhala prova inkriminanti kontra tieghu. L-Ewwel Onorabbli Qorti kelha tezamina jekk kienx hemm 'compelling reasons' li jiggustifkaw ir-restrizzjoni tad-dritt ghal assistenza legali tal-appellant. L-Ewwel Onorabbli Qorti m'ghamlitx dan, u ghalhekk ghamlet zball fl-applikazzjoni tal-ligi meta uzat l-istqarrija in kwistjoni bhala prova kontra l-appellant.

Illi ghalhekk l-appellant umilment jissottometti illi l-proceduri quddiem l-Ewwel Onorabbli Qorti kienu lezivi tad-dritt tieghu ghal smiegh xieraq hekk kif sancit fl-Artikolu 39 tal-Kostituzzjoni Maltija u l-Artikolu 6 tal-Konvenzjoni Ewropeja ghad Drittijiet Umani. Galadarba dawn il-proceduri naqsu milli jiggarantixxu dritt li johrog espressament mill-Kostituzzjoni, l-appellant umilment jissottometti illi s-sentenza moghtija mill-Ewwel Onorabbli Qorti fil-konfront tieghu hija nulla u ghandha tigi mhassra u revokata minn dina l-Onorabbli Qorti.

2. **It-tieni aggravju**: Illi minghajr pregudizzju ghas-suespost, l-Ewwel Onorabbli Qorti ghamlet zball fl-applikazzjoni tal-ligi meta kkonkludiet illi l-istqarrija rilaxxata mill-appellant hija prova ammissibli.

Illi a skans ta' ripetizzjoni ta' dawk hawn fuq suespost rigward il-gurisprudenza koncernanti l-uzu ta' stqarrija meta l-akkuzat ma kienx inghata c-cans jikkonsulta ma' avukat, l-appellant umilment jissottometti illi l-Ewwel Onorabbli Qorti

[3] Dayanan v. Turkey, ECHR (13 ta' Ottubru 2009) §33.

[4] Pavlenko v. Russia, ECHR, (1 ta' April 2010)§118.

ghamlet applikazzjoni hazina tal-ligi ghaliex ibbazat il-konkluzjoni tal-ammissibilita tal-istqarrija fuq l-ezami inkorrett.

Illi sabiex stqarrija li giet rilaxxata minn akkuzat li ma kienx inghata d-dritt li jikkonsulta ma' avukat qabel l-interrogazzjoni tkun ammissibli, skont il-gurisprudenza tal-Qorti ta' Strasbourg ried ikun hemm '*compelling reasons*' li jiggustifikaw ir-restrizzjoni tad-dritt ghal assistenza legali. Fil-kaz odjern, l-Ewwel Onorabbli m'ghamlet l-ebda indagni rigward tali '*compelling reasons*' u bbazat il-konkluzjoni taghha fuq il-fatt illi l-istqarrija tal-appellant ma kienetx l-unika prova tal-prosekuzzjoni.

Illi li kieku l-Ewwel Onorabbli Qorti applikat l-ezami korrett ghall-ammissibilita tal-istqarrija, il-konkluzjoni kienet tkun ben differenti minn dik li waslet ghaliha, u cioe illi l-istqarrija li kienet giet rilaxxata mill-appellant hija inamissibli ghaliex ma kien hemm l-ebda compelling reasons li jiggustifikaw ir-restrizzjoni tad-dritt ghal assistenza legali tal-appellant. Filfatt, il-prosekuzzjoni ma' resqet l-ebda prova rigward l-ezistenza ta' xi *compelling reason* illi tiggustifika l-fatt li l-appellant kienx inghata c-cans li jikkonsulta ma' avukat qabel ma gie interrogat mill-pulizija.

Illi ghalhekk l-appellant umilment jissottometti illi l-isqarrija illi huwa kien irrilaxxa hija prova inamissibli u ma kelliex tigi uzata bhala prova inkriminanti kontra tieghu.

3. **It-tielet aggravju**: Illi minghajr pregudizzju ghas-suespost, l-Ewwel Onorabbli Qorti kienet zbaljata fid-dritt u fil-fatt, meta kkonkludiet illi l-kontenut tal-istqarrija tal-appellant kien korroborat minn provi ohra mressqa mill-prosekuzzjoni.

Illi fl-ewwel lok, ix-xhieda tal-haddiema tas-showroom minn fejn insterqet il-vettura in kwistjoni ma jistghux jitqiesu bhala prova li tikkorrobora l-kontenut tal-istqarrija tal-appellant. Fl-ewwel lok, id-deposizzjoni ta' dawn ix-xhieda hija prova biss tal-fatt illi l-vettura mertu tal-appell odjern kienet giet misruqa. Peress illi l-appellant ma kellu x'jaqsam xejn ma' dan is-serq, tant li lanqas gie akkuzat bih, id-deposizzjoni ta' dawn ix-xhieda ma tikkorrobora xejn mill-istqarrija tal-appellant. Inoltre, dawn ix-xhieda ma kkonfermaw bl-ebda mod l-involviment tal-appellant fil-kommissjoni ta' xi reat li bih kien akkuzat, ghaliex il-fatt li l-vettura kienet misruqa ma jippruvawx il-fatt la li l-appellant kien involut fir-ricetazzjoni ta' din il-vettura, u lanqas li kien jaf li din kienet vettura misruqa, element krucjali tar-reat ta' ricetazzjoni.

Illi lanqas ma jista' jigi meqjus bhala prova korroborattiva dak li qal l-ispettur fid-deposizzjoni tieghu quddiem l-Ewwel Onorabbli Qorti rigward li qalulu nies

ohra, u senjatament, Carmel Debono u Alfred Gialanze. Illi fl-ewwel lok, hekk kif ikkonfermat l-Ewwel Onorabbli Qorti stess, dak kontenut fi stqarrija huwa prova kontra min irilaxxa dik l-istqarrija biss, u ghalhekk dak li qalu Carmel Debono u Alfred Gialanze fl-istqarrija taghhom ma jistax jammonta bhala prova kontra l-appellant, lanqas jekk jissemma mill-Ispettur fid-deposizzjoni tieghu. Illi inoltre, peress li l-Ispettur kien qieghed jixhed fuq dak li qallu haddiehor u mhux fuq dak li ra jew sema' huwa stess, ix-xhieda ta' l-ispettur fir-rigward ta' dak li qalu Debono u Gialanze jammonta ghal *detto del detto* u ghalhekk ma jistax jigi meqjus bhala prova korroboranti tal-istqarrija tal-appellant.

Illi ghalhekk l-appellant umilment jissottometti illi huwa car li l-istqarrija rilaxxata minnu ma kienetx korroborata mill-provi prodotti mill-prosekuzzjoni. Ghaldaqstant, din l-istqarrija kellha tigi meqjusa bhala wahda inamissibli, u l-appellant kellhu jigi lliberat mill-akkuzi kollha kif dedotti kontrih fuq nuqqas ta' provi li jippruvaw ir-responsabbilita kriminali tieghu sal-grad rikjest mill-ligi.

4. **Ir-raba'** aggravju: Illi minghajr pregudizzju ghas-suespost, u fil-kaz illi dina l-Onorabbli Qorti tikkonferma is-sejbien ta' htija, il-piena nflitta fuq l-appellant hija eccessiva kkunsidrat ic-cirkostanzi tal-kaz odjern, u ghandha tigi mnaqqsa.

Illi ghalkemm huwa minnu li l-paragun huwa odjuz, wiehed ma jistax hlief jaghmel paragun bejn il-piena nflitta fuq l-appellant u dik inflitta fuq Alfred Gialanze. L-appellant ghandhu fedina penali kwazi netta, li turi li huwa mhuwiex mitfuh f'hajja ta' kriminalita, anke peress illi fil-fedina penali hemm biss offizi ta' natura kontravenzjonali. Minn naha l-ohra, l-fedina penali ta' Alfred Gialanze turi illi huwa kien diga nstab hati ta' serq tliet darbiet.

Illi fil-fatt, fil-proceduri rigwardanti r-ricetazzjoni tal-vettura de quo, Alfred Gialanze gie wkoll misjub hati ta' recediva. Inoltre, fit-tratazzjoni tal-proskezzjoni fil-kaz odjern, a Fol 329, jigi kkonfermat illi semmai, l-appellant kellu l-inqas involviment u anke l-fatt li l-unici precedenti tieghu kienu ta' natura kontravenzjonali. Ghalhekk kif jista' wiehed jispjega illi Alfred Gialanze kien gie lliberat bil-kundizzjoni li ma jaghmilx reat iehor, filwaqt li l-appellant gie kkundanat ghal sentenza ta' prigunerija sospiza?

Illi ghalhekk l-appellant umilment jissottometti illi d-diskrepanza bejn il-piena nflitta fuqu mill-Ewwel Onorabbli Qorti, u l-piena li kienet giet inflitta fuq Alfred Gialanze mill-istess Qorti jsarrfu f'incertezza legali u ghalhekk din l-Onorabbli Qorti ghandha tirrivedi l-piena nflitta fuq l-appellant sabiex tinfliggi wahda li tirrispekja b'mod aktar adegwat ic-cirkostanzi tal-kaz.

Rat l-atti kollha tal-kawza.

Semghet it-trattazzjoni tal-partijiet.

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

Ikkunsidrat,
Illi jibda' biex jinghad illi l-Qorti ser titratta z-zewg appelli imressqa mill-imputati Lanzon u Zaffarese flimkien u dan peress illi essenzjalment fl-aggravji minnhom imqanqla huma jikkritikaw id-decizjoni appellata bl-istess mod u cioe' fl-ewwel lok jilmentaw illi sehhet l-lezjoni tad-dritt taghhom ghal smigh xieraq meta l-istqarrija rilaxxjata minnhom lil pulizija ittiehdet bhala prova kontra taghhhom, kif ukoll illi sar apprezzament zbaljat tal-provi li kien hemm in atti, bl-appellant Lanzon jigi misjub hati tar-reat tas-serq filwaqt Zaffarese huwa hati biss tar-ricettazzjoni tar-*res furtiva* mertu ta' dan il-kaz.

Fil-fatt mill-atti probatorji ghandu jirrizulta illi originarjament kien hemm tnejn minn nies ohra involuti f'dina l-vicenda kriminuza u cioe' Carmel Debono u Alfred Gialanze li matul il-proceduri quddiem l-Ewwel Qorti ammettew l-imputazzjonijiet migjuba fil-konfront taghhom fejn allura l-kaz taghhom ghadda in gudikat fid-19 ta' Novembru 2013.

Illi l-Prosekuzzjoni f'dan il-kaz xliet lill-appellant Lanzon bis-serq ta' vettura tal-ghamla BMW, li kienet ghadha gdida fjamanti, mill-garaxx tas-socjeta Muscat Motors tal-Gzira. Dan meta l-istess Lanzon jammetti fl-istqarrija minnu rilaxxjata lil pulizija li wettaq dan ir-reat. Mill-istqarrijiet rilaxxjati mill-ko-akkuzati l-ohra, imbaghad, li whud minnhom ittiehdu wara konfront li sar bejn dawn l-erba' minn nies fil-kors tal-istharrug tal-pulizija, hareg l-*iter* li segwiet din il-vicenda mill-mument illi l-vettura insterqet

minn Lanzon, sa meta din imbaghad ghaddiet ghand Alfred Gialanze li flimkien ma' Lanzon bieghha lil Joseph Zaffarese ghal prezz irrizorju ta' Lm200. Zaffarese minn naha tieghu imbaghad bieghha lil ko-akkuzat l-iehor Carmel Debono ghal prezz baxx ta' Lm700. Minn dak mistqarr minn dawn it-tlett ko-imputati, matul dawn in-negozjati huma kollha kienu ben konxju li din il-vettura kienet wahda misruqa, mhux biss mill-prezz irrizorju li bih ghaddiet minn id ghall-ohra, izda wkoll ghaliex il-vettura kienet ghadha tidher li kienet gdida u li qatt ma kienet ghadha giet misjuqa hlief minn Lanzon u l-ko-akkuzati l-ohra sabiex giet trasportata minnhom minn post ghall-iehor sakemm fl-ahhar sabet ruhha gewwa l-Fgura vicin ir-residenza ta' Debono fejn instabet mill-pulizija.

Illi minn ezami tal-atti probatorji ghalkemm jitressqu diversi xhieda fosthom membri tal-pulizija involuti fl-investigazzjoni tal-kaz u impjegati tad-ditta ta' Muscat Motors li jikkonfermaw is-serq tal-vettura u mbaghad l-identita' tal-vettura misjuba fil-pussess ta' Debono bhala l-istess wahda li kienet insterqet, l-provi li b'xi mod jimplikaw lill-appellanti f'din il-vicenda huma unikament l-istqarrijiet minnhom rilaxxjati lil pulizija fil-kors tal-investigazzjonijiet. Issa huwa principju tad-dritt penali illi dak mistqarr minn akkuzat wiehed huwa biss prova fil-konfront ta' dak l-akkuzat u ma jista' qatt jittiehed bhala prova la favur u lanqas kontra l-ko-akkuzat/i l-iehor jew l-ohra.

Illi r-regola li l-ko-akkuzat ma hux xhud kompetenti favur jew kontra l-ko-akkuzat l-iehor jew il-ko-akkuzati l-ohra hi desunta *a contrario sensu* minn dak li jipprovdi l-paragrafu (b) ta' l-Artikolu 636 tal-Kodici Kriminali, u giet kostantement applikata mill-qrati taghna, fis-sens li l-ko-akkuzat isir xhud kompetenti fir-rigward ta' ko-akkuzat iehor biss wara li l-kaz fil-konfront tieghu jkun gie definittivament deciz[5].

[5]Sua Maesta` il Re v. Carmelo Cutajar ed altri Qorti Kriminali, 18 ta' Jannar, 1927; Il-Pulizija v. Toni Pisani Appell Kriminali, 11 ta' Novembru, 1944; Il-Maesta` Tieghu ir-Re v. Karmenu Vella Qorti Kriminali, 3 ta' Dicembru, 1947; The Police v. Alfred W. Luck et. Appell 3 Kriminali, 25 ta' April, 1949; Ir-Repubblika ta' Malta v. Faustino Barbara Appell Kriminali, 19 ta' Jannar, 1996; Il-Pulizija v. Naser Eshtewi Be Hag et. Appell Kriminali, 2 ta' Frar, 1996; Il-

Issa ghal xi raguni, li tisfuggi lil din il-Qorti, wara li l-ko-akkuzati Carmel Debono u Alfred Gialanze ammettew ghall-imputazzjonijiet migjuba kontra taghhom, u wara allura li l-kaz gie deciz fil-konfront taghhom u s-sentenza ghaddiet in gudikat, l-Prosekuzzjoni naqqset milli tressaq lil dawn it-tnejn minn nies biex jiddeponu billi allura minn dan il-mument 'il quddiem kienu saru xhieda kompetenti fil-konfront tal-appellanti odjerni. Dan qed jinghad ghaliex ma hemm l-ebda prova ohra in atti la diretta u lanqas indizzjarja, ghajr ghall-ammissjoni kontenut fl-istqarrijiet tal-appellanti li b'xi mod timplikhom fir-reati lilhom addebitati. Ma hemm l-ebda xhud okulari tas-serqa tal-vettura, l-ebda prova indizzjarja bhal per ezempju xi impronti digitali ta' xi hadd mill-partijiet involuti, filmati ta' CCTV, telefonati jew prova ta' DNA, ma hemm l-ebda xhud iehor li b'xi mod kien involut fin-negozjati li segwew wara t-trasferiment tal-vettura u l-prezz li thallas ghal bejgh taghha. L-uniku prova tinsab kontenuta f'dak dikjarat mill-erba' minn nies involuti f'din il-vicenda kriminuza. Dan qed jigi rilevat fid-dawl tal-aggravvju imqanqal miz-zewg appellanti fejn qeghdin jitlobu lil Qorti tiskarta l-prova maghmula permezz tal-istqarrijiet mehuda mill-pulizija lura fis-sena 2006 billi dawn gew minnhom rilaxxjati meta la gew moghtija il-jedd li jiehdu parir legali qabel u wisq anqas kienu assistiti minn avukat fil-mument li irrilaxxjawhom. Dan iktar u iktar fid-dawl tal-fatt illi fl-imsemmija stqarrijiet huma inkriminaw rwiehhom b'mod inkondizzjonat u ammettaw ghal partecipazzjoni taghhom f'dan l-event kriminuz.

Illi allura gjaldarba, kif inghad l-istqarrijiet taz-zewg appellanti hija l-unika prova li hemm fl-atti li b'xi mod timplikahom fil-kummissjoni tar-reati lilhom addebitati u li dwarhom huma gew misjuba hatja, kif jirrizulta fuq kollox mis-sentenza appellata, l-Qorti trid necessarjament *in primis* tqies jekk din il-prova maghmula permezz tal-istqarrijiet tal-appellanti hijiex ammissibbli u allura li tista' twassal ghal kundanna

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Pulizija v. Carmelo Camilleri u Theresa Agius Appell Kriminali, 11 ta' Lulju, 1997; u Ir-Repubblika ta' Malta v. Domenic Zammit et. Appell Kriminali, 31 ta' Lulju, 1998)

taghhom. Dan ghaliex huma rrinunzjaw ghad-dritt taghhom ghas-silenzju u ghad-dritt li ma jinkriminawx rwiehom minghajr ma kellhom l-opportunita jiksbu parir minn ghand avukat tal-fiducja taghhom qabel ghamlu dina l-ghazla li kienet determinanti finalment ghall-ezitu ahhari tal-kaz fejn huma gew misjuba hatja tal-akkuzi dedotti kontra taghhom.

Ikkunsidrat:

Issa din il-Qorti, kif ippresjeduta kellha diga' okkazjoni tesprimi ruhha fir-rigward u dan referribilment ghal dawk l-istqarrijiet rilaxxjati qabel Frar tas-sena 2010, billi l-ligi dak iz-zmien kienet tipprekludi lill-persuna arrestata milli tiehu parir legali qabel ma tigi interrogata bil-konsegwenza allura li kien hemm il-perikolu li tinkrimina ruhha ghaliex l-istqarrija kienet titqies bhala prova regina fil-proceduri penali li jigu istitwiti sussegwentement.

Illi tali fehma kienet imsejsa fuq il-linja mehuda mill-Qorti Ewropeja tad-Drittijiet tal-Bniedem fil-kaz "Borg vs Malta" fejn sa dak iz-zmien d-decizjonijiet kienu kollha konsoni fil-konkluzjoni taghhom illi jkun hemm vjolazzjoni ta'l-artikolu 6(3)(c) tal-Konvenzjoni kull meta persuna arrestata u interrogata ma tkunx inghatat assistenza legali qabel ma tigi assoggettata ghall-interrogazzjoni fejn tista' tinkrimina ruhha u dan meta l-ligi tal-pajjiz kienet teskludi b'mod sistematiku tali jedd.

> "**60. The Court notes 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*, 24 October 2013; *Brusco v. France*, October 2010; and *Stojkovic v. France and Belgium*, 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).**
>
> **61. In respect of the present case, the Court observes that no reliance can be placed on the assertion that the applicant had been reminded of his right to remain**

silent (see *Salduz*, cited above, § 59); indeed, it is not disputed that the applicant did not waive the right to be assisted by a lawyer at that stage of the proceedings, a right which was not available in domestic law. In this connection, the Court notes that the Government have not contested that there existed a general ban in the domestic system on all accused persons seeking the assistance of a lawyer at the pre-trial stage (in the Maltese context, the stage before arraignment).

62. It follows that, also in the present case, the applicant was denied the right to legal assistance at the pre-trial stage as a result of a systemic restriction applicable to all accused persons. This already falls short of the requirements of Article 6 namely that the right to assistance of a lawyer at the initial stages of police interrogation may only be subject to restrictions if there are compelling reasons (see *Salduz*, cited above, §§ 52, 55 and 56).

63. There has accordingly been a violation of Article 6 § 3 (c) taken in conjunction with Article 6 § 1 of the Convention."

Illi s-sentenza fl-ismijiet "ir-Repubblika ta' Malta vs Rio Micallef et" deciza mil-Qorti tal-Appell Kriminali Superjuri traccat l-izvilupp gurisprudenjzali kemm lokali kif ukoll tal-Qorti Ewropeja f'din il-materja:

"7. Brevement rakkontata is-sitwazzjoni qabel l-2002, fil-kwistjoni tal-istqarrija fil-pre trial stage, persuna arrestata ma kellha ebda jedd ghall-xi forma ta' assistenza legali sakemm iddum arrestata inkluz waqt l-interrogatorju. L-Att III tal-2002 imbaghad introduca fis-sistema legali taghna forma ta' dritt ta' assistenza legali billi ta il-jedd li persuna arrestata tkun intitolata titkellem wicc imm'wicc jew bit-telefon ma' avukat jew prokuratur legali ghal mhux aktar minn siegha zmien ex artikolu 355 AT tal-Kap 9. Dan il-jedd ma dahalx fis-sistema legali taghna minghajr skossi ghaliex l-artikolu 355 AU imbaghad holoq id-dritt tal-inferenza, igifieri, li f'kaz fejn l-arrestat ikun utilizza d-dritt li jikkonsulta mal-legali tieghu, ikun naqas milli jsemmi fatti li ragonevolment ikun mistenni li jsemmi, l-Qorti, allura fi stadju wara l-pre trial stage, "tista taghmel dawk l-inferenzi minn dan in-nuqqas bhala jidhru xierqa, liema inferenzi ma jistghux wahedhom jitqiesu bhala prova ta' htija izda jistghu jitqiesu bhala li jammontaw ghal korroborazzjoni ta' kull xhieda ta' htija tal-persuna akkuzata jew imputata". Dan kien ifisser illi ma tistghax issir tali inferenza f'dak il-kaz li l-persuna arrestata taghzel li ma taghmilx uzu mill-jedd ghall-assistenza legali. Mqabbla dawn il-provvedimenti mad-Direttiva numru 2013/48/EU tal-Parlament Ewropew u tal-Kunsill dwar id-dritt ghall-assistenza legali waqt l-arrest, kien hemm lok ghal-dibattitu dwar kemm il-provvedimenti tal-Kap 9 jirrispekkjaw d-dritt ghall-assistenza legali moghti lill-arrestat tenut kont ukoll illi dan id-dritt, kif ezistenti dakinhar taht il-ligi taghna, kien ristrett ghal siegha qabel l-interrogatorju u b'hekk kien jeskludi

l-jedd tal-presenza tal-avukat waqt l-istess interrogatorju. F'dak l-istadju l-arrestat kien soggett ghal-mistoqsijiet diretti u suggestivi bir-risposti taghhom, anke jekk jghazel li ma jwegibx, bit-traskrizzjoni tieghu tkun eventwalment esebita fil-proceduri kontrih fejn ikun meqjus innocenti sakemm pruvat mod iehor. Tajjeb li jkun rilevat ukoll illi l-Att III tal-2002 ma dahalx fis-sehh qabel is-sena 2010;

8. Gara, izda, illi l-Att LI tal-2017 biddel l-Artikolu 355AT u l-Artikoliu 355 AU meta dahal fil-kodici id-dritt tal-assistenza legali kif postulat fid-Direttiva 2013/48 EU. Dawn l-emendi dahlu fis-sehh permezz tal-Avviz Legali 401/2016, igifieri ferm wara l-ghoti tal-ewwel sentenza. Tajjeb li jinghad ukoll illi bis-sahha tal-Avviz Legali 102/2017 maghmulha taht il-Kodici Kriminali, kienu introdotti fis-sistema legali taghna ir-Regolamenti dwar il-procedura waqt l-interogazzjoni ta' persuni suspettati u persuni akkuzati; [6]"

Illi sfortunatament din is-"saga" dwar l-ammissibilita' o meno bhala prova ta'l-istqarrija rilaxxjata mill-persuna akkuzata meta din ma tkunx giet assistita minn avukat ghadha ma ratx it-tmiem taghha, bil-qrati taghna issa rinfaccjati b'decizjonijiet godda mill-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem li fil-fehma ta' din il-Qorti, imorru lura ghall-*istatus quo ante* d-decizjoni "Borg vs Malta". U ghalkemm f'din id-decizjoni kienet saret kritika lejn il-qrati Maltin u dan ghaliex d-decizjonijiet ma kenux qed jimxu kollha b'mod konformi, issa din l-istess Qorti wasslet hi stess biex qed timxi b'nuqqas ta' konformita' l-aktar bid-decizjonijiet recenti li inghataw u cioe' Beuze vs Belgium (decizjoni Grand Chamber), Doyle vs Ireland (Court 5th Section) u dik li laqtet lil pajjizna "Farrugia vs Malta" deciza fl-04 ta' Gunju 2019 (Court 3rd Section) fejn il-Qorti strahet fuq il-konsiderazzjonijiet minnha maghmula fil-kawza "Beuze vs Belgium[7]" meta holqot test imsejjes fuq zewg binarji li l-qorti trid taghmel f'kull kaz ghalih meta qalet:

"97. In *Beuze*, drawing from its previous case-law the Court explained the aims pursued by the right of access to a lawyer (§§ 125-130) and elaborated on

[6] Repubblika ta' Malta vs Rio Micallef, David Tabone u Darren James Vella – Appell 14/2013/1 deċiża mill-Qorti tal-Appell Kriminali Superjuri, deċiża nhar it-3 ta' April 2019.

[7] Deciza mill-Grand Chamber fid-09 ta' Novembru 2018

the content of the right of access to a lawyer reiterating, in particular, that suspects must be able to enter into contact with a lawyer from the time when they are taken into custody. It must therefore be possible for a suspect to consult with his or her lawyer prior to an interview or even where there is no interview and that suspects have the right for their lawyer to be physically present during their initial police interviews and whenever they are questioned in the subsequent pre-trial proceedings (§§ 133-134).

98. Prior to the recent *Beuze* judgment, in a number of cases, the Court found that systematic restrictions on the right of access to a lawyer had led, *ab initio*, to a violation of the Convention (see, in particular, *Dayanan v. Turkey*, no. 7377/03, § 33, 13 October 2009 and *Boz v. Turkey*, no. 2039/04, § 35, 9 February 2010). That same approach was followed by the Court in relation to the Maltese context in *Borg* (no. 37537/13, 12 January 2016).

99. Subsequently, being confronted with a certain divergence in the approach to be followed in cases dealing with the right of access to a lawyer, the Court had occasion to further examine the matter in *Ibrahim and Others*, *Simeonovi* and more recently in *Beuze*, all cited above, where the Court departed from the principle set out in the preceding paragraph. In *Beuze*, the most recent authority on the matter, the Grand Chamber gave prominence to the examination of the overall fairness approach and confirmed the applicability of a two stage test, namely whether there are compelling reasons to justify the restriction as well as the examination of the overall fairness and provided further clarification as to each of those stages and the relationship between them, as explained below.

i) Concept of compelling reasons

100. The criterion of "compelling reasons" is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the suspect's first police interview, restrictions on access to a lawyer are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case. A finding of compelling reasons cannot stem from the mere existence of legislation precluding the presence of a lawyer. The fact that there is a general and mandatory restriction on the right of access to a lawyer, having a statutory basis, does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons. Where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to a compelling reason to restrict access to legal advice for the purposes of Article 6 of the Convention (see *Beuze*, cited above, §§ 142-143).

(ii) The fairness of the proceedings as a whole and the relationship between the two stages of the test

101. Where there are no compelling reasons, the Court must apply very strict scrutiny to its fairness assessment. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer (see *Beuze*, cited above, § 145).

102. The Court further emphasises that where access to a lawyer was delayed, and where the suspect was not notified of the right to legal assistance, the privilege against self-incrimination or the right to remain silent, it will be even more difficult for the Government to show that the proceedings as a whole were fair (ibid., § 146).

103. As the Court has already observed, subject to respect for the overall fairness of the proceedings, the conditions for the application of Article 6 §§ 1 and 3 (c) during police custody and the pre-trial proceedings will depend on the specific nature of those two phases and on the circumstances of the case (ibid., § 149).

(iii) Relevant factors for the overall fairness assessment

104. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account:

(a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;

(b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;

(c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;

(d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;

(e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;

(f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;

(g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon

which the conviction was based, and the strength of the other evidence in the case;

(h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;

(i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and

(j) other relevant procedural safeguards afforded by domestic law and practice."

Illi din id-decizjoni wasslet ghalhekk ghal ezami gdid li ghandu isir f'kull kaz ghalih sabiex titqies l-ammissibilita' o meno tal-istqarrija bhala prova in atti. Id-*dissenting opinions* ghal din id-decizjoni ta'l-Imhallfin Serghides u Pinto de Albuquerque jaghtu stampa tal-*iter* li hadu id-decizjonijiet tal-Qorti Ewropeja fuq dan il-punt u jikkritikaw din id-decizjoni billi fil-fehma taghhom tmur kontra il-principju tas-smigh xieraq kif imhaddan fil-Konvenzjoni. Illi l-Qorti ser taghmel referenza ghal din l-opinjoni billi fil-fehma taghha tipprovdi stampa dwar il-kunflitt li hemm fil-hsibijiet wara d-decizjonijiet tal-Qorti Ewropeja n materja:

I. Two approaches to the right to a lawyer

2. There are two basic Grand Chamber case-law approaches regarding the interpretation and application of Article 6 § 3 (c). The first approach (henceforth referred to as such) is that of *John Murray v. the United Kingdom*[1] and *Salduz v. Turkey*[2]. Under this approach, evaluation of the overall fairness of a trial (stage two) is required only when there were compelling reasons justifying the restriction on the right to a lawyer (stage one): "the question, in each case, has therefore been whether the restriction was justified *and if so*, whether in the light of the entirety of the proceedings it has not deprived the accused from a fair hearing"[3]. Hence, according to this approach, there should be no stage two if at stage one it is found that there were not compelling reasons for the restriction.

3. The second approach (henceforth referred to as such) is that of *Ibrahim and Others v. the United Kingdom*[4], *Simeonovi v. Bulgaria*[5] and *Beuze v. Belgium*[6].Pursuant to this approach, an evaluation of the overall fairness of the trial is always required, even if there were not compelling reasons which justified the restriction. Hence, under this approach there is a compulsory two-stage test in every case.

Fil-fehma taghhom gjaldarba ma tezisti l-ebda raguni impellenti 'il ghala l-persuna

suspettata tkun giet imcahhda mid-dritt ghall-assistenza legali, allura f'dak il-kaz tinsorgi awtomatikament il-lezjoni fit-termini tal-artikolu 6(3)(c) tal-Konvenzjoni minghajr il-htiega li l-Qorti tezamina l-proceduri penali fl-intier taghhom sabiex tqies jekk tkunx saret ingustizzja mal-persuna akkuzata. Ikomplu hekk jikkritikaw din id-decizjoni:

> **" The second approach interpreted the Article 6 § 3 (c) right in a manner contrary to its wording, object and purpose, and diminished its importance to the extent that its core is seriously, if not mortally, affected. Thus, we do not consider it an advancement or further realisation[10], but a retrogression of the relevant human right. Such a result could have been avoided if the Court had never lost sight of the principle of effectiveness in the interpretation and application of the right to a lawyer."**

U jikkonkludu hekk wara li jezaminaw l-argumenti imressqa mil-maggoranza tal-Imhallfin li wasslu ghal konkluzjoni li ma kienx hemm ebda vjolazzjoni tal-artikolu 6 fil-kaz ta' Farrugia, li kien gie imcahhad mid-dritt ghall-assistenza legali qabel ma gie interrogat, gie illiberat mill-Ewwel Qorti izda misjub hati mill-Qorti ta'l-Appell fejn ghalkemm dik il-qorti strahet fuq evidenza ohra li kien hemm fl-atti, madanakollu qieset illi Farrugia ma kienx kredibbli fl-istqarrijiet minnu rilaxxjati sabiex b'hekk tat iktar piz lill-provi l-ohra li kien hemm kontrieh:

> **"This is a truly Kafkaesque case, in which an already acquitted defendant ultimately finds himself convicted on the basis of shaky testimony from one single prosecution witness and the appellate judges' doubts regarding the credibility of the defendant's replies to police questions concerning facts unrelated to the imputed offence. We were already persuaded that, under the first approach, his conviction should not stand. It is clear from the above analysis that all the arguments used by the majority in applying the second approach are unfounded. After concluding this analysis, we are further strengthened in our firm conviction that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention in the present case. Having found such a violation, we would obviously award the applicant a sum in respect of non-pecuniary damage."**

Illi l-Qorti taqbel ma' din il-fehma ghaliex gjaldarba ma hemm ebda raguni impellenti li abbazi taghha l-persuna suspettata tkun giet mcahhda mill-jedd ghall-assistenza legali,

anke jekk wahda minima, allura kwalunkwe dikjarazzjoni hekk rilaxxjata tpoggi lil dik il-persuna sussegwentement akkuzata fi zvantagg, meta dak dikjarat minnha fi stadju investigattiv, anke jekk mhux inkriminatorja, tingieb imbaghad bhala prova kontra tieghu/taghha fil-process penali tant ghalhekk illi jkun hemm lezjoni tad-dritt tieghu/taghha ghal smigh xieraq. Dan minghajr il-htiega li jigi ezaminat jekk tali stqarrija kenitx determinanti o meno fil-gudizzju finali u li allura jigu ezaminati "*the overall fairness of the proceedings*", it-tieni kriterju stabbilit fit-test gdid imfassal mill-Qorti Ewropeja. Il-Qorti tirrileva illi qed thaddan din il-fehma biss fir-rigward ta' dawk l-istqarrijiet rilaxxjati qabel Frar tas-sena 2010 u allura fiz-zmien meta kien hemm projbizzjoni assoluta ghal persuna suspettata li tikseb parir legali jew li tkun assistita minn avukat u allura meta fil-maggior parti tal-kazijiet ma kien hemm ebda raguni impellenti 'il ghala l-persuna suspettata kellha tigi imcahhda mill-assistenza legali.

Maghmula dawn il-konsiderazzjoni, ghalhekk u applikati ghal kaz in dizamina, il-Qorti tqies illi f'dan il-kaz ma kien hemm l-ebda raguni impellenti 'il ghala z-zewg appellanti kellhom jigi imcahhad mill-jedd li jkollhom l-assistenza legali qabel ma rrilaxxjaw l-istqarrijiet inkriminatorja taghhom, iktar u iktar meta dawn saru wara li l-pulizija ghamlu konfront mal-ko-akkuzati l-ohra, meta dikjarazzjonijet maghmula minn ko-akkuzat lanqas tista' titqies bhal prova fil-konfront ta' ko-akkuzat iehor.

Illi anke kieku l-Qorti kellha taddotta t-test imfassal fil-kaz ta' *Farrugia vs Malta*, ghandu johrog illi qatt ma tista ssir gustizzja mal-appellanti billi l-uniku prova li b'xi mod tinkriminahom f'dawn il-proceduri, kif inghad, hija l-istqarrija taghhom u allura hija l-prova determinanti li ser twassal ghal kundanna taghhom. Fil-fatt l-Ewwel Qorti sejset is-sejbien ta' htija fuq dawn l-istqarrijiet li hija qieset bhala veritjieri billi fil-fehma taghha kienu korroborati minn provi ohra li kien hemm fl-atti.

Illi mhux biss, izda ghalkemm mal-mument illi l-kaz tal-ko-akkuzati Debono u Gialanze ghadda in gudikat l-Prosekuzzjoni kellha f'idejha prova ohra li setghet tressaq, u cioe' l-

prova maghmula permezz ta' dawn il-komplici li imbaghad saru xhieda kompetenti fil-konfront tal-appellanti, din ghazlet li din il-prova ma tressaqhiex. Fil-fatt il-Prosekuzzjoni indunat b'dan in-nuqqas, issa fi stadju inoltrat ta' dawn l-appelli[8] meta tallbet lil din il-Qorti (u dan meta l-Avukat Generali ma appellax mis-sentenza tal-Ewwel Qorti) biex taghmel il-prova permezz tax-xiehda ta' Carmel Debono u Alfred Gialanze, talba li din il-Qorti cahhdet ghal motivi migjuba fid-digriet taghha tal-04 ta' Lulju 2019.

Illi allura l-Qorti qatt ma tista' taqbel mat-test maghmul mill-Ewwel Qorti meta qieset dawn l-istqarrijiet bhala prova ammissibbli unikament abbazi tat-test tal-vulnerabbilita', billi dan wahdu certament qatt ma jista' jirrendi l-istqarrija inkriminatorja bhala wahda mhux leziva tad-dritt sancit fl-artikolu 6 tal-Konvenzjoni u dan meta l-kaz jistrieh unikament fuq din il-prova. Illi gjaldarba allura l-prosekuzzjoni ma irnexxilhiex teghleb it-test li kien hemm 'l hekk imsejjha "*compelling reasons*" biex l-assistenza legali tigi mcahhda, u lanqas ghelbet it-test tal-"*overall fairness of the proceedings*", kwindi l-Qorti ma ghandhiex triq ohra hlief li tiskarta din il-prova maghmula permezz tal-istqarrijiet rilaxxjati mill-appellanti lil pulizija bhala prova inammissibbli billi leziva tad-dritt tal-appellanti ghal smigh xieraq, gjaldarba giet rilaxxjata meta l-appellanti kienu imcahhda mid-dritt ghall-assistenza legali fil-mument determinanti meta irrinunjaw ghad-dritt li taghtihom il-ligi li izommu s-silenzju u ma jinkriminawx rwiehom b'dak mistqarr minnhom.

Illi maghmula dawn il-konsiderazzjonijiet u skartata l-prova tal-istqarrijiet, kif inghad, ma hemm l-ebda prova ohra la diretta u lanqas indizzjarja li tista' twassal ghar-reita' fl-appellanti billi kif inghad mill-Ewwel Qorti fis-sentenza appellata l-provi l-ohra iservu

[8] It-talba saret fis-seduta tal-10 ta' Mejju 2019, hames snin wara li gie ipprezentat l-appell u sitt snin wara li l-kawza kontra Carmel Debono u Alfred Gialanze kien ghadda in gudikat.

unikament biex jikkoroborraw dak mistqarr fl-istqarrijiet tal-appellanti, izda li wahedhom ma jikkostitwixxu ebda prova li tipponta fid-direzzjoni tal-htija.

Ghal dawn il-motivi, l-Qorti taqta' u tiddeciedi billi tilqa' l-appelli interposti, tghaddi ghalhekk biex tirrevoka s-sentenza appellata u tillibera lill-appellanti Daniel Lanzon u Joseph Zaffarese minn kull imputazzjoni u htija.

(ft) Imhallef

Vera Kopja

Joyce Agius

Deputat Registratur