Qorti tal-Appell Kriminali

Onor. Imħallef Dr. Edwina Grima LL.D.

Appell Nru: 363/2023

Il-Pulizija

Vs

Joan Pascal Damien Andre Belling

Illum, 29 ta' Jannar 2025

Il-Qorti,

Rat l-imputazzjonijiet dedotti kontra l-appellant, Joan Pascal Damien Andre Belling, detentur tal-passaport Franċiż bin-numru 08RF02445, akkużat quddiem il-Qorti tal-Maġistrati (Malta) talli f'dawn il-Gżejjer fil-15 ta' Awwissu 2017:

1. Bi vjolenza kkometta stupru fuq il-persuna ta' Pamela Vera;
2. Ikkometta attentat vjolenti għall-pudur fuq il-persuna ta' Pamela Vera;
3. Bla ordni skond il-liġi tal-awtorita' kompetenti, u barra mill-kazijiet li fihom il-liġi tagħti s-setgħa lill-privat li jarresta lill-ħati, arresta, żamm jew issekwestra lil Pamela Vera kontra l-volonta' tagħha.

Rat is-sentenza tal-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali tat-12 t' Ottubru 2023, fejn il-Qorti, filwaqt li sabet u ddikjarat lill-imputat mhux ħati tat-tielet imputazzjoni (dik imsejsa fuq l-Artikolu 86 tal-Kap. 9) u minnha lliberatu skond il-liġi, sabet u ddikjarat lil Joan Pascal Damien Andre Belling, propju wara li rat l-artikoli 8, 9, 11, 14, 15A, 16, 17, 22, 27, 31, 49, 198, 201(b), 207, 209A, 382A u 412C tal-

Kodiċi Kriminali, Kapitolu 9 tal-Liġijiet ta' Malta, ħati taz-zewġ imputazzjonijiet l-oħra kif miġjuba fil-paragrafi (1) u (2) u kkundannatu komplessivament għal tlett snin u sitt xhur priġunerija. Kif ukoll, a tenur tal-artikoli 382A u 412C tal-Kodiċi Kriminali, Kapitolu 9 tal-Liġijiet ta' Malta, il-Qorti ordnat li jinħareġ Ordni ta' Trażżin fil-konfront tal-ħati a favur ta' Pamela Vera għat-terminu massimu preskritt mill-liġi, mill-mument li din il-kawza tgħaddi in ġudikat.

Rat ir-rikors tal-appellant Joan Pascal Damien Andre Belling, ippreżentat fit-30 ta' Ottubru 2023, fejn talab lil din l-Qorti tvarja s-sentenza tal-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali li ngħatat fit-12 t'Ottubru 2023 billi tikkonfermaha f'dik il-parti fejn sabet lill-esponent mhux ħati tat-tielet imputazzjoni u tħassar, tirrevoka u tikkanċella l-istess sentenza f'dik il-parti fejn sabitu ħati tal-ewwel zewġ imputazzjonjiet u konsegwentement tilliberah minn kull imputazzjoni u piena jew alternattivament, fl-eventwalita' li ma tilqax l-aggravji fuq il-mertu tvarja s-sentenza appellata f'dik il-parti li tikkonċerna l-piena.

Rat ir-risposta tal-Avukat Ġenerali datata is-26 ta' Jannar 2024.

Rat l-atti u d-dokumenti kollha.

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

Semgħet trattazzjoni.

Ikkunsidrat:

Illi, fl-ewwel aggravju l-appellant jikkritika s-sentenza ta'l-Ewwel Qorti għal motiv illi, fil-fehma tiegħu, fiha hemm enunċazzjoni żbaljata u skorretta tal-elementi tar-reat ta' stupru hekk kif dan ir-reat kien ravvizat fis-sena 2017, u ċioe' fiż-żmien temporali li fih allegatament ġie kommess.

Illi, minn eżami akkurat tas-sentenza appellata, għalkemm ma jidhirx illi l-Ewwel Qorti daħlet biex teżamina l-elementi kostitwenti r-reat ta'l-istupru, kif allura lanqas issemmi illi kien hemm emendi fil-liġi regolanti dan ir-reat permezz ta'l-Att LXII tal-

2018 meta id-disposizzjonijiet ta'l-artikolu 198 tal-Kodiċi Kriminali ġiet sostitwita, ħlief fil-konsiderazzjonijiet li hija tagħmel dwar il-piena, madanakollu tagħmel referenza għal dak li igħallem il-kompjant Professur Anthony Mamo, fin-Notamenti tiegħu fuq il-Liġi Kriminali li jitkellem essenzjalment dwar iż-żewġ elementi meħtieġa sabiex jiffigura r-reat, u ċioe' l-att materjali konsistenti fil-konġunġiment karnali u l-element tal-vjolenza ipperpetrata fuq il-vittma. Is-sentenza appellata tagħmel ukoll ampja referenza għal ġurisprudenza u dottrina iċċitata fis-sentenza *Il-Pulizija vs David Xuereb*, li tikkonċerna ir-reat tal-istupru kif kien viġenti qabel l-emendi introdotti fis-sena 2018. Dan ifisser illi l-apprezzament tal-provi magħmul mill-Ewwel Qorti sar fid-dawl tal-elementi tar-reat tal-istupru kif kien viġenti fiż-żmien meta allegatament kien kommess ir-reat.

Illi, dina l-Qorti m'hijiex tal-fehma li l-Ewwel Qorti ddipartixxiet b'xi mod minn dana t-tagħlim ġurisprudenzjali appena ċċitat u għalhekk l-ewwel aggravju tal-appellant qed jiġi miċħud.

Jingħad biss illi l-artikolu 201(b) tal-Kodiċi Kriminali, qabel l-emendi introdotti permezz ta'l-Att XIII tal-2018 kien joħloq presunzjoni legali fis-sens illi l-istupru jitqies dejjem bħala vjolenti meta "l-**persuna li fuqha jsir l-abbuż ma tkunx tista' tirreżisti minħabba marda tal-ġisem jew tal-moħħ jew għal raġuni oħra indipendenti mill-egħmil tal-ħati, inkella minħabba l-mezzi qarrieqa li l-ħati jkun inqeda bihom.**"

Ikkunsidrat:

Illi, fit-tieni aggravju tiegħu, l-appellant jisħaq li l-Ewwel Qorti għamlet interpretazzjoni skoretta u fuq kollox inkompleta tal-provi b'mod li għalhekk wasslet sabiex erronjament tirriskontra il-ħtija. Jilmenta li l-istess Qorti straħet biss fuq il-verzjoni ta' Pamela Vera li ngħatat fl-Istruttorja u l-verżjoni mogħtija minnu fl-istqarrija tiegħu, u skartat kompletament provi oħra li jirriżultaw mill-atti, fosthom il-verzjoni oriġinarjament mogħtija mill-istess Pamela Vera fir-rapport inizjali mibgħut lill-pulizija Maltija mill-*Interpol* ġewwa Manchester li jinsab eżebit *a folio* 18 tal-proċess.

Illi, stante li dan l-aggravju jirrigwarda l-apprezzament tal-provi magħmul mill-Ewwel Qorti din il-Qorti tfakkar illi huwa prinċipju stabbilit fil-ġurisprudenza li hija ma tiddisturbax l-apprezzament dwar il-provi magħmul mill-Ewwel Qorti jekk tasal għall-konklużjoni li dik il-Qorti setgħet raġonevolment u legalment tasal għall-konklużjoni li tkun waslet għaliha. Fid-dawl ta' dan, il-Qorti eżaminat mill-ġdid l-atti proċesswali, inkluz id-dokumenti kollha ezebiti u t-testimonjanzi tax-xhieda li ddeponew quddiem l-Ewwel Qorti, biex b'hekk tinsab f'posizzjoni aħjar sabiex tevalwa jekk l-apprezzament dwar il-provi magħmula mill-Ewwel Qorti kienx wieħed raġjonevolment u legalment validu.[1]

Illi, dawn il-proċeduri skattaw meta nhar it-23 t'Ottubru 2017, l-awtoritajiet Maltin irċevew is-segwenti rapport mill-*Interpol Manchester National Crime Agency* -

> ***Victim Pamela Vera has stated that she had gone to Malta on 07/07/2017 for a ten (10) day holiday with her friend Naomi Lyne. They stayed in Boho Hostel which is located in St Julian's. On the third day victim stated she met the suspect, Joan Belling, along with others who were also staying at the hostel.***
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> ***On 14/08/2017 victim stated that she along with the others who resided in the hostel went to Paceville which is a clubbing district in St Julians. Whilst in the club victim stated that her and the suspect were dancing to which he made comments such as 'I like your bum' and 'you have a nice body'. Victim and suspect had a kiss but she made it clear that nothing would go further. Victim stated that she told suspect 'I don't really want to kiss you anymore, you slept with my friend Naomi'. Victim told officers she had four (4) double vodkas which she consumed quite quickly.***
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> ***She felt she needed fresh air and she went outside with suspect. Victim then got into a cab to go back to the hostel and the suspect went with her. Once back at the hostel victim said that she and the suspect were in the front garden on the big chair loungers. Victim believed she was in and out of consciousness through the effects of the alcohol.***
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> ***Victim stated that she woke up and glanced over to which she saw the suspect. She had woken up lying on her side and stated that she could feel something inside of her. She could not confirm whether it was the suspect's penis or his***

[1] Ara, fost ohrajn, l-Appelli Kriminali Superjuri: Ir-Repubblika ta' Malta v. Rida Salem Suleiman Shoaib, 15 ta' Jannar 2009; Ir-Repubblika ta' Malta v. Paul Hili, 19 ta' Gunju 2008; Ir-Repubblika ta' Malta v. Etienne Carter, 14 ta' Dicembru 2004 Ir-Repubblika ta' Malta v. Domenic Briffa, 16 ta' Ottubru 2003; Ir-Repubblika ta' Malta v. Godfrey Lopez u r-Repubblika ta' Malta v. Eleno sive Lino Bezzina 24 ta' April 2003, Ir-Repubblika ta' Malta v. Lawrence Asciak sive Axiak 23 ta' Jannar 2003, Ir-Repubblika ta' Malta v. Mustafa Ali Larbed, 5 ta' Lulju 2002; Ir-Repubblika ta' Malta v. Thomas sive Tommy Baldacchino, 7 ta' Marzu 2000, Ir-Repubblika ta' Malta v. Ivan Gatt, 1 ta' Dicembru 1994; u Ir-Repubblika ta' Malta v. George Azzopardi, 14 ta' Frar 1989; u lAppelli Kriminali Inferjuri: Il-Pulizija v. Andrew George Stone, 12 ta' Mejju 2004, Il-Pulizija v. Anthony Bartolo, 6 ta' Mejju 2004; Il-Pulizija v. Maurice Saliba, 30 ta' April 2004; Il-Pulizija v. Saviour Cutajar, 30 ta' Marzu 2004; Il-Pulizija v. Seifeddine Mohamed Marshan et, 21 ta' Ottubru 1996; Il-Pulizija v. Raymond Psaila et, 12 ta' Mejju 1994; Il-Pulizija v. Simon Paris, 15 ta' Lulju 1996; Il-Pulizija v. Carmel sive Chalmer Pace, 31 ta' Mejju 1991; Il-Pulizija v. Anthony Zammit, 31 ta' Mejju 1991.

fingers. Victim said she was in shock and felt she couldn't move. She believes the suspect stopped once he heard the others come through the gates when she heard the suspect say 'shit'.

Victim stated that when she had awoken her clothes were still on and her zipper on her shorts still intact.

Victim stated she did not sustain any injuries during the evening. She then told her friend Naomi Lyne that she had been raped.

Victim stated she tried to contact the British Embassy with regards to the incident but it was a national holiday in Malta so it was unavailable. She landed in the UK on the 16/08/2017 to which she came straight from the airport to the police station to report the incident. The victim has been forensically examined and these exhibits have been seized by the police. The clothing that the victim was wearing at the time of the incident has been seized by the police.

Illi, l-allegata vittma Pamela Vera xehdet fit-tul quddiem l-Ewwel Qorti fejn bdiet billi tgħid li hija kienet ġiet Malta għal btala fis-7 ta' Awwissu 2017 flimkien mal-ħabiba tagħha Naomi. Sussegwentement dwar l-inċident *de quo* xehdet hekk –

I was raped in the early morning of the 15th, so on Monday 14th me and Naomi had got a ferry to go to Gozo, it's our second time in Gozo during our holiday and on our way back, we were talking about going out clubbing, seen as it was our last night there and we'd already been clubbing on the Saturday with everyone else from the hostel and we thought it will be a nice way to like end the holiday and then the next day we would have a ferry trip to Comino. So when we go tin from Gozo it was about 7 or 8pm and Naomi had said i'm actually really tired I don't think I want to go out any more. And then I asked her again like once or twice if she's sure she doesn't wanna go out. She was like no, I'm gonna pack and I said ok sure. So considering that I'd already been out with everyone on Saturday and I'd already spent some time speaking to people we both didn't see any immediate danger of me still going out even though she wasn't gonna come with me. So I decided to still go out with everyone ...

We probably left about 11pm. I hadn't drunk anything at that time, so I bumped into Joan in the living area at some point and he made a comment about me wearing a lot of perfume and I didn't really think anything of it, he was just oh it smells nice and I said ok thank you. And then I went into the garden the front garden which is where everyone was pre-drinking and I didn't have any alcohol so I wasn't drinking but Nick, one of the guys said I have some more beer that you can have if you want. And then I said oh I don't really like the taste of beer, I don't really drink beer, and he said no like Maltese beer is quite light, it's not the same as like there in England so he went upstairs and came back down with a beer and I had a couple of sips of this beer. At this point everyone who was gonna go out was kind of in the front garden, they were waiting on me because I had to shower and then change so I was kind of the last person to get ready. So I had a couple of sips of the Maltese beer and then I didn't really like the taste like I don't really like beer so I said to Nick

> ***oh you know what like it's ok thank you and I think I just left it on the table. So we left around like 11pm and then we walked from xxx hostel to, I know it's spelt Paceville, but I know it's pronounced Paceville it's like the clubbing district in Malta. So we walked, it was about 10-15 minute walk, so we walk from the hostel to Paceville, so it was kind of like Joan and Joseph, they were kind of walking ahead of everyone, kind of like by themselves and then I was walking with Nick and with Jordan and Pierre and Celia and Javier were kind of somewhere in the middle like coming in and out and in between and then we were just talking, so I was just kind like asking Jordan and Pierre were they live in France...***

Illi l-parte ċivile kompliet tixhed li mbagħad qabdet parlata mal-appellant fejn dan kien qalilha li meta kienu ħarġu ftit tal-jiem qabel hu kellu x'jaqsam sesswalment ma' ħabibitha Naomi fuq dgħajsa. Hija qalet li Naomi kienet qaltilha b'dan u kienet imbarazzata u li ma kinitx ser terġa' jkollha x'taqsam miegħu. Il-parte ċivile tgħid li mbagħad irħewlha kollha lejn il-bar 'Native' fejn qattgħu il-ħin hemmhekk jixorbu u jiżfnu. Xehdet li hija ħadet "*double vodka and coke*" u li mbagħad -

> ***... Joan started asking me questions about Naomi asking me if she has Facebook she asked like he said he doesn't really know what to do and then he asked us when we were leaving and then I said we're gonna leave tomorrow night, and then he just like said ok. And then he was quite touchy feely but at that point it wasn't anything for me to worry about, it was kind of like touching my shoulders, just like here and there it wasn't really anything for me to worry about at that point.***

Illi, hija tgħid li pero' ftit tal-ħin wara, l-appellant beda' jmissha aktar –

> ***"just like stroking me, like two seconds too much, like too long with that I wasn't really comfortable with. Just things like that, like trying to touch my waist and things like that. And then, he was kind of getting a bit closer like his face, like the way he was speaking to me was a bit more intense it was like a lot closer to my face and at this point he kind of stopped asking questions about Naomi and so forth and he was asking different questions. And it was all just like I just felt a bit uncomfortable so I just kind of said like straight way like I don't want anything to happen between us, like I'm not gonna have sex with you" ... "I told him I don't want anything to happen between us, I told him I'm not gonna have sex with him and that's more, so I felt quite uncomfortable when he was kind of touching me for a bit too long ... his reaction was I'm not trying to do anything with you and it seemed really genuine so I said oh ok and just left it and then after we kind of danced a bit more... ".***

Illi, l-parte ċivile komplet tirrakkonta li hija ħadet *double vodka coke* ieħor u bdiet tkellem lil Jordan għax kellha grazzja miegħu. Pero' tgħid li ġuvni ieħor li kien

magħhom, bl-isem ta' Nick, kien qalilha sabiex tagħti naqra spazju lil Jordan għax jista' jkun li kienet qed iddejjqu –

> *... **So then it was at this point that I like Joan kind of came into the mix and then we were like talking ... and then he started being quite touchy again ... I said you know like I'm not gonna have sex with you can you stop and then he said you keep saying I want to have sex with you but I really don't and then I even apologised because I was like ph ok I've said this twice now and each time you said no like that's not what my intention is and honestly like he seemed genuine. And he was just kind of like stroking me, for just like stroking my back for just a bit too long for what I felt comfortable with and so when he said it a second time like it seemed really really genuine and the point where I apologised and I said ok like I'm sorry. And the it was just, so then I was like dancing with Celia and Javier and so forth and I went and I had a third double vodka and coke and then in between that time me and Joan shared quite like a quick drunken kiss and then I pulled away and then later on he tried to kiss me again and then I told him no like that kiss was a mistake I don't wanna sleep with you I don't wanna have sex with you, besides he's already slept with my friend Naomi etc etc. And then he just left it and then we went to the bar and he bought me my last, my fourth drink which was the double vodka and coke and I'd gone to the bar with him and then like at this point he tried to touch my bum and I kind of like flung it away then I had the drink the double vodka and coke and so at this point I kind of thought to myself my third and fourth drink was consumed in quite a short amount of time as to what I would normally have, whereas like my first and second was quite spaced out, and then as a British resident I'm not allowed to have the Maltese tap water cause it's bad for your stomach which is what I usually do on nights out, ask for some tap water to just help sober me out. So at this point I just thought ok like I need, like my drinks were a bit too close to each other, you know like I just want to be careful I'm feeling a little bit like tipsy not anything overly drastic at this point and so I asked Jordan cause I didn't wanna lose everyone, I asked Jordan if he'll come outside with me and he said no no I'm gonna go dance with Pierre and so then I went to go outside by myself and Joan like followed me and asked where I was going and I said I was gonna go outside to get a breather. So in my head I've already said to this person I don't want to have sex with you, i've you know I don't want to lose everyone.***

Illi, tkompli tixhed li hi ma riditx titlef lill-oħrajn għax kien hemm ħafna nies pero' ħarġet minn fejn kienet u qagħdet bilqegħda fuq taraġ, fejn kienet akkompanjata mill-appellant. Hija staqsitu jekk jaħsibx li Jordan kellux interess fiha, fejn l-appellant wieġeb li le – "***I don't think Jordan likes you because you're black and then I just said oh ok but he said but I do. I want to have sex with you and he said I like your body you have a nice bum and then at this point I was just like I don't want to have sex with you and was just like no thank you.***" Tgħid li f'dak il-ħin ppruvat tqum imma

waqgħet u bdiet tħossha għajjiena ħafna u bin-nagħas. Tirrakonta li kien hemm tfajla ta' nazzjonalita' Ġermaniza li għenitha issib *taxi* u li l-appellant tela' magħha għalkemm ma kenitx stednitu sabiex jirkeb magħha. Tgħid li ma tiftakar xejn aktar minn dak il-ħin 'il quddiem sakemm stenbħet fil-ġnien tal-*hostel:* –

> ***"I realised I was in the front garden of the hostel, and then I could feel and I could hear someone breathing and then I could feel something inside of me ... and then I realised it was a penis inside of me and then I looked across and I knew who it was like I knew it was him, and he was in kind of like a kneeling position and then I just froze, and I was really really weak like ... and I just froze and I just wasn't strong enough to like try and kick him off I wasn't strong enough to do anything and all I could was just like say no, stop and that took so much out of me cause I was so scared, and I said no and I said stop so many times and he didn't he just carried on ... and I remember just thinking I'm being raped, I'm being raped and was the only thought that was doing through my head, and I was so scared. And I don't know what he was gonna do after and I didn't know if I ... he was kneeling on the sofa bed, so if I'm in a side, I was in a side position and he was kind of kneeling, like penetrating behind ... so I said no and I was saying stop and he wouldn't and I was really really scared and my entire body was just frozen and that's all I could do, all I could do was to say no. I can't scream I was unable to fight him off, I was unable to do anything, I was just so weak and so drowsy and my body just, I was just really scared. And I thought it might kill me or something if, and I remember just thinking in my head I'm being raped, I'm being raped, I'm being raped all throughout. And then I heard the metal gate of the hostel, so it was this really big klunky metal gate and it was being moved, then I heard him say oh shit and then he stopped whatever he was doing, he stopped what he was doing. And before that there was I could feel a hand on my thigh and then he stopped that and then he took himself out of my vagina and then I could feel him reshuffle the position that he was in and then I could hear footsteps of everyone."***

Illi, l-parte ċivile kompliet tixhed li mbagħad kienet rat lil Javier jipprova jqajjimha u hi bdiet tibki u daħluha ġewwa. Wara dan il-ħabiba tagħha Naomi niżlet ħdejha u hi baqgħet tibki – ***"I was just crying and I was hysterical"*** – u hemmhekk qaltilha li kienet ġiet stuprata. L-appellant ċaħad li kien stupraha u pprova javviċinaha: –

> ***"I slapped him and I pushed him away and I said you had sex with me when I was sleeping and than he said, and I kind of said this a few times and I was crying and I said you fucked me when I was asleep, you had sex with me when I was sleeping and I was crying and then he said I'm sorry that you feel that way I thought that we had a good time and then he was just saying like we were kissing in the taxi and then I said that's not true and he was saying we kissed in the club I thought we had a good time, and then I said I was asleep,***

> ***you had sex with me, you fucked me when I was sleeping and then him Jordan and Pierre were having conversations, kind of back and forth in French*".**

Illi, Vera tgħid li hi baqgħet fi stat ta' disperazzjoni sakemm mbagħad raqdet. Tgħid li l-għada kienet għadha fi stat ta' xokk imma kienet marret ma' Naomi Kemmuna hekk kif kienu ppjanati li jagħmlu peress li ma riditx tibqa fil-*hostel*. Tgħid li għamlet ġurnata tibki u li kellha ġisimha juġagħha u li kienet għadha taħt xokk. Dakinhar kienet anke ppruvat iċċempel l-ambaxxata Ingliza, izda peress li kienet btala pubblika ma kellhiex tweġiba. Tgħid li kienet propensa li tmur l-Għassa tal-Pulizija aktar tard imma sħabha ikkonvinċewha sabiex tirraporta lill-awtoritajiet Inglizi. Għalhekk nhar is-16 t'Awwissu siefret lura lejn l-Ingilterra u marret għand il-Pulizija hemmhekk, fejn ħadulha diversi *swabs* minn partijiet diversi ta' ġisimha.

Illi, in kontro-ezami, il-parte ċivile stqarret li fil-bidu ma kinitx taf x'kien hemm ġo ġisimha meta qamet, u ċioe' jekk kienx l-organu sesswali tal-appellant jew is-swaba tiegħu – "***and then I realised it was a penis ... my first initial thought was oh my god that's a penis inside my vagina, because my last recollection which is fact was that I was not engaging in sexual activity so why would I have a penis inside of me***". Tispjega li meta rrealizat x'kien qed jiġri, iffrizat u ma setgħet tgħid u tagħmel xejn – "***I froze because I was in danger***". Dwar dan il-punt kien anke xehed l-Uffiċjal Prosekutur l-Ispettur John Spiteri li stqarr li meta kien ikkonfrontaha b'din id-diskrepanza fil-verzjoni tagħha, il-parte ċivile kienet qaltlu li hija kienet għamlitha ċara mal-Pulizija Ingliza li kienet taf li kien l-organu ġenitali tal-imputat u mhux subgħajh, u dana għal kuntrarju ta' dak li hemm miktub fir-rapport imħejji mill-*Interpol*.

Illi, minn naħa l-oħra, l-verzjoni tal-fatti mogħtija mill-appellant hija waħda dijametrikament opposta. Fl-istqarrija minnu mogħtija nhar it-2 ta' Jannar 2019 huwa jikkonferma li dakinhar tal-akkadut huwa u l-parte ċivile, flimkien ma' xi ħbieb oħra kienu marru Paceville. Stqarr li:–

> "***So in Bar Native Pamela and me we looked us together. I see it that she looked at me. She see that I look at her. It is music to dance so we get close. She said to me I am horny. I am horny. So I was like this with her and we kissed. But not just a kiss. A long kiss***".

Illi, l-appellant ikompli jgħid li ftit tal-ħin wara Pamela Vera reġgħet qaltlu l-istess kif ukoll qaltlu "***Let's have sex***". Ikompli: -

> ***"Then she take my hands she take both my hands and she puts it on her tits. She wanted I touch her breasts and at this moment I said I am laughing again yeah, you have a nice body, complete. So i stopped doing this and at this moment she said come with me, fuck together and she take me this and she keeps her hands between my legs like this and she asked me three times to fuck her".***

Jistqarr li wara dan huma ħarġu flimkien minn ġewwa l-istabbiliment imma hi ma bdietx tħossha sew u filfatt irremmetiet fit-*taxi* fi triqithom lura lejn il-*hostel*. L-appellant stqarr li hekk kif waslu l-*hostel,* il-parte ċivile qaltlu li kienet qed tħossha aħjar u ħaditu lejn it-terrazzin li skond hu kien post sinonimu għas-sess f'dan il-*hostel;* -

> ***"She said to me I want you – come. And she lies like this – come and she is bringing me and at this moment, I go on her, I kiss her here, I kiss her there and I touching together ... we have the clothes at this moment. And she said, I want you. I take the short back and my underwear back at one foot and she take her short away too. She were lying and she put it away and next to me. And so I am going again on her, we are touching us. She take my penis. I had a few drinks. She hand job me a little ... To give me an erection and she helps me to push it in, you know. She was like this and I was on and she helped me to push it in but she with her underwaear; she has her underwear not off. And at this point we had sex between 1 and two minutes maximum".***

Jgħid li sakemm kien qed isir dan kollu, il-parte ċivile "***she was doing noise of pleasure***". Jgħid li mbagħad semgħu lin-nies ġejjin u libsu jiġru. Ikompli jgħid li dak il-ħin ġew Naomi u sħabhom l-oħra u hekk kif il-parte ċivile rat lil Naomi qaltilha b'mod kalm "***he raped me while I was sleeping***". L-appellant fermament jinnega li stupraha u jgħid li s-sess bejnithom sar b'mod konsenswali.

Illi, minn dawn iż-żewġ verżjonijiet tal-fatti l-uniku punt ta' qbil huwa dwar il-fatt illi seħħ l-att sesswali bejniethom, bl-appellant jikkontendi li dan sar b'mod konsenswali, filwaqt li l-parti offiża tinsisti illi dan sar meta hija kienet mitlufa minn sensieha u allura mingħajr il-kunsens tagħha. Fil-fatt, id-difiża, fis-seduta ta' nhar s-26 ta' Frar 2020 ivverbalizat illi:-

> **Id-difiza tirrileva li ma hemmx kontestazzjoni dwar il-fatt li effettivament kien hemm kuntatt sesswali bejn il-partijiet – u ċioe' bejn Joan Belling u**

Pamela Vera – b'dan illi l-akkuzat jiddikjara li tali kuntatt kien għal kollox konsenswali u saħansitra inizjat u ggwidat mill-istess parte ċivile Pamela Vera.

Illi qabel kull konsiderazzjoni dwar l-apprezzament magħmul mill-Ewwel Qorti, għandu jkun rilevat, fil-kwadru tal-fatti probatorji ta' dan il-każ fejn l-element tal-vjolenza qed jkun marbut mal-assenza ta'l-kunsens minn naħa tal-vittma stante l-istat ta' sokor li kienet tinsab fih, illi ghalkemm il-ligi taghna tiddisponi illi jkun hemm il-presunzjoni tal-vjolenza kull meta il-vittma tkun fiżikament jew mentalment inkapaci, madanakollu ma issir l-ebda distinzjoni mill-legislatur dwar jekk dik l-infermita' mentali ghandhiex tkun dovuta għall-azzjoni volontarja tal-vittma jew inkella tal-agressur tagħha.

Illi dan il-punt ġie dibattitu reċentement fl-Italja billi fid-dritt penali taljan l-istat ta' inkapaċita' mentali naxxenti mill-konsum tal-akoħol fil-każijiet ta' vjolenza sesswali iġib miegħu aggravanti fil-piena[2]. Illi l-*Corte di Cassazione* saħħqet illi r-reat xortawaħda jissussisti (u dan referibbilment għall-artikolu 609 tal-*Codice Penale*), fiċ-ċirkostanzi fejn il-konsum ikun wiehed volontarju u allura ma tikkonfigurax biss l-aggravanti.

"L'elemento che deve essere accertato per affermare la sussistenza di un reato contro la libertà sessuale individuale, è l'assenza di volontà e consenso al momento del compimento degli atti. Qualora dalle circostanze del caso, la persona offesa non poteva dirsi cosciente e, dunque, consenziente, il delitto si configura, a prescindere da come e da chi abbia provocato lo stato di incoscienza della vittima, la quale potrebbe essersi posta in tale condizione, anche volontariamente.

La pronuncia si pone dunque in linea con la giurisprudenza ormai pacifica in materia, che intende tutelare al massimo la libertà personale - in cui rientra la sfera sessuale - dell'individuo, colpendo i fatti che aggrediscono la persona, e fornendo un'interpretazione delle disposizioni normative che possa garantire la massima protezione.[3]"

"Lo stato d'ebbrezza, ancorché autoindotto, pone la persona offesa in una posizione di svantaggio e di menomazione, tale da non poter esprimere un<<valido consenso (la capacità) al rapporto sessuale>>. Per tale motivo, è integrato il reato di violenza sessuale (non aggravato), giacché la vittima

[2] Articolo 609 Codice Penale
[3] www.diritto.it

verteva in condizioni d'inferiorità tali da essere incapace di autodeterminarsi e, dunque, di acconsentire al rapporto[4]"

F'decizjoni moghtija mill-*Corte di Cassazione* f'kaz analogu inghad:

> ***Integra il reato di violenza sessuale con abuso delle condizioni di inferiorità psichica o fisica (art. 609 bis, comma secondo, n. 1, c.p.) la condotta di chi si congiunga carnalmente con una donna addormentatasi a seguito di ingestione di sostanze alcooliche, essendo l'aggressione alla sfera sessuale della vittima connotata da modalità insidiose e fraudolente5.***

Għalhekk, dak li l-Ewwel Qorti kellha tiddetermina huwa jekk il-konġunġiment karnali li seħħ kienx bil-kunsens tal-parte ċivile *o meno*. Il-parte ċivile tisħaq li dan ma kienx għax hija kienet fis-sakra u lanqas biss kienet f'sensiha meta l-att sesswali seħħ filwaqt li minn naħa l-oħra, l-appellant jgħid li hija kienet f'sensiha u li hija riedet li jseħħ dan l-att bejniethom u li anke għenitu sabiex jasal għal gratifikazzjoni sesswali tiegħu u bdiet tagħmel ħsejjes ta' pjaċir tant illi huwa fehem li hija kienet taf x'kien qed jiġri. Il-kontestazzjoni allura teżisti biss fir-rigward tal-presenza o meno tal-kunsens tal-vittma fil-mument li sehh l-att inkriminatorju u allura jekk kienx jeżisti wiehed mill-elementi legali sabiex jissussiti r-reat tal-istupru b'dan il-każ jirrisolvi ruħu dwar jekk għandhiex tapplika l-presunzjoni legali stabbilita fl-artikolu 201(b) sabiex b'hekk jikkonfigura l-element tal-vjolenza.

Illi, l-Ewwel Qorti tat affidament lil verżjoni tal-fatti tal-parti offiża u ċioe' li din kienet fis-sakra u mitlufa minn sensiha waqt l-att sesswali. Illi huwa indubitat illi fil-fatt Vera kienet kkunsmat l-akoħol f'dik il-lejla u konsegwenza ta' dan il-fatt hija ma kenitx f'sikitha tant illi l-appellant stess igħid illi fit-*taxi* huma u sejrin lura lejn il-*hostel* hija irremmettiet. Għalih dan kellu jkun sinjal li l-vittma ma kenitx f'sikitha, u allura li ma kenitx konsapevoli tal-azzjonijiet minnha meħuda. Jikkonsegwi għalhekk illi ġaldarba kienet f'dan l-istat ta' inebrijatezza l-appellant messu iddeżista milli ikollu x'jaqsam magħha sesswalment, u dan għaliex anke jekk kien hemm dak li dehrlu li kien

[4] www.diritto.it
5(Cassazione penale, Sez. III, sentenza n. 1183 del 16 gennaio 2012)

kunsens minn naħa tagħha, kellu jkun jaf li dan ma kienx wieħed validu fid-dawl tal-istat ta' sokor tagħha.

Issa għalkemm l-Prosekuzzjoni naqset milli tressaq diversi xhieda mportanti li setgħu b'xi mod jew ieħor jikkorraboraw il-verzjoni tal-parte ċivile, madanakollu ix-xiehda ta' sid il-*hostel* in kwistjoni, Noella Abramovich, magħrufa bħala "Penny" tixħet dawl fuq il-veradiċita' tal-verżjoni tal-parti offiża. Ibda biex jingħad illi Vera mal-ewwel istanzi stqarret ma' din ix-xhud illi l-appellant "***took advantage of me***". Tgħid li hija kienet tatha parir tagħmel rapport lill-Pulizija imma l-parte ċivile kienet qaltilha li tippreferi tagħmel dan ġewwa l-Ingilterra. Tikkonferma illi Vera ippruvat tikkuntattja lill-ambaxxata Ingliża, iżda peress illi kienet festa sabet l-uffiċini magħluqa. Abramovich xehdet ukoll li wara dan kollu hija kienet kellmet lill-appellant li kien ammetta magħha li kellu x'jaqsam sesswalment mal-parte ċivile imma li dan kien b'mod konsenswali. Fl-aħħarnett stqarret ukoll li l-parte ċivile kienet talbitha tagħmel kuntatt man-nies l-oħra li kienu magħha fil-*hostel* dakinhar tal-akkadut biex jagħtu l-verzjoni tal-fatti tagħhom.

Illi, infatti, Abramovich ippreżentat korrispondenza permezz tal-*email* li kellha, partikolarment dik ta' Joseph Critien u Pierre Tossani, li kienu tnejn minn nies li kienu ħarġu mal-parte ċivile u mal-appellant dakinhar tal-akkadut. Joseph Critien kien tenna li:

> "***I don't know what went on personally only what I was told by the others however whilst we were in Paceville Pam was flirting with a number of the males within the group***".

Minn naħa l-oħra, Pierre Tossani kien tenna li:

> "***Entering the hostel we saw Joan on the couch, and Pam was sleeping next to him. We tried to carry her to her bed in vain. She began to throw up. After this she explained us that she came back to the hostel with Joan in a taxi and she added 'He fucked me when I was sleeping'. Joan said that it was true but that she had 'teased him' (sexually) in the taxi. She started crying and asked us to look for her (female) friend***".

Jgħid li marru jfittxu lil din l-ħabiba mbagħad "***Pam's friend arrived. She tried to comfort her***".

Din il-verżjoni, għalkemm mhux ikkonfermata bil-ġurament, tindika ċar u tond illi Vera kienet għada fi stat ta' inebrijatezza wara li seħħ l-att sesswali tant illi kellha tiġi assistita biex tqum minn fuq is-sufan u anke reġgħet bdiet tirremmetii.

Illi, finalment, ġie prodott Hugo Alexandre Coeff bħala xhud *in difesa*, liema xhud huwa l-kuġin tal-appellant li kien miegħu dakinhar tal-akkadut. Coeff xehed li –

> "**wara, tlaqna it-tieni club li jismu Footloose. Hemmhekk jiena sirt naf lil Pamela. Li hija tfajla sewda u ingliza. Joan u Pamela bdew jizfnu. U viċin ħafna ta' xulxin. Imbagħad tbewsu ukoll. Dehru b'mod ċar li kienu nteressati f'xulxin. Ftit wara, jiena mort fil-bar, dejjem Footloose. U jiena tlabt drink. Rajt lil Joan imur fil-bar u Pamela marret warajh. Pamela u Joan bdew jiddiskuti. Ftit minuti wara, Pamela qabdet idejn Joan biex tpoġġihom fuq sidirha u wara poġġiet idha fuq il-parti sesswali ta' Joan. Ftit minuti wara telqu flimkien mill-club. Pamela ħarġet l-ewwel. Waqt li ħerġin hi kienet qed izommlu jdejh**".

Dan ix-xhud, iżda me kienx preżenti fil-mument li seħħ l-att inkriminatorju u għalhekk ma jistax jitfa' dawl fuq l-akkadut.

Illi, imbagħad, is-*security* li kien xogħol ġewwa l-hostel f'dik il-lejla, ċertu Milan Miljkovic jirrakkonta illi meta għamel ronda fil-ġnien huwa innota koppja fuq is-sufan u innota li dawn kienu kwieti u kien għahekk li ma qalilhomx biex jidhlu ġewwa. Igħid li l-iskrivanija tiegħu kienet ftit metri 'l bogħod minn fejn kienet il-koppja u fl-ebda ħin ma nnota li dawn kienu qed jagħmlu xi ħsejjes. Dan għalhekk jikkonforta l-verżjoni tal-fatti tal-vittma li tinsisti illi tul l-att sesswali hija kienet rieqed, u tikkontrasta ma' dak li igħid l-appellant illi din kienet qed tistiednu għal konġunġiment karnali u anke li waqt l-att kienet qed tagħmel xi ħsejjes li indikaw għalih pjaċir sesswali.

Illi mhux biss iżda mill-verżjoni tal-fatti tal-parti offiża, għalkemm seta' kien minnu illi f'dik il-lejla hija wriet interess fl-appellant, tant illi, kif anke minnha ammess, kien hemm tokkamenti bejniethom u anke bews, madanakollu tikkontendi illi għamlitilu ċara li hija ma reditx ikollha x'taqsam miegħu sesswalment għal iktar minn darba. Kwindi dan, abbinat mal-fatt illi l-vittma kienet tidher ċar u tond li kienet fi stat ta' inebrijatezza, kellu ifisser għall-appellant illi fil-mument tal-att sesswali din ma kenitx kapaċi tirreżisti l-avvanzi sesswali tiegħu u allura ma kienx hemm il-kunsens biex l-

intimita' li kien hemm bejniethom iktar kmieni matul dik il-lejla, kellha twassal għal konġunġiment karnali. Finalment kuntrarjament għal dak li jsostni l-appellant, il-parti offiża dejjem kienet u baqgħet konsistenti fil-verżjoni tagħha tal-fatti u għalkemm fir-rapport inizjali tindika li hekk kif stenbħet u indunat li kien hemm l-appellant viċin tagħha u ħasset xi ħaġa fl-orefiċi intima tagħha li ħassbet li seta' kien subajgħ, madanakollu imbagħad tgħid li ndunat li kienet il-virga maskili tiegħu li kienet inserita fl-orefiċi tagħha. Fuq kollox l-appellant stess *ex admissis* igħid li kien hemm konġunġiment karnali bejniethom. Jikkonsegwi għalhekk illi jirriżultaw iċ-ċirkostanzi ravviżati fl-artikolu 201(b) tal-Kodiċi Kriminali bil-parti offiża tkun fi stat li ma tistax tirreżisti għall-avvanzi sesswali tal-appellant billi ma kenitx f'sensieha kaġun tal-istat ta' inebrijatezza. Għaldaqstant dan l-aggravju qed ikun miċħud.

Illi fl-aħħar żewġ aggravji imqanqla minnu, l-appellant jikkontendi illi huwa qatt ma seta' jinstab ħati tar-reat ravviżat fl-artikolu 207 tal-Kodiċi Kriminali meta hija sabet ħtija għar-reat tal-istupru, u allura lanqas ma setgħet l-Ewwel Qorti tgħaddi biex tinfliġġi il-piena għal dan ir-reat bl-applikazzjoni ta'l-artikolu 17(b) tal-Kodiċi Kriminali. Għalhekk, fil-fehma tiegħu, il-piena erogata kienet waħda eċċessiva.

Illi l-appellant għandu raġun f'dawn l-aggravji minnu ntenat u dan għaliex dak li isostni huwa rifless fid-diċitura adoperata fil-liġi innifisha minn fejn jemerġi illi ir-reat ravviżat fl-atikolu 207 tal-Kodiċi Kriminali, u allura r-reat li fiż-żmien il-kummissjoni tiegħu kien jissejjaħ "attentat vjolenti għal pudur", huwa alternattiv għar-reat ta'l-istupru meta kien hemm hekk dispost f'din id-disposizzjoni tal-liġi qabel l-emendi introdotti:

> **"Kull min jinsab ħati ta' attentat vjolent għall-pudur <u>li, fih innifsu, ma jkunx jikkostitwixxi wieħed mid-delitti ikkunsmat jew attentat, imsemmijin fl-artikoli ta' qabel ta' dan is-sub-titolu</u>, jeħel il-piena ta' priġunerija minn tliet xhur sa sena.** (sottolinjar tal-Qorti).

Jikkonsegwi għalhekk, illi ġaldarba l-Ewwel Qorti sabet ħtija fl-appellant għar-reat ta'l-istupru, hija kellha tgħaddi biex tastjeni milli tieħu konjizzjoni ulterjuri tat-tieni imputazzjoni, u allura lanqas setgħet tinfliġġi il-piena għal dan ir-reat.

Illi magħdud dan, għalhekk, għandu jkun hemm temperament fil-piena sabiex jirrifletti dan il-fatt. Jingħad ukoll illi l-Qorti ser tieħu in konsiderazzjoni il-fatt illi l-appellant għandu fedina penali nadifa u kwindi għandu jitqies bħala *first time offender*, u għalhekk il-piena għandha tkun fil-minimu tagħha.

Għal dawn il-motivi, l-Qorti taqta' u tiddeċiedi billi tilqa' parzjalment l-appell interpost. Tgħaddi għalhekk sabiex tirriforma s-sentenza appellata billi tikkonfermaha fejn l-appellant kien misjub ħati tal-ewwel imputazzjoni miġjuba kontra tiegħu, u fejn huwa kien illiberat mit-tielet imputazzjoni, u wara li rat l-artikolu 207 tal-Kodiċi Kriminali, tirrevoka s-sejbien ta' ħtija għat-tieni imputazzjoni u minflok tastjeni milli tieħu konjizzjoni ta'l-istess. Tvarja l-piena inflitta u tikkundanna lill-appellant għal perijodu ta' tlett snin priġunerija.

Edwina Grima
Imħallef