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

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

Kaz Nru: 190/2012

Il-Pulizija

(Spettur Spiridione Zammit

Spettur Jesmond J. Borg)

kontra

CLAYTON CREMONA

(ID No. 442185(M))

Illum, it-18 ta' Ottubru 2022

Il-Qorti:

Rat l-imputazzjonijiet migjuba fil-konfront ta' **Clayton Cremona**, ta' hamsa u ghoxrin (25) sena bin Francis Xavier u Theresa nee Attard, imwieled Pieta nhar is-26 ta' Awwissu 1985, presentement residenti fil-Facilita' Korrettiva ta' Kordin u detentur tal-karta ta' l-identita bin-numru 442185M akkuzat talli f'dawn il-Gzejjer, nhar it-22 ta' Lulju 2011, gewwa Rahal Gdid, kif ukoll fil-granet ta' qabel din id-data, f'hinijiet differenti minn gewwa l-Facilita' Korrettiva ta' Kordin;

1. Assocja ruhu ma' xi persuna jew persuni ohra f'dawn il-Gzejjer jew barra minn dawn il-Gzejjer sabiex ibigh jew jittraffika f'dawn il-Gzejjer medicina (herojina) bi ksur tad-disposizzjonijiet ta' l-Ordinanza dwar il-Medicini Perikoluzi, Kap 101 tal-Ligijiet ta' Malta jew ippromwova, ikkostitwixxa, organizza jew iffinalizza tali assocjazzjoni.
2. Forna jew ipprokura jew offra li jforni jew li jipprokura d-droga eroina, specifikata fl-ewwel skeda ta' l-ordinanza dwar il-medicini perikoluzi Kap. 101 tal-Ligijiet ta' Malta lill-persuna jew persuni jew ghall uzu ta' persuna/i minghajr ma kellu licenzja mill-President ta' Malta minghajr ma kien awtorizzat bir-regoli tal-1939 ghall-kontroll intern tad-drogi perikoluzi (G.N. 292/1939) jew minn xi awtorita' moghtija mill-President ta' Malta li jforni d-droga u minghajr ma kien fil-pussess ta' awtorizazzjoni ghall-importazzjoni jew ghall-esportazzjoni mahrug mit-Tabib Principali tal-Gvern skont id-disposizzjonijiet tas-sitt taqsima ta' l-ordinanza imsemmija u minghajr ma kellu licenzja jew xorta ohra awtorizzat li jimmanifattura jew iforni d-droga imsemmija u mighajr ma kellu licenzja li jipprokura l-istess droga u dan bi ksur tar-regolament 4 tar-regolamenti ta' l-1939 ghall-kontroll intern tad-drogi perikoluzi (G.N. 292/1939) kif sussegwentement emendati u bi ksur ta' l-Ordinanza dwar il-Medicini Perikoluzi Kap. 101 tal-Ligijiet ta' Malta.
3. Kellu fil-pussess tieghu d-droga eroina specifikata fl-ewwel skeda ta' l-Ordinanza dwar il-medicini perikoluzi Kap. 101 tal-Ligijiet ta' Malta meta ma kienx fil-pussess ta' awtorizazzjoni ghall-importazzjoni jew ghall-esportazzjoni mahrug mt-Tabib Principali tal-Gvern skont id-disposizzjonijiet tar-4 u s-6 Taqsima ta' l-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 imsemmija fil-pussess tieghu u naqas li jipprova li d-droga imsemmija giet fornuta lilu ghall-uzu tieghu skont ir-ricetta kif provdut fir-regolamenti imsemmija u dan bi ksur tar-regoli ta' l-1939 dwar il-kontroll intern tad-drogi perikoluzi (G.N. 292/1939) kif sussegwentement emmendati u bi ksur ta' l-Ordinanza dwar il-Medicini Perikoluzi Kap. 101 tal-Ligijiet ta' Malta.
4. Bhala persuna li mhux impjegata fil-habs Facilita' Korrettiva ta' Kordin, minghajr l-awtorita' legittima, dahhal jew ipprova idahhal f'xi parti tal-konfini tal-Habs xi oggett ikun li jkun, li huma pprojbiti skont xi regolamenti maghmila skont dan l-Att jew jgorr jew jipprova jgorr xi oggett bhal dawk barra minn xi habs u dan bi ksur ta' artikolu 7(1) tal-kap. 260 tal-Ligijiet ta' Malta.
5. Sar recidiv b'diversi sentenzi moghtija mill-Qrati ta' Malta, liema sentenzi saru definittivi u ma jistghux jigu mibdula.
6. Ikkommetta reat punibbli bi prigunerija waqt perjodu operattiv ta' sentenza sospiza ta' prigunerija, liema sentenza inghatat mill-Magistrat Dr. S.

Demicoli LL.D. nhar it-23 ta' Gunju 2010, liema sentenza saret definittiva u ma tistax tigi mibdula.

7. Ikkommetta reat punibbli bi prigunerija waqt perjodu operattiv ta' sentenza sospiza ta' prigunerija liema sentenza inghatat mill-Magistrat Dr. A. Micallef Trigona LL.D. nhar it-22 ta' Ottubru 2010, liema sentenza saret definittiva u ma tistax tigi mibdula.

Il-Qorti giet mitluba sabiex barra milli tapplika l-piena skont il-Ligi, tordna lill-imputat ihallas l-ispejjez li ghandhom x'jaqsmu mal-hatra ta' l-esperti skont 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-Ligjiet ta' Malta), li permezz tal-istess Ordni, ordna li l-imputat titressaq quddiem din il-Qorti biex iwiegeb ghall-imputazzjonijiet migjuba kontra tieghu[1] kif ukoll il-kunsens tal-istess Avukat Generali sabiex il-kaz odjern jigi trattat bi procedura sommarja u dan ai termini tal-artikolu 370 tal-Kodici Kriminali[2];

Rat id-Digriet tal-Assenjazzjonijiet ta' Kawzi u Doveri datat it-28 ta' Lulju 2021[3];

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 preseduta[4];

Semghet is-sottomissjonijiet tal-partijiet;

Ikkunsidrat:

A. <u>Fatti tal-kaz</u>

Illi mill-provi prodotti jirrizulta inkontestat u ampjament ippruvat li fit-22 ta' Lulju 2011, waqt li Melanie Agius marret il-habs sabiex izzur lil huha, Christopher Philip Agius, hija giet mwaqqfa mill-ufficjali tal-habs fejn saritilha tfittxija. Minn din it-tfittxija li ghamlu l-ufficcjali tal-Facilita Korrettiva ta' Kordin fl- ikel (tumpana) li kienet hadet maghha u li kien intiz unikament ghall-istess Christopher Agius instabet is-sustanza suspettata droga. Il-pulizija gew

[1] Fol. 3 tal-atti processwali
[2] Fol. 89 tal-atti processwali
[3] Fol. 391 tal-atti processwali
[4] Fol. 395 tal-atti processwali

infurmati b'dan li min-naha taghhom infurmaw lill-Magistrat Inkwerenti li ordna li ssir inkjesta. **L-ispizjar Mario Mifsud** li kien mahtur bhala espert f'din l-inkjesta kkonkluda li l-imsemmija sustanza kienet id-droga herojina fl-ammont ta' 0.92 grammi b'purita ta' circa 28.4%[5]. Il-mobile ta' Melanie Agius gie elevat u l-kontenut tal-istess gie downloaded mill-espert mahtur ghal dan l-iskop **Dr. Martin Bajada**[6].

Melanie Agius xehdet quddiem din il-Qorti fejn hija spjegat li dakinhar tal-vista li hija kellha pjanata ma huha fil-habs, hija kienet iltaqghet ma ragel iehor li hija ma tafux li kien ghaddielha l-ikel ghal huha Christopher Philip Agius. Hija spjegat li ma kinitx konsapevoli li fl-ikel setgha kien hemm sustanza illegali. Hija spjegat li kien huha, permezz ta' telefonata mill-habs, li kien talabha sabiex tiltaqa ma dan ir-ragel gewwa r-Rahal il-Gdid bil-ghan li jghaddielha xi ikel li sussegwentament hija kellha tiehu lilu.

Xehed ukoll viva voce fil-proceduri odjerni **Carmel Zerafa**, missier adottattiv ta' Christopher Philip Agius u dana anke wara li rrillaxxa stqarrija guramentata quddiem dak iz-zmien Magistrat (illum Onor. Imhallef) Francesco Depasquale. Zerafa fix-xhieda tieghu spjega b'mod konsistenti ferm li fil-perjodu mertu tal-kaz odjern, Christopher Agius kien jinsab residenti fil-Facilita' Korrettiva ta' Kordin. Huwa spjega li f'dak il-perjodu Agius kien jabbuza mis-sustanza illecita. Jispjega li meta dahal il-habs, kien hemm istanzi li Agius kien jitolbu l-flus. Jghid li l-flus huwa kien jehodhomlu gol-Facilita' Korrettiva ta' Kordin. Jghid ukoll li kien hemm istanzi fejn Agius kien icempillu u jitolbu jghaddi xi flus lil terzi u dana l-ghaliex kien jibza minn xi ritaljazzjoni galadarba kellu jhallashom xi flus u kien iltaqa maghhom gewwa l-habs. Zerafa, b'referenza partikolari ghal kaz odjern, xehed li huwa kien gie kkuntatjat minn Agius minn gewwa l-habs fejn talbu sabiex jghaddi l-flus lil persuna li kienet ha cempillu. Jghid li ftit wara persuna cemplitlu, ltaqa mieghu u tah il-flus. Mir-ritratti li huwa gie muri mill-pulizija waqt l-investigazzjonijiet huwa identifika lil Saviour Attard bhal dak il-persuna li kien ikkuntatjah bil-ghan li jigbor il-flus. Huwa jikkonferma bil-gurament li huwa ma kienx konsapevoli li dawk il-flus kien hlas ghad-droga.

Christopher Philip Agius ha l-pedana tax-xhieda fil-proceduri odjerni darbtejn. Huwa kkonferma li fiz-zmien tal-kaz odjern huwa kellu biss l-eta' ta' dsatax-il sena u kien residenti fil-Facilita' Korrettiva ta' Kordin f'cella numru 3 f'Divizzjoni 13. Jghid ukoll li dak iz-zmien huwa kellu problema kbira tad-droga u kien talab lill-ohtu tiltaqa' ma persuna sabiex tghaddielha xi ikel (originarjament l-ikel ippjanat kien jelly) intiz ghalih. Huwa jispjega li dan l-arrangament huwa kien

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[5] Fol. 54 tal-atti processwali.
[6] Issir referenza ghal Dok. MB a fol. 119 et seq tal-atti processwali odjerni.

ghamlu ma xi persuna/persuni li huwa kien ltaqa maghhom fl-imsemmija Divizzjoni gewwa l-habs. Madanakollu minkejja li gie mistoqsi diversi drabi huwa naqas milli jiddentifika min kien jew kienu dawn il-persuna jew persuni. Jispjega ukoll li ohtu Melanie Agius ma kinitx konsapevoli li fit-tumpana kien hemm id-droga. Jispjega ukoll li kien propju hu li kien jitlob lil missieru u cioe' lil Carmel Zerafa sabiex jghaddielu jew ihallas xi flus madanakollu jispjega li huwa qatt ma kien jghid lil Zerafa li l-flus kienu intizi ghal droga u adirittura jispjega li meta talbu jghaddi xi flus lil terzi huwa dejjem kien jghidlu li dawk il-flejjes kien hlas ghal dejn li huwa kien qed jigi mhedded sabiex ihallas.

Il-prosekuzzjoni ressqet ukoll bhala prova l-istqarrija guramentata rrillaxata minn Dolores Azzopardi quddiem il-Magistrat Inkwerenti, dak iz-zmien il-Magistrat Dr. Francesco Depasquale. Dolores Azzopardi baqghet ma tressqet qatt sabiex tixhed viva voce fil-proceduri odjerni. Fl-istqarrija guramentata taghha, Azzopardi tispjega li hija tigi oht, Saviour Attard - in-nannu tal-imputat. Hija tghid li Saviour Attard ma jghix maghha madonnakollu jmur ghandha b'mod frekwenti. Tghid ukoll li l-imputat icempel hafna lil Saviour Attard u dan rigward il-bzonnijiet tieghu. Bil-gurament tikkonferma li xi gimghatejn qabel ma rrillaxat l-imsemmija stqarrija Attard kien ghandha u cempillu l-imputat u talab lill-istess Attard imur isiblu zewg persuni filwaqt li tah in-numru cellulari taghhom sabiex ikun jistgha jsir kuntatt. Sussegwentament Azzopardi kienet akkumpanjat lil Attard ir-Rahal il-Gdid. X'hin wasslu hemm huwa mar wahdu jiltaqa ma xi hadd u wara Attard kien qal lil Azzopardi li dan il-persuna kien tah Eur. 50 ghad-droga. Minn hemm maru l-Marsa fejn wara li mar x'imkien bil-pass, Attard kien irritorna fil-karozza fejn kienet Azzopardi u gab mieghu Eur. 50 sabiex ikun jistgha jibghat id-droga lil Clayton Cremona. Azzopardi spjegat li l-imputat kellu diversi hbieb fil-Facilita' Korrettiva ta' Kordin u huwa kien jaghmel l-arrangamenti ma Attard bil-ghan li jdahhlilhom id-droga. Tispjega li l-kuntatt dejjem kien ikun bejn l-imputat u Attard u dan dejjem skond dak li kien jghidilha Attard li kien jiftah qalbu maghha. L-ghada li kien gabar il-flus, Attard kien reggha mar ghand Azzopardi u saqsieha minn fejn setgha jixtri tumpana bil-ghan li jitfa d-droga fiha, wara kellu jghaddieha lil wahda mara bil-ghan li din tkun tista' ddahhalha fil-habs. Attard kien spjega ukoll lil Azzopardi li d-droga li kien ser jitfa fit-tumpana kienet ser tintuza minn tnejn jew tlieta min-nies.

Xehdu ukoll **l-ufficcjali prosekuturi, l-ispetturi Spiridione Zammit u Jesmond J. Borg** dwar l-investigazzjoni metikoluza taghhom. Huma spjegaw li l-kaz odjern kien ibbazzat fuq it-testimonjanza tax-xhieda pajzana kif ukoll it-telefonati li saru minn gewwa l-Facilita' Korrettiva ta' Kordin (minn Christopher Agius u l-qua imputat) lil Attard kif ukoll lil Zerafa u Agius.

In difesa, l-**imputat, Clayton Cremona**, volontarjament ghazel li jiehu l-pedana tax-xhieda fejn spjega li huwa ma kellu l-ebda konnessjoni mal-kaz odjern u ma jafx kif spiccat akkuzat bl-imputazzjonijiet odjerni.

B. Kunsiderazzjonijiet Preliminari

B.1 Stqarrija tal-Imputat

Illi fl-istadju investigattiv, Clayton Cremona, irrillaxxa stqarrija lill-pulizija dwar il-fatti mertu tal-kaz odjern. Din l-istqarrija ttiehdet fl-20 t'Awwissu tas-sena 2011[7] u dana wara li l-imputat rrifjuta d-dritt ghall-assistenza legali qabel l-istqarrija u ta' dan iffirma dikjarazzjoni fil-prezenza ta' zewg xhieda[8].

Il-ligi vigenti f' Awwissu 2011 kienet tipprovdi li l-imputat jinghata d-dritt ghall-assistenza legali limitament ghal siegha qabel l-interrogatorju biss. Dan id-dritt jirrizulta li gie offrut lill-imputat odjern izda gie rrifjutat (hekk kif l-imputat kellu kull dritt li jaghmel). Madanakollu jrid jinghad li d-dritt ristrett ghall-assistenza legali qabel it-tehid tal-istqarrija ma jistgha qatt jigi ekwiparat mad-dritt ghall-assistenza legali waqt l-istqarrija. Dan l-ahhar dritt ma giex mghoti lil Cremona u dan l-ghaliex dan it-tip ta' dritt gie ntrodott fil-Kodici Kriminali permezz ta' l-Att LI fit-28 ta' Novembru 2016.

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-interogazzjoni. Fil-fatt, hekk kif inghad iktar 'il fuq, mid-dokumenti pprezentati jirrizulta li l-qua imputat gie offrut id-dritt ghall-assistenza legali qabel (mhux waqt) 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.

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*

[7] Dokument immarkat bhala JJB1 (fol. 197 tal-atti processwali)
[8] Dokument immarkat bhala JJB (fol. 196 tal-atti processwali)

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[9] *(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;

[9] Emfazi ta' dina l-Qorti

“(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”.

Permezz ta’ diversi sentenzi ricenti mghotija mill-Qrati lokali, saret referenza ghal din is-sentenza u sabiex jigi assigurat li d-dritt ghal smigh xieraq ma jigiex mittifes, il-Qrati skartaw l-istqarrija rrillaxata f’cirkostanzi bhal dawk odjerni meta gew sabiex jikkunsidraw ir-responsabilita’ tal-imputat li jkun.

Fil-kaz in dezamina, mill-qari tal-istqarrija hawn fuq imsemmija jirrizulta li l-imputat inkrimina lilu nnifsu rigward uhud mill-imputazzjonijiet migjuba fil-konfront tieghu. Din id-dikjarazzjoni li giet mghotija fi stadju ferm bikri tal-investigazzjonijiet tal-pulizija u ghaldaqstant tal-proceduri odjerni tista’

tippregudika d-difiza tal-imputat (jekk tittiehed in konsiderazzjoni). 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.

B.2 L-istqarrija Guramentata ta' Dolores Azzopardi

Illi hekk kif inghad iktar qabel f'din is-sentenza fl-atti processwali giet ipprezentata stqarrija guramentata ta' Dolores Azzopardi ai termini tal-artikolu 24A(12) u (13) tal-Kap. 101 tal-Ligijiet ta' Malta. Fl-imsemmija stqarrija guramentata hija xehdet principalment dwar dak li kien jghidilha huha Saviour Attard rigward dak li kien iqabbdu jaghmel il-qua imputat kif ukoll dwar diskussjonijiet li hija semghet meta l-imputat u Saviour Attard tkellmu fuq l-apparat cellulari fil-prezenza taghha. Minn ezami tal-atti processwali jirrizulta li l-prosekuzzjoni ma ressqitx lil Dolores sabiex tixhed viva voce fil-prezenza tal-imputat u isegwi ghalhekk li hija ma kinitx soggetta ghall-kontro-ezami tal-istess imputat.

Stabbiliti dawn il-fatti, dina l-Qorti trid tevalwa l-piz tal-prova li ghandha tinghata lix-xhieda guramentata t'Azzopardi mghotija ai termini tal-artikolu 24A(12) u (13) tal-Kap. 101 tal-Ligijiet ta' Malta. F'dan ir-rigward issir referenza ghas-sentenza tal-Qorti tal-Appell (Sede Inferjuri) mghotija fis-26 ta' Mejju 2003 fl-ismijiet **il-Pulizija vs. Pierre Gravina**, fejn gie ddikjarat:

> *"Issa, huwa principju generali li "…ix-xhieda ghandhom dejjem jigu ezaminati fil-Qorti u viva voce" (Artikolu 646(1), Kap. 9). Ghal din ir-regola, pero`, hemm certi eccezzjonijiet li jipprovdi ghalihom l-istess Artikolu 646 fissubartikoli li jigu wara s-subartikolu (1). Hemm ukoll l-eccezzjoni tad-deposizzjoni mehuda in segwitu ghall-hrug ta' ittri rogatorja li bil-procedura traccjata fl-Artikolu 399 tal-Kodici Kriminali, procedura li giet ritenuta applikabbli anke ghal kawzi sommarji (ara* ***Il-Pulizija v. Angelo Grima*** *App. Krim. 18 ta' Ottubru, 1952), u li fil-prattika giet ukoll applikata mill-Qorti Kriminali f'xi kazijiet wara l-hrug tal-att ta' akkuza. U hemm l-eccezzjoni ta' meta xhud jinstema' f'daru minhabba mard jew xjuhija (Art. 647, Kap. 9). Jigi osservat li anke fil-kaz ta' xiehda permezz ta' rogatorji u ta' xhieda li jinstemghu f'darhom, l-imputat jew akkuzat ghandu dejjem il-jedd li jkun presenti waqt is-smigh tax-xhud jew li jahtar rappresentant tieghu ghal waqt tali smigh – Art. 647(3) u 399(2). L-ewwel sentenza tal-Artikolu 30A tal-Kap. 101 taghmilha cara li dak l-Artikolu qed jipprovdi ukoll eccezzjoni, pero` mhux eccezzjoni ghar-regola kontenuta fl-Artikolu 646(1) tal-*

<u>Kodici Kriminali izda ghar-regola kontenuta fl-Artikolu 661 ta' l-istess Kodici.</u> Minn dan isegwi, li anke meta l-prosekuzzjoni tkun trid taghmel uzu minn dikjarazzjoni guramentata mehuda skond l-imsemmi Artikolu 30A, ir-regola ghandha tkun li minn ikun ghamel dik l-istqarrija ghandu jingieb fil-qorti biex l-imputat jew akkuzat ikun jista' jikkontroezaminah dawrha. S'intendi, dan ma jfissirx li jekk ix-xhud, meta jigi ezaminat jew kontro-ezaminat, ibiddel jew jirritratta minn dak li jkun qal fid-dikjarazzjoni guramentata, allura dik id-dikjarazzjoni (jew il-parti mibdula jew ritrattata) ma tkunx aktar tista' tittiehed bhala prova kontra l-akkuzat; il-gudikant jista' xorta wahda, wara li jkun sema' lix-xhud, jasal ghall-konkluzzjoni li il-verita` hija dik kontenuta fl-istqarrija guramenetata u mhux dak li jkun iddepona fil-qorti x-xhud. Ifisser biss li, bhala regola, min ikun ghamel tali stqarrija guramentata ghandu jingieb il-qorti ghall-fini ta' kontroll da parti tal-akkuzat jew imputat. F'dan is-sens ukoll esprimiet ruhha l-Qorti Ewropea fil-kawza ***Kostovski v. Netherlands*** *(20 ta' Novembru, 1989) meta qalet li d-dritt ta' akkuzat li jikkonfronta xhud migjub kontra tieghu* ***does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs (3)(d) and (1) of Article 6, provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage in the proceedings*** *((1990) 12 E.H.R.R.434, para. 41)."*

L-istess principju gie riavvizat fis-sentenza tal-Qorti Kriminali tat-8 ta' April 2010, fl-ismijiet Ir-**<u>Repubblika ta' Malta vs Matthew-John Migneco</u>**:

"S'intendi, dana l-Artikolu 30A tal-Kap. 101 irid dejjem jinqara fid-dawl tad-disposizzjonijiet ġenerali tal-Kodiċi Kriminali (eċċetwat l-Artikolu 661 tal-istess Kodici, li għalih l-Artikolu 30A jagħmel deroga espressa). Issa, l-Artikolu 549(4) (u ma jistax ikun hemm dubju li l-intervent ta' Maġistrat taħt is-subartikoli (12) u (13) tal-Art. 24A tal-Kap. 101 hija forma ta' inkjesta dwar l-in genere b'modalitajiet kemm xejn differenti meħtieġa għall-finijiet tal-istess Kap. 101) u 646(2) tal-Kap. 9 huma ċari fil-portata tagħhom: id-deposizzjoni regolarment mogħtija fl-inkjesta dwar l-in genere ... tista' tingieb bhala prova, u mhux sempliċiment għall-finijiet ta' kontroll, <u>basta, pero`, li x-xhud jinġieb ukoll fil-qorti biex jiġi eżaminat viva voce</u> ... ħlief jekk ix-xhud ikun mejjet, ikun barra minn

> *Malta jew ma jkunx jista' jinstab… (ara l-proviso tas-subartikolu (2) tal-imsemmi Artikolu 646).”* (sottolinear ta' din il-Qorti).

Fis-sentenza tal-Qorti Kriminali tas-6 ta' Lulju 2016, fl-ismijiet **<u>Ir-Repubblika ta' Malta vs Charles Paul Muscat</u>**, b'referenza għall-Artikolu 30A tal-Kap. 101 u l-Artikolu 661 tal-Kap. 9 u wara li gew ikkonfermati l-principji stabbiliti permezz tas-sentenzi hawn fuq imsemmija, ingħad hekk:

> *“Izda jekk f'dak l-istadju* (guri) *huma jiddikjaraw li ser jaghzlu li ma jixhdux biex ma jinkrimnawx irwiehom fil-process penali li jkun ghadu pendenti fil-konfront taghhom, imbaghad f'dak l-istadju il-gurati ghandhom jigu ggwidati meta jigu biex jiznu il-valur probatorju tal-istqarrijiet guramentati u dan ghaliex “The right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed to expediency.”*

Dan ghaliex kif gie deciz fil-kaz **Luca v Italy** [(2003) 36 EHRR 46], inghad mill-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem:-

> *"As the court has stated on a number of occasions . . . it may prove necessary in certain circumstances to refer to depositions made during the investigative stage (in particular where the witness refuses to repeat his deposition in public owing to fears for his safety, a not infrequent occurrence in trials concerning Mafia-type organisations). If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6.1 and 3(d). The corollary of that, however, is that where the conviction is both solely or to a decisive degree based on depositions that had been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6."*

Dan ifisser allura illi hemm erba' kriterji li jridu jigu ikkunsidrati:

1. *Ix-xhieda bhala regola ghandha tinghata viva voce fil-Qorti fejn l-akkuzat ikollu kull opportunita' li jikkontrolla dak li jghid ix-xhud.*
2. *Il-fatt illi x-xhieda ma jixhdux madanakollu ma ghandux iwassal ghall-inammissibilita` tal-istqarrija minnhom rilaxxata fl-istadju tal-investigazzjonijiet jew fil-pre-trial stage u dan ghaliex irid jittiehed in konsiderazzjoni l-fatturi kollha tal-kaz, bhal perezempju fil-kaz meta xhud ma jistax jingieb jixhed ghax ikun miet.*
3. *L-affidabbilita ta' dik l-istqarrija u tax-xhud li jkun irrilaxxjaha.*
4. *Finalment jekk dik ix-xhieda guramentata wahedha hijiex l-unika prova inkriminanti u deciziva fil-konfront tal-persuna akkuzata.”*

Stabbiliti dawn il-principji, jinghad ukoll li fil-kaz in dezamina ma gewx osservati d-dittami tal-artikolu 646(1) tal-Kodici Kriminali li jistipula li:

> *Bla ħsara tad-dispożizzjonijiet li ġejjin ta' dan l-artikolu, ix-xhieda għandhom dejjem jiġu eżaminati fil-qorti u vivavoce.*

L-unika eccezzjonijiet ghal din ir-regola huma s-segwenti (a) meta jitqiesu ċ-ċirkostanzi tal-każ, huwa evidenti lill-Qorti li xhieda viva voce tista' tikkawża ħsara psikoloġika lix-xhud u (b) jekk ix-xhud ikun mejjet, (c) ikun barra minn Malta jew (d) ma jkunx jista' jinsab.

Mill-atti processwali ma jirrizultax li dawn ir-ragunijiet huma applikabbli ghax-xhud Dolores Azzopardi. Mill-atti processwali jirrizulta ukoll li Dolores Azzopardi ma tressqitx il-Qori bil-ghan li taffaccja akkuzi relatati mal-kaz odjern. Konsegwentament ma kien hemm l-ebda raguni l-ghaliex Azzopardi ma haditx il-pedana tax-xhieda viva voce fil-prezenza tal-imputat. Mill-istqarrija guramentata jirrizula ukoll li Azzopardi xehdet limitament dwar dak li kien jghidilha Saviour Attard dwar l-imputat kif ukoll dwar il-konversazzjonijiet li kien hemm bejn Attard u l-imputat fuq il-mobile li hija semghet ghax saru fil-prezenza taghha. Ovvjament hafna drabi hija semghet biss dak li kien qed jghid Attard u mhux l-imputat. Jirrizulta ukoll li Azzopardi hija oht Attard li min-naha tieghu huwa n-nannu tal-imputat. Ghaldaqstant huwa impellenti li din il-Qorti tizen tajjeb l-imsemmija xhieda qabel ma taghzel li tistrieh fuqha ai fini ta' sejbien ta' htija jew altrimenti. Konsegwentament f'dawn ic-cirkostanzi din il-Qorti ma hijiex tal-fehma li jkun *safe and satisfactory* li hija tistrieh fuq ix-xhieda guramentata ta' Azzopardi biss (u dan fid-dawl tal-kunsiderazzjonijiet l-ohra li ser issiru f'din is-sentenza) meta l-imsemmija Azzopardi ma xehditx *viva voce* fil-prezenza tal-imputat hekk kif rikjest mil-ligi b'tali mod li l-istess imputat ikun jista' jikkontrolla u jaghmel il-kontro-ezami tal-istess xhieda u per konsegwenza ser tiskarta l-istess ai fini ta' kunsiderazzjonijiet dwar ir-reita o meno tal-imputat fir-rigward tal-imputazzjonijiet odjerni.

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

Il-Prosekuzzjoni ressqu bhala xhieda lil Melanie Agius li kienet il-persuna li nqabbdet fizikament iddahhal id-droga eroina fil-Facilita' Korrettiva ta' Kordin. Agius spjegat kif hija nghatat l-ikel li kien jikkontjeni d-droga kif ukoll min kien ta' l-istruzzjonijiet sabiex tiehu l-ikel minghand dan il-persuna – senjatament huha Cristopher Agius. Tressaq ukoll sabiex jixhed missier Christopher Agius li spjega kif u ghaliex huwa kien ghada l-flus lil Attard. F'dan ir-rigward huwa jghid li ma kienx konsapevoli Attard min kien u l-istruzzjonijiet biex jghaddielu l-flus kien hadhom minghand Christopher Agius. Christopher Agius ha l-pedana tax-xhieda fil-proceduri odjerni wara li l-proceduri fil-konfront tieghu ghall-fatti hawn fuq imsemmija saru res judicata. Huwa xehed dwar kif id-droga kienet intiza ghalih. Jixhed ukoll li huwa kien ghamel l-arrangament sabiex idahhal id-

droga l-habs ma prigunier/prigunieri ohra li dak iz-zmien kienu/u detenut/i mieghu f'divizjoni 13 gewwa l-Facilita' Korrettiva ta' Kordin. Madanakollu huwa fl-ebda hin ma jghid li dawn il-persuna/i kienet jew kienu jinkludu lill-imputat odjern. Konsegwentament ix-xhieda ta' Zerafa u Christopher u Melanie Agius ma titfa l-ebda dawl dwar ir-responsabilita' kriminali li l-imputat jistgha jkollu in konnessjoni mal-fatti odjerni.

Minn ezami tal-atti processwali jirrizulta ukoll li Saviour Attard ma tressaqx bhala xhud. Dan huwa persuna li allegatament kien f'kuntatt dirett mal-imputat u kien sahansitra tressaq il-Qorti sabiex iwiegeb ghall-imputazzjonijiet relatati mal-istess fatti. Huwa kien instab hati u gie kkundanat ghal sena u nofs prigunerija effettiva. Mandanakollu l-prosekuzzjoni ghazlet li lil dan ix-xhud ma tressqux bhal xhud f'din il-kawza.

Fl-ahhar net, mix-xhieda tal-ufficjali investigattivi, jirrizulta car li prova ohra krucjali kienu t-telefonati li saru mill-Facilita' Korrettiva ta' Kordin bejn l-imputat u Attard kif ukoll bejn Cristopher Agius u Melanie Agius u Carmel Zerafa. L-ispettur Borg xehed fid-dettal dwar dawn it-telefonati u adirittura prezenta t-transcript mhejjija minnu tal-istess telefonati bil-ghan li fi kliemu jiffaccilita x-xoghol tal-Qorti. Mix-xhieda tieghu jirrizulta car ukoll li kellhom jigi mharrka rapprezentanti tal-Facilita' Korrettiva ta' Kordin bil-ghan li jesebixxu l-imsemmija recordings. Madanakollu din il-prova li tidher li kienet wahda krucjali baqghet ma tressqitx mill-prosekuzzjoni.

Din il-Qorti ma tistax tistrieh unikament fuq it-transcripts ipprezentati mill-ufficjal prosekutur sabiex tiddetermina jekk l-imputazzjonijiet migjuba fil-konfront tal-imputat jissusistux jew le. Dawn definittivament ma humiex l-ahjar prova li setghet tressaq il-prosekuzzjoni. Dan il-prosekuzzjoni kienet tafu u fil-fatt mix-xhieda tal-ispettur Borg jirrizuta car li dak iz-zmien il-prosekuzzjoni ma esebitx ir-recordings tat-telefonati hi izda uriet l-intendiment car taghha li kienet ser tharrek rapprezentant tal-Facilita' Korrettiva ta' Kordin bil-ghan li jixhed u jesebixxi l-istess.

Fin-nuqqas ta' din il-prova, fin-nuqqas tax-xhieda ta' Saviour Attard, u fin-nuqqas tal-identifikazzjoni tal-imputat minn Christopher Agius bhala dak il-persuna li ghamel l-arrangament necessarji sabiex Agius ikun jistgha jdahhal d-droga eroina fil-Facilita' Korrettiva ta' Kordin kif ukoll fin-nuqqas ta' prova ohra li torbot lil qua imputat mal-imputazzjonijiet migjuba fil-konfront tieghu din il-Qorti ser tillibera lill-imputat mill-ewwel, it-tieni u r-raba' imputazzjoni migjuba fil-konfront tieghu.

Ghal dak li jirrigwarda t-tielet imputazzjoni, jinghad li din tistrieh unikament fuq l-istqarrija rrillaxxata mill-qua imputat. Ghaldaqstant fid-dawl tal-

kunsiderazzjonijiet hawn fuq maghmula fir-rigward tal-istess stqarrija din il-Qorti ser tillibera lill-qua imputat minn din l-imputazzjoni ukoll.

B'referenza ghall-hames, is-sitt u seba' imputazzjonijiet jinghad li sabiex tkun tista' tissussti kwalunkwe htija f'dawn l-imputazzjonijiet huwa fl-ewwel lok essenzjali li tinsab htija fl-imputazzjoni l-ohra (fl-imputazzjonijiet innumerati 1 sa 4). Konsegwentament fid-dawl tal-kunsiderazzjonijiet maghmula hawn izjed 'il fuq, din il-Qorti ser tillibera lill-imputat anke minn dawn l-imputazzjonijiet.

Decide

Ghal dawn il-mottivi din il-Qorti qed issib lill-qua imputat Clayton Cremona mhux hati tal-imputazzjonijiet dedotti fil-konfront tieghu u konsegwentament qed tilliberah mill-istess.

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

Christine Farrugia

Deputat Registratur