



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

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

Illum, 5 t'Ottubru 2022

Kaz Nru; 256/12

IL-PULIZIJA

kontra

SAVIOUR CACHIA

(detentur tal-karta tal-identita' 271481(M))

Il-Qorti;

Rat l-imputazzjonijiet migjuba fil-konfront ta' **Saviour Cachia**, iben Anthony Cachia u Vincenza *nee*' Schembri, mwieled il-Pieta', nhar il-31 ta' Mejju, 1981, residenti gewwa *Silver Springs, Block A, Flat 6, Triq il-Labour, Haz-Zabbar*, u detentur tal-karta tal-identita' bin-numru 271481M, senjatament akkuzat talli;

1. Kellu fil-pussess tieghu d-droga erojina specifkata fl-Ewwel Skeda tal-Ordinanza dwar il-Medicini Perikoluzi, Kap. 101 tal-Ligijiet ta' Malta, meta ma kienx fil-pussess ta' awtorizzazzjoni ghall-importazzjoni jew esportazzjoni mahrug mit-Tabib Principali tal-Gvern, skond id-dispozizzjonijiet tar-4 u tas-6 Taqsima tal-Ordinanza, u meta ma kienx bil-licenzja jew xort'ohra awtorizzat li jimmanifattura jew li jforni d-droga msemija u ma kienx b'xi mod iehor bil-licenzja mill-President ta' Malta li jkollu fil-pussess tieghu din id-droga, u naqas li jipprova li d-droga msemija giet fornuta lilu ghall-uzu tieghu skond ir-ricetta kif provdut fir-regolamenti msemija, u dan bi ksur tar-Regoli tal-1939 dwar il-Kontroll Intern tad-Drogi Perikoluzi (G.N. 292/1939) kif sussegwentament ammendati u bi ksur tal-Ordinanza dwar il-Medicini Perikoluzi, Kap. 101 tal-Ligijiet ta' Malta, liema droga kienet fil-pussess tieghu f'tali mod li ma kienx ghall-uzu esklussiv tieghu;

2. Akkuzat ukoll talli fl-istess data, lok, hin, u cirkostanzi, bhala persuna li m'hix ufficjal tal-habs jew persuna ohra mpjegata fil-habs, minghajr l-awtorita' legittima, dahhal jew ipprova jdahhal f'xi parti tal-konfini ta' habs xi oggett li jkun, li hu pprojbit skond xi regolamenti maghmula skond dan l-att, jew garr jew ipprova jgorr xi oggett bhal dak barra mill-habs;
3. U aktar talli kiser il-provvedimenti tal-Artikolu 7 tal-Kap. 446 moghti lill mill-Qorti tal-Magistrati (Malta) fil-5 ta' Mejju, 2010, mill-Magistrat Dr. J. Padovani LL.D.;
4. Akkuzat ukoll talli rrenda ruhu recidiv *ai termini* tal-Artikoli 49 u 50 tal-Kap. 9 tal-Ligijiet ta' Malta wara li kien gie misjub hati b'diversi sentenzi moghtija mill-Qorti ta' Malta, liema sentenzi saru definittivi u ma jistghux jigu mibdula.

Il-Qorti kienet gentilment mitluba sabiex barra milli tapplika l-piena skond il-Ligi, tordna li jithallsu l-ispejjez li ghandhom x'jaqsmu mal-hatra tal-esperti skond l-Artikolu 533 tal-Kap. 9 tal-Ligijiet ta' Malta.

Rat u semghet ix-xhieda;

Rat l-atti processwali kollha tal-kaz odjern u d-dokumenti esebieti;

Rat l-Ordni tal-Avukat Generali, *ai termini* tas-subartikolu (2) tal-Artikolu 22 tal-Ordinanza dwar il-Medicini Perikoluzi (Kapitolu 101 tal-Ligijiet ta' Malta), li permezz tal-istess Ordni, ordna li l-imputat titressaq quddiem din il-Qorti biex iwiegeb ghall-imputazzjonijiet migjuba kontra tieghu¹ kif ukoll il-kunsens tal-Avukat Generali u tal-imputat ghall-procedura sommarja fit-termini tal-artikolu 370 tal-Kodici Kriminali²;

Rat id-Digriet tal-Assenjazzjonijiet ta' Kawzi u Doveri datat it-28 ta' Lulju 2021;

Rat l-ezenzjoni tal-partijiet lil dina l-Qorti hekk kif preseduta mis-smigh mill-gdid tax-xhieda gia prodotti quddiem dina l-Qorti diversament preseduta³;

Semghet is-sottomissjonijiet tal-partijiet;

Ikkunsidrat:

A. Fatti tal-kaz

Illi nhar it-12 t'Ottubru tas-sena 2010, Saviour Cachia gie ezaminat mit-tabib

¹ Fol. 19 tal-atti processwali

² Fol. 20 u 28 tal-atti processwali

³ Fl-udjenza tal-15 ta' Frar 2022

tal-habs wara contact visit fejn irrizulta li huwa kellu foreign body fil-warrani tieghu. Cachia nehha dan il-foreign body fil-prezenza ta' CO165 Dennis Thornton. Fi kliem dan l-ufficcjal l-imsemmi il-foreign body kien qisu ballun gol-foil u plastik⁴. Il-pulizija gew infurmati b'din is-sejba li min-naha taghhom infurmaw lill-Magistrat Inwerenti li fethet inkjesta u hatret numru ta' esperti bil-ghan li jassistuha. PC1253 Frederick Brincat ipprezenta sett ta' tlett ritratti tal-imsemmi oggett elevat minghand il-qua imputat filwaqt li x-xjenzat Mario Mifsud analizza s-sustanza elevata fejn ikkonkluda:

*"...jista' jikkonkludi li fit-trab ta' lewn kannella li kien hemm f'zewg boroz zghar tal-plastik fid-dokument 436/10/01, li l-piz nett totali tieghu kien ta' 2.38 grammi instabet is-sustanza herojina. Il-purita tat-trab ta' lewn kannella ghas-sustanza herojina kienet ta' circa 21.6%. Is-sustanza herojina hija kkontrollata bil-ligi that l-ewwel Skeda Taqsima 1 tal-Kapitolu 101 tal-Ligijiet ta' Malta."*⁵

B. Kunsiderazzjonijiet Preliminari

B.1 Stqarrija tal-Imputat

Illi fl-istadju investigattiv, Saviour Cachia, irrillaxxa stqarrija lill-pulizija dwar il-fatti mertu tal-kaz odjern. Din l-istqarrija ttiehdet fid-9 ta' Jannar 2012⁶ u dana wara li l-imputat irrifjuta d-dritt li jikkonsulta ma avukat qabel l-interrogazzjoni u in sostenn ta' dan iffirma dikjarazzjoni fil-prezenza tal-ispettur u zewg xhieda⁷. Fl-udjenza tal-11 ta' Lulju 2022, l-imputat ressaq talba sabiex din il-Qorti tiskarta kompletament dak li l-imputat qal fl-imsemmija stqarrija u dana galadarba l-imputat ma kienx mghoti d-dritt ghall-assistenza legali waqt l-istqarrija. Tajjeb li jinghad li l-ligi vigenti f' Jannar tas-sena 2012 ma kinitx tipprovdi d-dritt ghall-assistenza legali waqt l-interrogatorju. Izda kien tipprovdi biss id-dritt ghall-assistenza legali ghall-massimu ta' siegha qabel l-interrogazzjoni biss. Mill-atti processwali ma jirrizultax li kien hemm ragunijiet impellenti li setghu zammew lill-imputat milli jkun assistiet permezz ta' avukat jew prokuratur legali waqt l-interrogazzjoni, fil-fatt huwa kien gie mghoti d-dritt li jkun legalment assistiet qabel l-interrogazzjoni, Isegwi ghalhekk li probabilment l-unika raguni l-ghaliex l-imputat ma giex offrut u ma kienx mghejjun minn avukat waqt l-interrogazzjoni kienet l-ghaliex il-ligi vigenti dak iz-zmien ma kinitx tippermettieha.

Il-guriprudenza lokali ricenti fir-rigward tal-assistenza legali waqt l-interrogatorju jidher li qed tistrieħ fuq l-insenjament mghoti fil-kaz **Beuze v il-Belgju** (App. Numru 71409/10) tad-9 ta' Novembru 2018, li kien jitratta ukoll

⁴ Issir referenza ghal fol. 36 tal-atti processwali

⁵ Fol. 15 tal-proces verbal (Dok. JM)

⁶ Referenza ghal fol. 3 tal-atti processwali

⁷ Referenza ghal Dok. JV1 (fol. 46 tal-atti processwali)

sitwazzjoni fejn il-ligi domestika rilevanti 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 lawyer⁸ (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 an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;

⁸ Emfazi ta' dina l-Qorti

“(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”.

F'diversi sentenzi ricenti mghotija mill-Qrati lokali ta' gurdizzjoni kriminali u anke Kostituzzjonali, saret referenza ghal din is-sentenza u, sabiex anke jigi assigurat li d-dritt ghal smigh xieraq ma jigiex mittifes, il-Qrati skartaw l-istqarrijiet rrillaxati f'cirkostanzi simili bhal daww odjerni meta gew sabiex jikkunsidraw ir-responsabilita' tal-imputat li jkun⁹. Fil-kaz in dezamina, mill-qari tal-istqarrija hawn fuq imsemmija jirrizulta li l-imputat inkrimina lilu nnifsu rigward l-imputazzjonijiet migjuba fil-konfront tieghu. Konsegwentament din il-Qorti ser tiskarta l-imsemmija stqarrija meta tigi biex tanalizza r-reita' tal-imputat fid-dawl tal-imputazzjonijiet migjuba fil-konfront tieghu.

C. Kunsiderazzjonijiet dwar il-htija o meno tal-imputat

⁹ F'dan is-sens issir referenza ghas-segventi sentenzi (izda mhux biss) Morgan Onourah vs L-Avukat tal-Istat (Qorti Kostituzzjonali), 27 ta' Jannar 2021, Ir-Repubblika ta' Malta vs Kevin Gatt et (Qorti tal-Appell Kriminali (Superjuri), (27 ta' Ottubru 2021), kif ukoll Christopher Bartolo vs L-Avukat ta' l-Istat Qorti Kostituzzjonali, (26 ta' April 2022) u Ir-Repubblika ta' Malta vs Andrew Mangion (Qorti tal-Appell Kriminali (Superjuri), (4 ta' Mejju 2022).

Illi mill-provi mressqa indubbjament jirrizulta li Saviour Cachia kellu fil-persuna tieghu *foreign body* kontenenti d-droga heroina fl-ammont ta' 2.38grammi. F'dawn ic-cirkostanzi l-ewwel imputazzjoni li tirrigward l-pussess xjenti tal-herojina tirrizulta pruvata skond il-ligi.

In kwantu ghat-tieni imputazzjoni mill-atti processwali ma jirrizultax li kien propju l-qua imputat li dahal fil-konfini tal-habs id-droga misjuba fil-pussess tieghu. Huwa minnu li l-ufficjali tal-habs jixhdu li huwa kien ghad kif kellu contact visit, madanakollu mill-provi mressqa ma jirrizultax li kien hemm xi agir li setgha jindika li l-imsemmija droga ghaddiet fil-pussess ta' Cachia waqt dik il-contact visit. Di piu' wisq inqas jirrizulta pruvat li, anke jekk kien il-kaz li d-droga ghaddiet waqt l-imsemmija contact visit, dan sar fuq struzzjonijiet mhotija mill-qua imputat. Ghaldaqstant din il-Qorti ser tkun qed tillibera lill-qua imputat mit-tieni imputazzjoni.

B'referenza ghat-tielet imputazzjoni li tirrigwarda l-ksur tal-provediment mghoti mill-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali fil-5 ta' Mejju 2010 ai termini tal-artikolu 7 tal-Kap. 446 tal-Ligijiet ta' Malta, il-prosekuzzjoni pprezentat vera kopja tas-sentenza mghotija mill-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali hekk kif preseduta mill-(dak iz-zmien) Magistrat Jacqueline Padovani Grima. Madnakollu l-prosekuzzjoni ma ressqitx prova li dik is-sentenza kien wahda res judicata. Ghaldaqstant din il-Qorti ser tillibera lil Cachia anke mit-tielet imputazzjoni.

B'referenza ghall-ahhar imputazzjoni li tirrigwarda ir-recidiva, jinghad li l-unika prova li tressqet mill-prosekuzzjoni hija s-sentenza hawn fuq msemmija mghotija mill-Qorti tal-Magistrati fil-5 ta' Mejju 2010. Konsegwentament, l-imputat ser jigi illiberat anke minn din l-imputazzjoni tenut kont li hekk kif gia nghad ma tressqet l-ebda prova li dik is-sentenza hija res judicata u anke galadarba l-Ordni ta' Probation ma hijiex meqjusa bhala kundanna ai fini tal-artikolu 50 tal-Kodici kriminali.

D. Kunsiderazzjonijiet dwar Piena

In kwantu ghal piena li ghandha tigi erogata din il-Qorti ser tqis ic-cirkostanzi u n-natura tar-reat li tieghu ser jinsab hati. L-imputat instab li kien fil-pussess tad-droga perikoluza gewwa l-Facilita' Korrettiva ta' Kordin u cioe' post li huwa intiz ghar-riabilitazzjoni ta' persuni. Ghaldaqstant din il-Qorti ser tkun qed tapplika d-disposizzjoni tal-artikolu 33A tal-Kodici Kriminali. Ser tqis ukoll l-ammont ta' droga kien dak ta' 2.38 grammi u li l-istess instabet fil-pussess ta' Cachia f' cirkostanzi li juru li kienet intiza ghall-uzu esklussiv tieghu u mhux sabiex tigi mghoddija lil terzi. Qieset ukoll li l-fatti speci tar-reat odjern jirrisalu lura ghas-sena 2010.

Finalment din il-Qorti ser tqies ukoll il-fedina penali tal-imputat minn fejn jirrizulta li l-qua imputat ghandu lista shiha ta' kundanni fuq perjodu twil ta' zmien, bl-ewwel kundanna tkun dik fis-sena 1996 u bl-ahhar wahda fis-sena 2010.

Decide:

Ghal dawn il-mottivi din il-Qorti wara li rat l-artikoli 22(1)(a) u 22(2)(b)(ii) tal-Kap. 101 tal-Liġijiet ta' Malta, ir-Regolament 9 tal-Leġislazzjoni Sussidjarja 101.02 u l-Artikolu 33A tal-Kodiċi Kriminali, **qed issib lill-imputat Saviour Cachia mhux hati tat-tieni, t-tielet, u r-raba' imputazzjoni migjuba fil-konfront tieghu filwaqt li qed isibu hati tal-ewwel imputazzjoni dedotta fil-konfront tieghu u konsegwentament qed tikkundanah ghall-piena ta' hames (5) xhur prigunerija effettiva.**

A tenur tal-artikolu 533 tal-Kodiċi Kriminali dina l-Qorti qeghda tordna lill-hati Saviour Cachia sabiex ihallas l-ispejjez fl-ammont ta' Eur. 433.56¹⁰ konnessi mal-hatra ta' l-esperti fil-proceduri odjerni fi zmien sena millum.

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

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

Christine Farrugia

Deputat Registratur

¹⁰ Eur. 47.75 (relazzjoni tal-Kuntistabbli Brincat) + Eur. 385.81 (relazzjoni ta' Mario Mifsud)