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

MAGISTRAT DR. ELAINE MERCIECA B.A., LL.D.

Illum, 9 ta' Mejju 2022

IL-PULIZIJA

vs

RITTMAR HATHERLY

Omissis

Il-Qorti;

Rat l-imputazzjonijiet migjuba fil-konfront ta' **Rittmar Hatherly**, iben James u Carmen *nee'* Farrugia, mwieled il-Pieta', nhar it-23 ta' Lulju, 1987, residenti gewwa 5, Triq it-Turgien, il-Belt Valletta, u detentur tal-karta tal-identita' bin-numru 363987M, senjatament akkuzat talli;

1. Fit-22 ta' Settembru, 2010, ghall-habta ta' bejn it-07:45pm u t-08:00pm gewwa Triq l-Iljun, Hal Qormi, kellu fil-pussess tieghu d-droga eroina specifikata fl-Ewwel Skeda tal-Ordinanza dwar il-Medicini Perikoluzi (Kap. 101) meta ma kienx fil-pussess ta' awtorizzazzjoni ghall-importazzjoni jew ghall-esportazzjoni mahrug mit-Tabib Principali tal-Gvern skond id-dispozizzjonijiet tar-4 u s-6 Taqsima tal-Ordinanza u meta ma kienx bil-licenzja jew xort'ohra awtorizzat li jimmanifattura jew li jforni d-droga msemmija, u meta ma kienx b'xi mod iehor bil-licenzja mill-President ta' Malta li jkollu d-droga fil-pussess tieghu u naqas li jipprovdi li d-droga msemmija giet fornuta lilu ghall-uzu tieghu skond ir-ricetta kif provdut fir-regolamenti msemmija, u dan bi ksur tar-Regolament 8 tar-Regoli tal-1939 dwar il-Kontroll Intern tad-Drogi Perikoluzi (G.N.

292/1939) kif sussegwentament emendati, u bi ksur tal-Ordinanza dwar il-Medicini Perikoluzi (Kap. 101) tal-Ligijiet ta' Malta;
2. U aktar talli fl-istess data, hin, lok u cirkostanzi kellu fil-pussess tieghu r-raza mehuda mill-pjanta *Cannabis* jew xi preparazzjonijiet li jkollhom bhala bazi din ir-raza u l-pjanta *Cannabis* kollha, jew bicca minnha u dan bi ksur tal-Artikolu 8 (a) u (d), tal-Kap. 101 tal-Ligijiet ta' Malta;
3. U aktar talli sar recidiv b'diversi sentenzi moghtija lilu mill-Qorti tal-Magistrati (Malta), liema sentenzi huma definittivi u ma jistghux jinbidlu;
4. Talli kiser diversi kundizzjonijiet imposti fuqu minn diversi sentenzi moghtija lilu mill-Qorti tal-Magistrati (Malta), liema sentenzi huma definittivi u ma jistghux jinbidlu.

Rat ix-xhieda;

Rat l-atti kollha tal-każ u d-dokumenti esebiti, inkluż l-Ordni tal-Avukat Ġenerali ai termini tas-sub-artikolu (2) tal-Artikolu 22 tal-Ordinanza dwar il-Mediċini Perikolużi (Kap. 101 tal-Liġijiet ta' Malta), sabiex din il-kawża tinstema' minn din il-Qorti bħala Qorti ta' Ġudikatura Kriminali[1],

Rat id-digriet tal-assenjazzjonijiet ta' kawzi u doveri tal-Prim Imhallef tat-28 ta' Lulju 2021[2];

Rat l-ezenzjoni tal-partijiet ghal-ismigh mill-gdid tax-xhieda mismugha viva-voce minn dina l-Qorti diversament preseduta[3];

Semghet is-sottomissjonijiet tal-partijiet;

Ikkunsidrat

Illi in sostenn tal-imputazzjonijiet miġjuba kontra l-imputat, il-Prosekuzzjoni ressqet is-segwenti xhieda u provi: PC495 Nathaniel Mamo u PC729 Kevin Decelis li ghamlu tfittxija fuq il-qua imputat u Justin Farrugia; PS 1240 Joseph Camilleri li xehed dwar ir-rapport li sar minn PC495 u PC729 meta dawn hadu lill-qua imputat flimkien ma Farrugia fl-ghassa tal-pulizija u l-ispettur Sandra Zammit li xehdet dwar l-investigazzjoni tal-kaz odjern, ezebiet l-istqarrija tal-qua imputat kif ukoll is-sustanza elevata. Xehdu ukoll numru ta' ufficjali tal-pulizija sabiex jispjegaw lil din il-Qorti r-raguni l-ghaliex il-mandat t'arrest li jkun hareg fil-konfront tal-qua imputat ma jkunx gie ezegwiet. Mill-atti processwali jirrizulta ukoll li d-difiza ezentat lill-prosekuzzjoni milli tressaq ix-xhieda ta' PC237 J. Camilleri bhala l-prova tal-volontarjeta' tal-istqarrija rrillaxxata mill-qua imputat. Id-difiza min-naha taghha ghazlet li ma tressaqx provi.

[1] Fol. 3 tal-atti processwali.
[2] Fol. 115 tal-atti processwali.
[3] Fol. 120 tal-atti processwali.

Illi l-fatti mertu tal-imputazzjonijiet odjerni jirrisalu lura ghat-22 ta' Settembru 2010 meta ghall-habta tat-tmienja nieqsin kwart ta' filghaxija PC495 Nathaniel Mamo u PC729 Kevin Decelis waqt li kien fuq ronda fl-inhawi tal-parking area tal-Lowenbrau gewwa Hal-Qormi, nnotaw vettura tal-ghamla Peugoet. Hekk kif l-ufficjali ressqu vicin l-imsemmija vettura huma setghu jinnotaw li l-persuni gewwa l-imsemmija vettura kienu ecitati. Huma talbu lil dawn iz-zewgt persuni jinzlu mill-vettura. L-ewwel nizel il-qua imputat li hu u hiereg mill-vettura rema' xi haga mal-art li sussegwentament irrizulta li kien qartas suspett sustanza illegali. Minn tfittxija fil-vettura u fuq il-persuna tal-passigier (Justin Farrugia) nstabet ukoll sustanza suspettata Cannabis. L-qua imputat u Farrugia gew arrestati u mehuda gewwa l-ghassa tal-pulizija fejn inghata hand-over tal-arrest u is-sustanza elevata lil PS1240 Joseph Camilleri. L-ispettur Zammit issoktat bl-investigazzjonijiet taghha billi hadet stqarrija lill-qua imputat.

Illi fl-ewwel lok dina l-Qorti ser tanalizza l-piz probatorju li ghandha tinghata lill-istqarrija tal-qua imputat li giet ezebieta a fol. 25 tal-atti processwali u mmarkata bhala Dok. SZ2. Minn qari tal-istess stqarrija jirrizulta li dina ttiehet lura f'Settembru tas-sena 2010 wara li l-qua imputat, skond il-ligi vigenti ta' dak iz-zmien, nghata d-dritt li jikkonsulta ma avukat jew prokuratur legali tal-ghazla tieghu qabel l-interrogatorju. Il-volontarjeta' tal-istess stqarrija ma hijiex qeghda tigi kkontestata mid-difiza u dana anke galadarba l-istess difiza ezentat lill-prosekuzzjoni milli tressaq ix-xhieda ta' PC237 Camilleri bil-ghan li jikkonferma l-istess. Ghaldaqstant il-kwistjoni tibqa' biss dwar il-piz li dina l-Qorti ghandha taghti lill-imsemmija stqarrija galadarba l-qua imputat ma kienx mghoti d-dritt tal-assistenza legali waqt l-istqarrija. Ma jirrizultax li kien hemm ragunijiet impellenti sabiex l-imputat ma jinghatax dan id-dritt fil-fatt jirrizulta li huwa kien fil-fatt mghoti d-dritt li jikkonsulta ma avukat jew prokuratur legali qabel it-tehid tal-stqarrija. Ghaldaqstant jirrizulta li l-qua imputat ma kienx mghoti d-dritt ta' assistenza legali waqt l-istqarrija fid-dawl tal-fatt li l-ligi dak iz-zmien ma kinitx tipprovi ghal tali assistenza legali.

Illi l-guriprudenza lokali ricenti fir-rigward tal-assistenza legali waqt l-interrogatorju jidher li qed tistrieh fuq l-insenjament mghoti fil-kaz **Beuze v il-Belgju** (App. Numru 71409/10) tad-9 ta' Novembru 2018, li kien jitratta ukoll sitwazzjoni fejn il-ligi domestika relevanti ma kinitx tippermetti l-assistenza legali waqt l-interrogazzjoni u fejn ma kienx hemm ragunijiet impellenti ghalfejn ma tigiex offruta l-assistenza tal-avukat. F'dan il-pronunzjament intqal:

> *"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 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 by the restriction on access to a lawyer[4] *(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

[4] Emfazi ta' dina l-Qorti

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 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".

Stabbilit dawn il-fatti u principji, minn qari tal-istqarrija jirrizulta li l-qua imputat mhux tali inkrimina lilu nnifsu izda tali l-imsemmija stqarrija (fid-dawl ta' dak li ha jinghad iktar 'il quddiem f'din is-sentenza) hija l-unika prova inkriminanti fil-konfront tieghu. Tenut kont dawn ic-cirkostanzi dina l-Qorti ma hijiex tal-fehma li fid-dawl tad-dritt fundament ghall-smigh xieraq hekk kif sancit fil-Kostituzzjoni u fil-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem, din il-Qorti ai fini ta' reita' o meno tal-imputat fir-rigward tal-imputazzjonijiet dedotti fil-konfront tieghu tistrieh unikament fuq l-istess stqarrija. Ghaldaqstant dina l-Qorti

ser tiskarta l-istess stqarrija mill-kunsiderazzjonijiet dwar htija o meno tal-imputat ghal dak li jirrigwarda l-imputazzjonijiet dedotti fil-konfront tieghu.

Illi fir-rigward tal-ewwel u t-tieni imputazzjoni dedotta fil-konfront tal-qua imputat irid jinghad li ghalkemm jirrizulta pruvat li gew elevati xi sustanzi minn fuq il-qua imputat, liema sustanza giet ezebieta fl-atti processwali odjerni, l-prosekuzzjoni fl-ebda hin ma talbet li din is-sustanza tigi analizzata bil-ghan li jigi stabbilit jekk din is-sustanza hijiex wahda illecita ai termini tal-Ligijiet Maltin. Fil-fatt dina l-Qorti hija kompletament sprovista minn kwalunkwe prova x'kienet is-sustanza elevata mill-isfera ta' kontroll tal-qua imputat. Ghaldaqstant dina l-Qorti hija tal-fehma li l-ewwel zewgt imputazzjonijiet ma gewx sodisfacentament pruvati sal-grad rikjest mil-ligi.

Illi konsegwentament dina l-Qorti lanqas ma ser isib htija fil-kumplament tal-imputazzjonijiet (cioe' t-tielet u r-raba' imputazzjoni) dedotti fil-konfront tal-qua imputat galadarba sabiex dawn l-imputazzjonijiet jirrizultaw fl-ewwel lok trid tinstab htija fl-ewwel u fit-tieni imputazzjoni.

Decide:

Ghal dawn il-mottivi, dina l-Qorti qed issib lill-qua imputat Rittmar Hatherly mhux hati tal-imputazzjonijiet kollha dedotti fil-konfront tieghu u konsegwentament qed tilliberah mill-istess.

Finalment, il-Qorti tordna d-distruzzjoni tad-droga esebieta hekk kif din is-sentenza tghaddi in gudikat, u dan taht il-harsien tar-Registratur li ghandu jirredigi proces verbal li jiddokumenta l-procedura tad-distruzzjoni, liema dokument ghandu jigi nserit fl-atti ta' din il-kawza mhux aktar tard minn hmistax-il jum minn tali distruzzjoni.

MAGISTRAT DR. ELAINE MERCIECA B.A., LL.D.

Christine Farrugia
Deputat Registratur