Qorti tal-Appell Kriminali

Onor. Imħallef Dr. Edwina Grima LL.D.

Appell Nru: 149/2019

Il-Pulizija

Vs

Michael Kingswell

Illum 30 ta' Settembru, 2020

Il-Qorti,

Rat l-akkuzi dedotti kontra l-appellant Michael Kingswell detentur tal-karta tal-identita Maltija bin-numru 25281(M), akkużat quddiem il-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali talli f'dawn il-Gżejjer fit-23 ta' Marzu, 2017 u fix-xhur u snin ta' qabel b'diversi atti magħmulin minnu ukoll jekk fi żminijiet differenti u li kisru l-istess dispożizzjoni tal-Liġi u li ġew magħmula b'riżoluzzjoni waħda;

1. Ipparteċipa f'attivitajiet sesswali ma' A minuri ta' 14-il sena.
2. B'għemil żieni, ikkorrompa lil A, minuri ta' 14-il sena.
3. Permezz ta' teknoloġija ta' informazzjoni u komunikazzjoni, ippropona li jiltaqa' ma' persuna ta' taħt l-eta' bil-ħsieb li jwettaq xi reat taħt l-artikoli 204, 204A sa 204D it-tnejn inklużi u 208A u dik il-proposta ġiet segwita b'atti materjali li wasslu għal dik il-laqgħa.
4. Għamel jew ipproduċa jew ippermetta li jiġi magħmul jew prodott xi materjal indeċenti jew ipproduċa, qassam, xerred, importa, esporta, offra, biegħ, issupplixxa, ittrasmetta, għamel disponibbli, akkwista għalih innifsu jew għal ħaddieħor jew wera dak il materjal indeċenti ta' persuna ta' taħt l-eta'.

5. Akkwista, xjentement akkwista aċċess permezz ta' teknoloġiji ta' informazzjoni u komunikazzjoni għal jew kellu fil-pussess tiegħu, xi materjal indeċenti li juri, jagħti stampa ta' jew jirrapreżenta xi persuna ta' taħt l-eta'.

Il-Qorti ġiet mitluba li jekk jidrilha xieraq tordna ordni ta' trattament skond l-Art 412 D ta' Kap 9 tal-Liġijiet ta' Malta.

Il-Qorti ġiet finalment ġentilment mitluba li f'każ ta' ħtija minbarra li tinflinġi l-piena stabbiliti mill-Liġi, tordna lill-imsemmija perduna sabiex tħallas l-ispejjeż li għandhom x'jaqsmu mal-ħatra tal-esperti, jekk ikun il-każ, kif provdut fl-Artikolu 533 tal-Kap 9 tal-Liġijiet ta' Malta.

Rat is-sentenza tal-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali, tat-3 ta' Mejju, 2019 li wara li rat l-Artikoli 17, 208AA (1), 208A u 208A(1B) tal-Kodiċi Kriminali, sabet lill-imputat ħati tat-tielet (3), tar-raba' (4) u tal-ħames (5) imputazzjoni miġjuba fil-konfront tiegħu u kkundannatu sentejn (2) priġunerija li bl-applikazzjoni tal-Artikolu 28A tal-Kodiċi Kriminali ġew sospiżi għall-perjodu ta' erba' (4) snin. Il-Qorti ddikjarat lill-imputat mhux ħati tal-ewwel (1) u tat-tieni (2) imputazzjoni miġjuba fil-konfronti tiegħu u konsegwentement illiberatu minnhom.

B'applikazzjoni tal-Artikolu 533 tal-Kodiċi Kriminali l-Qorti kkundannat lill-imputat sabiex sa żmien xahar minn meta jiġi hekk mitlub bil-miktub mir-Reġistratur tal-Qorti iħallas l-istess Reġistratur tal-Qorti s-somma ta' elfejn, mitejn u tnax il-Ewro u ħamsin ċenteżmu (€2212.50), liema ammont jirrappreżenta l-ispejjeż konnessi mal-ħatra ta' espert f'dan il-każ.

Wara li rat il-Kap. 518 tal-Liġijiet ta' Malta l-Qorti ordnat lir-Reġistratur tal-Qrati Ċivili u Tribunali sabiex l-imputat jitniżżel fuq ir-Reġistru ndikat fl-imsemmi Att u għal dan il-għan ordnat li kopja ta' din is-sentenza tiġi kommunikata lill-imsemmi Reġistratur.

In oltre ordnat d-distruzzjoni tal-materjal kollu pornografiku esebit f'dawn il-proċeduri.

Rat ir-rikors tal-appellant Michael Kingswell, ppreżentat fit-30 ta' Mejju, 2019, fejn talab lil din il-Qorti:

1. Tikkonferma fejn ma sabitx lill-esponenti ħati tal-ewwel u t-tieni imputazzjoni;

2. Tħassarha in kwantu sabet lill-esponenti ħati tat-tielet, tar-raba' u tal-ħames imputazzjoni u tiddikjarah mhux ħati ta' tali imputazzjonijiet; u

3. Mingħajr preġudizzju għas-suespost, u b'mod sussidjarju, fl-eventwalita li tikkonferma l-ħtija kif inflitta mill-Ewwel Onorabbli Qorti, li tibdel il-piena mposta, b'piena aktar ekwa uġusta għall-każ odjern.

Rat l-aggravji imqanqla mill-appellant.

Rat l-atti u d-dokumenti kollha.

Rat il-fedina penali aġġornata tal-appellant esebita mill-prosekuzzjoni fuq ordni tal-Qorti.

Semghet trattazzjoni.

Ikkunsidrat:

Illi fl-ewwel aggravju minnu ntentat l-appellant jattakka l-valur probatorju ta'l-istqarrija minnu rilaxxjata lil pulizija meta gie arrestat u interrogat fl-24 ta' Marzu 2017. Qabel gie interrogat l-appellant gie moghti id-drittijiet li kienu vigenti skont il-ligi f'dak iz-zmien, inkluz allura il-jedd li jikkonferixxi ma' avukat tal-fiducja tieghu sabiex jikseb dawk il-pariri mehtiega qabel ma jwiegeb ghal mistoqsijiet li b'xi mod setghu jinkriminawh u jintuzaw kontra tieghu f'awla tal-qorti. Fil-fatt l-appellant ghazel li jkellem lil-Avukat Dr. Luciano Busuttil qabel ma gie interrogat. Huwa ghazel ukoll li jiffirma l-istqarrija tieghu.

Illi qabel kull konsiderazzjoni ohra dwar dan l-ewwel aggravju l-Qorti ma tistax ma tinnotax illi l-appellant fl-ebda stadju tal-proceduri quddiem l-Ewwel Qorti ma talab li l-prova maghmula mill-Prosekuzzoni permezz tal-istqarrija rilaxxjata minnu tigi skartata u dan ghaliex potenzjalment seta' jkun hemm xi vjolazzjoni tal-jedd tieghu ghal smigh xieraq. Mhux biss izda minn ezami tat-trattazzjoni maghmula mid-difiza tal-appellant quddiem l-Ewwel Qorti, ssir referenza ghal dina l-istqarrija u dan sabiex titressaq 'il quddiem il-linja difensjonali illi l-ewwel zewg akkuzi fil-konfront tal-appellant ma kenux jissussistu, kif fil-fatt gie deciz fis-sentenza impunjata. Minn ezami tal-atti processwali ma jirrizulta minn imkien illi l-appellant qanqal din il-kwistjoni, izda ghogbu iqajjem dan l-ilment biss issa fi stadju ta' revizjoni.

L-appellant essenzjalment jilmenta illi ghalkemm huwa kiseb parir legali qabel ma gie interrogat izda ma kellux prezenti mieghu fizikament waqt l-interrogazzjoni l-imsemmi avukat u dan ghalkemm illum il-ligi penali permezz tal-Att LI tal-2017, li gab fis-sehh fil-qafas legislattiv ta' pajjizna id-Direttiva 2013/48 EU, taghti dan il-jedd lil persuna suspettata filwaqt tal-interrogatorju taghha. Huwa isejjes dan l-aggravju fuq il-pronunzjament gudizzjarju maghmul fis-sentenza moghtija mill-Prim'Awla tal-Qorti Civili (sede kostituzzjonali) fl-ismijiet 'Il-Pulizija vs Aldo Pistella', kif sussegwentement ikkonfermata mill-Qorti Kostituzzjonali. Dan l-insenjament gudizzjarju, madanakollu, ma baqax jigi sewgiet mill-qrati taghna, u anke mill-Qorti Kostituzzjonali innifisha, u dan meta l-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem fasslet test gdid li kull qorti ghandha taghmel preventivament qabel ma jigi deciz jekk il-valur probatorju ta' stqarrija giex mittiefes bil-fatt illi ma kienx hemm dik l-assistenza legali shiha u effettiva li llum trid il-ligi. Dan qed jinghad b'referenza ghal diversi sentenzi li issa gew moghtija minn dik il-Qorti fosthom dik ta' 'Beuze vs Belgium[1]', 'Doyle vs Ireland[2]' u fuq kollox dik li laqtet lil pajjizna 'Farrugia vs Malta[3]'. Recentement

[1] Application number 71409/10 deciza 09/11/2018
[2] Application number 51979/17 deciza 23/08/2019
[3] Application number 63041/13 deciza 04/06/2019

f'kaz analogu, fil-fatt, il-Qorti Kostituzzjonali ghamlet referenza ghal dawn id-decizonijiet u hekk stqarret fir-rigward ta' dan il-*quaestio iuris*:

> **19. Fis-sentenza li ngħatat mis-Sezzjonijiet Magħquda tal-Qorti Ewropea fid- 9 ta' Novembru 2018 il-qorti qalet:**
>
> **"120. The fairness of a criminal trial must be guaranteed in all circumstances. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case (see Ibrahim and Others, … § 250). The Court's primary concern, in examining a complaint under Article 6 § 1, is to evaluate the overall fairness of the criminal proceedings … … …**
>
> **"121. As the Court has found on numerous occasions, compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings. … … … "… … …**
>
> **"139. The stages of the analysis as set out in the Salduz judgment – first looking at whether or not there were compelling reasons to justify the restriction on the right of access to a lawyer, then examining the overall fairness of the proceedings – have been followed by Chambers of the Court in cases concerning either statutory restrictions of a general and mandatory nature, or restrictions stemming from case- specific decisions taken by the competent authorities.**
>
> **"140. In a number of cases, which all concerned Turkey, the Court did not, however, address the question of compelling reasons, and neither did it examine the fairness of the proceedings, but found that systematic restrictions on the right of access to a lawyer had led, ab initio, to a violation of the Convention … … … Nevertheless, in the majority of cases, the Court has opted for a less absolute approach and has conducted an examination of the overall fairness of the proceedings, sometimes in summary form … and sometimes in greater detail …**
>
> **"141. Being confronted with a certain divergence in the approach to be followed, in Ibrahim and Others the Court consolidated the principle established by the Salduz judgment, thus confirming that the applicable test consisted of two stages and providing some clarification as to each of those Rik. Kost. 38/18 11 stages and the relationship between them (see Ibrahim and Others, … §§ 257 and 258-62).**

"144. In Ibrahim and Others the Court also confirmed that the absence of compelling reasons did not lead in itself to a finding of a violation of Article 6. Whether or not there are compelling reasons, it is necessary in each case to view the proceedings as a whole (see Ibrahim and Others, ... § 262). That latter point is of particular importance in the present case, since the applicant relied on a certain interpretation of the Court's case-law on the right of access to a lawyer ... to the effect that the statutory and systematic origin of a restriction on that right sufficed, in the absence of compelling reasons, for the requirements of Article 6 to have been breached. However, as can be seen from the Ibrahim and Others judgment, followed by the Simeonovi judgment, the Court rejected the argument of the applicants in those cases that Salduz had laid down an absolute rule of that nature. The Court has thus departed from the principle that was set out, in particular, in the Dayanan case and other judgments against Turkey.

"145. 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 byrad the restriction on access to a lawyer (see Ibrahim and Others, ... § 265).......

"147. Lastly, it must be pointed out that the principle of placing the overall fairness of the proceedings at the heart of the assessment is not limited to the right of access to a lawyer under Article 6 § 3 (c) but is inherent in the broader case-law on defence rights enshrined in Article 6 § 1 of the Convention ... ... "148. That emphasis, moreover, is consistent with the role of the Court, which is not to adjudicate in the abstract or to harmonise the various legal systems, but to establish safeguards to ensure that the proceedings followed in each case comply with the requirements of a fair trial, having regard to the specific circumstances of each accused.......

"150. 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 (see Ibrahim and Others, ... § 274, and Simeonovi, ... § 120):
"(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 Rik. Kost. 38/18 12 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”.

20. Hu fuq l-Istat l-obbligu li jagħti prova li fil-proċess kriminali kien hemm overall fairness[4].

Illi l-Qorti ghamlet dan l-ezercizzju wara li ezaminat l-atti tal-kaz minn fejn jirrizulta inkonfutabbilment illi l-istqarrija rilaxxjata mill-appellant lil pulizija ma kenitx l-uniku prova determinati f’dan il-process gudizzjarju, tant illi l-Prosekuzzjoni ressqet lil minuri kollha li kienu involuti u li ghalihom ssir referenza fl-interrogatorju tal-appellant. Mhux biss izda sahansitra giet varata inkjesta magisterali bil-hatra ta’ esperti fil-qasam tal-informatika sabiex jassistu lil Qorti tasal ghad-decizjoni taghha. Fil-fatt l-appellant gie lliberat mill-ewwel zewg imputazzjonijiet migjuba fil-konfront tieghu. Mhux biss izda ma hemm ebda indikazzjoni jew allegazzjoni fl-atti illi l-appellant, li kien ragel matur ta’ 37 sena meta gie interrogat, kien xi persuna vulnerabbli. Kif anqas hemm xi indikazzjoni jew allegazzjoni illi huwa gie mbezza’, mhedded jew

[4] Qorti Kostituzzjonali Ir-Repubblika ta’ Malta vs Martino Aiello deciza 27/03/2020

intuzat xi vjolenza fuqu sabiex iwiegeb ghal mistoqsijiet li kienu qed isirulu, mistoqsijiet li fil-fehma tal-Qorti jidher li kienu perfettament legittimi u li fl-ebda hin ma jidher illi l-appellant kien qed jipprova jigi svijat, tant illi l-ufficjal tal-pulizija li kien qed imexxi l-interrogatorju sahansitra wrieh ir-ritratti inkriminatorji li kellhom f'idejhom l-investigaturi bhala prova kontra tieghu. Fuq kollox l-appellant stess quddiem l-Ewwel Qorti qatt ma qanqal l-oggezzjoni ghal validita' tal-istqarrija tieghu tant illi kif inghad id-difiza strahet fuqha fost provi ohra sabiex tressaq 'il quddiem l-insostenibbilita' tal-ewwel zewg imputazzjonijiet migjuba fil-konfront tieghu.

Kwindi ghal dawn il-motivi kollha l-ewwel aggravju qed jigi michud.

Ikkunsidrat:

Michud l-aggravvju dwar il-valur probatorju tal-istqarrija rilaxxjata mill-appellant jifdal sabiex jigu kkunsidrati l-ilmenti l-ohra imqanqla fir-rikors tal-appell bl-ewwel wiehed ikun dak marbut ma-data indikata fl-akkuza meta allegatament sehhew l-atti inkriminatorji. Illi l-appellant jinsab mixli li kkometta r-reati lilu addebitati fit-23 ta' Marzu 2017 u matul ix-xhur u s-snin ta' qabel. Jidher li din id-data hija marbuta ma' inkjesta magisterjali li giet varata wara allert li ntbaghat mill-Europol lill-investigaturi maltin illi kien hemm xi tixrid ta' materjal pornografiku koncernanti minuri minn persuna ghal ohra gewwa Malta, liema ritratt intbaghat mill-profil bl-isem "Michael King" lil certu B. Jilmenta l-appellant illi l-Prosekuzzjoni setghet indikat b'aktar precizjoni id-data meta sehh l-allegat reat billi it-tixrid ta' dan il-materjal seta' jigi identifikat bil-preciz bid-data u il-hin gjaldarba it-trasmissjoni kienet wahda ta' natura elettronika u kwindi ma kellhiex tigi indikata d-data b'dan il-mod wiesgha.

Illi qabel xejn ghandu jigi rilevat illi l-investigazzjonijiet kondotti mill-pulizija sussegwenti ghal dan ir-rapport kienu aktar wiesgha u mifruxa tant illi l-appellant gie mixli b'reati ohra fosthom dawk tal-partecipazzjoni f'attivita` sesswali ma' minuri u dak tal-korruzzjoni tal-minorenni. Fil-fatt minn dak li

jistqarr l-appellant mal-investigaturi fl-interogatorju tieghu jirrizultaw diversi *chats* fuq l-*facebook* ma' numru ta' tfajliet taht l-eta'. Illi allura minn dak kollu li kien qed johrog mill-istharrig irrizulta illi fiz-zmien li ppreceda id-data fejn skattat l-investigazzjoni, l-appellant, li kellu is-sengha ta' fotografu, apparti li huwa suldat mal-Forzi Armati ta' Malta, kien qed ikollu diversi kuntatti ma' tfajliet ta' taht l-eta bil-ghan illi dawn jigu minnu ffotografati. Fil-fatt l-akkuzi jirriflettu mhux biss l-incident izolat fejn intbaghat ir-ritratt inkriminatorju u li dwaru l-appellant gie misjub hati mill-Ewwel Qorti, izda ukoll fatti ohra marbuta ma' attivita li kienet qed issir mill-appellant koncernanti minuri u li dwarhom allura gie mixli ukoll ghalkemm illiberat sussegwentement. Ghal dawn il-motivi dan l-aggravju wkoll qed jigi michud.

Ikkunsidrat:

Misjub hati unikament tal-ahhar tlett imputazzjonijiet migjuba fil-konfront tieghu u dan abbazi ta' ritratt ezebiet in atti bhala dokument JB1 li l-Ewwel Qorti interpretat li kellu kontenut pornografiku, l-appellant jilmenta illi sar apprezzament zbaljat kif ukoll interpretazzjoni erronja fis-sentenza impunjata ta' dak li jikkostitwixxi materali pornografiku skont il-linji gwida stabbiliti f'l hekk imsejjah *Copine Taxonomy*. Ghalkemm fl-aggravju minnu intentat l-appellant ighid li dan ir-ritratt immarkat bhala Dokument JM1 qatt ma gie pprezentat, dan mhuwiex minnu billi r-ritratt inkriminatorju jinsab esebiet gewwa *envelope* a *folio* 31 tal-atti processwali u mmarkat bhala Dokument JM1, ritratt li juri minghajr ebda ombra ta' dubbju zewg subien taht l-eta' minghajr hwejjeg wiehed mimdud fuq l-iehor bl-espressjonijiet tal-wicc indikattivi li qed jaghmlu xi attivita ta' natura sesswali. Illi anke jekk *gratia argomenti* r-ritratt ma jigix interpretat b'dan il-mod, l-appellant stess *ex admissis* ighid illi r-ritratt nizzlu hu stess minn fuq l-internet u baghtu lil B. Ighid hekk:

> "*Dan battulha ghaliex konna qed nitkellmu fuq xi lizbjani u batuhla biex hija tkun tista tigi ma tifla ohra halli jien inkun nista nihu ritratt taghhom it-tnejn hekk*[5]."

[5] Ara stqarrija tal-appellant a fol.9 et seq.

Dan imbaghad tikkonfermah ukoll B fid-deposizzjoni taghha, meta tghid li l-appellant kien jibghat lilha u lil habiba taghha C ritratti "*nudes*" fuq il-*facebook* u "*jghidilna li jixtieq jaghmel bhalhom biex jiehu ritratti gharwenin.*[6]"

Dan ifisser kuntrarjament ghal dak li jsostni l-appellant f'dan l-aggravju, li ma kienx hemm in-necessita' illi l-espert jikkonferma l-provenjenza tar-ritratt meta ghamel l-ezami tat-taghmir elettroniku proprjeta tieghu u li gie elevat mill-pulizija. Dan gie ammess mill-appellant stess meta stqarr li nizzel ir-ritratt minn fuq l-internet liema ritratt intbaghat lil B, li minn naha taghha tikkonferma illi kienet tircievi dawn ir-ritratti minn ghand l-appellant. Dawn il-fatti probatorji ma ghandhom ihallu ebda dubbju f'mohh min hu imsejjah biex jiggudika bl-intenzjoni li kellu l-appellant li jhajjar lil dawn it-tfajliet ta' taht l-eta li johdielhom ritratti b'kontenut indicenti. Illi *di piu* ghalkemm huwa minnu li fl-ezami li jaghmel l-espert ta' dan it-taghmir elettroniku ma nstabx dan ir-ritratt partikolari, madanakollu kif tghid l-Ewwel Qorti fis-sentenza impunjata, l-espert sab materjal iehor indicenti ta' minuri sabiex b'hekk l-intenzjoni kriminuza tal-appellant tirrizulta car u tond, intenzjoni ta' ragel adult u matur li, kif inghad. ihajjar tfajliet kollha ta' taht l-eta` sabiex jippozawlu b'mod indicenti minghajr l-kunsens tal-genituri taghhom. Illi dan, fil-maggior parti tal-kazijiet, kien jaghmlu minghajr hlas u f'kazijiet ohra kien sahansitra ihallas lil minuri hu stess sabiex dawn jippermettulu johdielhom dawn ir-ritratti.

Finalment, l-appellant jilmenta illi t-tielet imputazzjoni imsejsa fuq ir-reat mahsub fl-artikolu 208AA tal-Kodici Kriminali ma jistax jissussisti billi ma kienx hemm prova, fl-ewwel lok, illi l-avvicinament bejn l-appellant u l-minuri sar bl-intenzjoni li jigi kommess ir-reat mahsub fl-artikolu 208A, u ukoll billi l-elementi l-ohra lanqas ma gew ippruvati u cioe' li l-proposta sabiex jigi kommess ir-reat gie segwiet minn xi atti materjali liema att kellu iwassal ghal laqgha b'dan il-ghan.

---

[6] Xhieda ta' B a fol. 167,168 tal-process

Illi d-dibattiti parlamentari marbuta mal-introduzzjoni mil-legislatur ta' dan ir-reat jindikaw x'kien il-hsieb warajh meta inghad hekk mill-Onor Carmelo Mifsud Bonnici, dak iz-zmien Ministru tal-Gustizzja:

> **"L-ewwel pass 'il quddiem li qegħdin nagħmlu f'din id-direzzjoni huwa intenzjonat sabiex nagħtu protezzjoni aqwa lit-tfal. Jidhrilna li fid-dinja tal-lum il-minuri huma esposti għal riskji ġodda li ġew proprju minħabba tteknoloġija moderna. Dawn ir-riskji llum huma ta' periklu kbir u dehrilna li għandna nagħmlu l-passi leġislattivi neċessarji sabiex inkunu nistgħu nikkontrastawhom.**
>
> **Dan nagħmluh billi nattakkaw żewġ setturi li għalija huma importanti ħafna, l-ewwel nett l-abbuż tat-tfal fis-settur tal-pornografija, jiġifieri li t-tfal jiġu wżati fil-films li huma marbuta ma' pornografija. ..... <u>It-tieni pass importanti li qegħdin nagħmlu huwa marbut mas-sollecitar ta' minuri fuq l-internet biex tiltaqa' magħhom</u> jew għal raġunijiet oħrajn marbutin mar-reati li huma kontra l-unur tal-familja, reati sesswali u reati li jnaqqsu mill-ġieħ tas-soċjetà tagħna.**
>
> **Jidhrilna li dawn iż- żewġ passi huma importanti ħafna fiż-żmien tal-lum. It-teknoloġija moderna hija qawwija u qiegħda tidħol direttament fid-djar tagħna. [7]"**

Mhux biss izda bis-shubija ta' Malta fl-Unjoni Ewropeja il-legislatur kellu necessarjament jimplimenta fil-legislazzjoni domestika id-dritt komunitarju in materja li f'dak iz-zmien kien mahsub fid-Decizjoni Kwadru tal-Kunsill 2004/68/JHA tat-22 ta' Dicembru 2003 dwar il-glieda kontra l-isfruttament tat-tfal u l-pornografija tat-tfal, liema Decizjoni Kwadru giet sostitwita bid-Direttiva 2011/92/EU. Fl-artikolu 4 tad-Decizjoni Kwadru intitolat, "***Instigation, aiding, abetting and attempt***", hemm dispost illi:

> ***"1. Each Member State shall take the necessary measures to ensure that the instigation of, or aiding or abetting in the commission of an offence referred to in Articles 2 and 3 is punishable.***
>
> ***2. Each Member State shall take the necessary measures to ensure that attempts to commit the conduct referred to in Article 2 and Article 3(1)(a) and (b), are punishable.***

Seduta Parlamentari tat-23 ta' Marzu 2010[7]

Dan ifisser illi l-att materjal jikkonsisti f'dawk l-atti preparatorji li fihom infushom jistghu iwasslu ghal kummissjoni tar-reat mahsub, f'dan il-kaz fl-artikolu 208A tal-Kodici Kriminali, minghajr l-htiega illi effettivament l-att inkriminatorju isehh. Illi, allura, l-malvivent jilhaq l-ghan kriminuz tieghu hekk kif ihajjar lil minuri jikkomettu r-reat. Dan ifisser illi meta l-appellant baghat ir-ritratt inkriminatorju lil B bit-tir li hi u l-habiba taghha C jiltaqghu mieghu sabiex iwettqu ghemil lezbiku, wahdu huwa sufficjenti sabiex ikun sehh il-konsumazzjoni tar-reat mahsub fl-artikolu 208AA tal-Kodici Kriminali. Issa jekk fil-fatt meta sehhet din il-laqgha sabiex issir din l-allegata *photoshoot*, dawn l-atti ma twettqux huwa ghal kollox irrilevanti billi kif inghad ir-reat kien diga wiehed ikkunsmat.

Illi l-ghan tal-legislatur, liema ghan il-qrati sejrin jimplimentaw skrupolozament, huwa dak li jigu mharsa il-minuri minn kull ghemil li jista' iwassal ghall-esplojtazzjoni taghhom u tas-sesswalita' taghhom. Illi huwa indubitat illi l-ghan wara l-ghemil tal-appellant kien wiehed ta' esplojtazzjoni ta' tfajliet minorenni fejn dan kien ihajjarhom b'mod kontinwu u assidwu fuq il-*facebook* sabiex jiltagqhu mieghu bl-ghan li jiehu ritratti indicenti taghhom u dan minghajr ma jikseb preventivament il-kunsens tal-genituri taghhom fejn f'okkazzjonijiet minnhom sahansitra kien ihajjarhom jaghmlu dan billi joffrielhom l-hlas ghaldaqstant. Illi ghal dawn il-motivi, l-Qorti ma tista' tara ebda mottiv li jgieghlha titbieghed mill-fehma ghaqlija milhuqa mill-Ewwel Qorti u ghaldaqstant dan l-aggravju qed jigi michud.

Ikkunsidrat:

Jifdal finalment sabiex jigi kkunsidrat l-ahhar aggravju nimqanqal mill-appellant u cioe' dak marbut mal-piena erogata mill-Ewwel Qorti ta' sentejn prigunerija, li bl-applikazzjoni tal-artikolu 28A tal-Kodici Kriminali gew sospizi ghal zmien erba' snin. L-appellant jilmenta illi din il-piena hija wahda eccessiva, fejn kellu jigi applikat l-artikolu 18 fil-konfront tieghu. Jilmenta

ukoll illi l-piena mhijiex proprozjonata mal-ghemil li wassal ghal kundanna tieghu.

Illi l-appellant jaghmel referenza ghall-artikolu 49(3) tal-Karta tad-Drittijiet Fundamentali tal-Unjoni Ewropeja hemm imfisser:

"Is-severità tal-piena m'għandhiex tkun sproporzjonata għar-reat."

Illi din il-Qorti fis-sede superjuri taghha esprimiet ruhha hekk dwar dan l-element ta' dritt:

> **"71.Dan il-principju, madanakollu, kien dejjem suggett ghal dibattitu dwar it-tifsira li ghandu jinghata, principju li qatt ma gie sewwa definit fil-ligi. Dan il-principju ghandu jiehu kont tal-principju l-iehor tar-retribuzzjoni, tal-utilita` ta' piena u dan fir-rigward tal-hati u tas-socjeta' in generali.**
> ***"Juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another... He must first be found guilty and punishable before there can be any thought of drawing from his punishment any benefit for himself or his fellow citizens. The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure of it, according to the Pharisaic maxim: 'It is better that one man should die than the whole people should perish.' For if justice and righteousness perish, human life would no longer have any value in the world."***
>
> **.... Huwa errat ghalhekk l-appellant meta jargumenta illi l-ammont tal-piena ghandu jkun evalwat biss mill-ottika tal-hati li fl-ahhar mill-ahhar ikun ser jiskonta dik il-piena[8]"**

Illi hija il-fehma ta' din il-Qorti illi l-piena erogata mill-Ewwel Qorti mhux biss hija wahda li taqa' fil-parametri tal-ligi, izda sahansitra hija wahda alternattiva ghal dik tal-prigunerija effettiva, bl-appellant ghalhekk jinghata opportunita` ohra sabiex jara illi jitbieghed mill-hajja tal-kriminalita' u dan

[8] Ir-Repubblika ta' Malta vs Aaron Farrugia deciza 26/04/2018

iktar u iktar meta wiehed iqies dak stabbilit fid-Decizjoni Kwadru hawn fuq iccitata fejn fl-artikolu 5 tieghu hemm hekk dispost:

> ***"…. each Member State shall take the necessary measures to ensure that the offences referred to in Articles 2, 3 and 4 are punishable by criminal penalties of a maximum of at least between one and three years of imprisonment."***

Dan ifisser illi l-ilmenti imqanqla mill-appellant marbuta ma' dan l-aggravju huma ghal kollox fiergha u ghalhekk qeghdin jigu michuda.

Ghal dawn il-motivi l-appell qed jigi michud u s-sentenza appellata ikkonfermata fl-intier taghha.

Edwina Grima
Imhallef