



QORTI TAL-APPELL KRIMINALI

Onor. Imħallef Consuelo Scerri Herrera, LL.D., Dip Matr., (Can)

Appell Nru: 168/2017

Il-Pulizja

Vs

Clayton Azzopardi

Illum, 15 ta' Mejju 2025

Il-Qorti,

Rat l-akkuzi dedotti kontra l-appellat, **Clayton Azzopardi** detenur tal-karta tal-identita Maltija **161983M**, akkuzat quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali talli:

1. Nhar is-7 ta' Settembru 2016, gewwa Marsaskala volontarjament hassar, ghamel bsara jew gharraq hwejjeg haddiehor, mobbli jew immobbli, liema bsara bija izjed minn elfejn u hames mitt euro (2,500), u dan ghad-detriment tal- Kumpanija 2000LTD u/jew persuni obra;
2. Fuq talba tad-Direttur Generali (Dwana) gie akkuzat talli:

Fis-7 ta' Settembru 2016, gewwa Marsaskala, wara intervent li sar mill-Ufficjali tal-Pulizija fil-Cabin Cruiser bl-isem ta' KIKA, li kienet irmonkata mal-vettura Toyota Hilux bin-numru tar-registrazzjoni ANT005, instab li f'dik il-gurnata, xjentement,

importat jew dahbal, jew kellu x'taqsam f'illi jigu importati jew imdabblin f'Malta, jew kellek fil-pussess u/jew taht il-kontroll tieghu, kif ukoll laqa' ghandu, zamm jew ukoll kellu b'xi mod x'jaqsam fil-garr, twarrib, habi jew depożitu ta' sigaretti bla dazju fi kwantita' kif deskritt hawn taht, u dan, bil- bsieb li jigi ffrodat il-Gvern minn Dazji u t-taxxa li jkun imiss jithallas fugbom, jew biex tinheles xi projbizzjoni jew limitazzjoni tad-Dwana dwar dawn is- sigaretti, liema sigaretti nstabu fuq il-Cabin Cruiser KIKA:

48 Kaxxa, b'50 Kartuna kull Kaxxa, b'200 sigarett kull kartuna - Richman Royal Kaxxa, b'50 kartuna, b-200 sigarett kull kartuna - ROCCO Kartuna, bi 8 pakketti b'20 sigarett kull pakkett u pakkett ichor miftub bi 17- il sigarett-Rachman Royal 50 Kartuna b-200 sigarett kull kartuna - Richman Royal Kartuna, b'200 sigarett-ROCCO

Dawn is-sigaretti, li l-importazzjoni u l-pussess taghhom huma projbiti u/jew restritti uf jew limitati, ghandhom Valur totali ta' €14,511.02, dazju tas-sisa, Darju ta' Importanzjoni u Tasca fuq il-Valur Mitjud (VAT) dovuti, li jammontaw ghal €85,064.60, €8,358.35 a €19,428.11 rispettivament, fejn liema Dazji u Taseca ma kienux gew imballsa gew imballsa wf jew kawtelati;

3. Fuq talba tal-Kummissarju tat-Taxi gie akkuzat ukoll talli fis-7 ta' Settembru 2016, gewwa Marsaskala, wara intervent li sar mill-ufficjali tal-Pulizija fil-Cabin Cruiser bl-isem ta' KIKA, li kienet irmonkata mal-vettura Toyota Hilux bin-numru tar-Registrazzjoni ANT005, instab li f'dik il-gurnata, xjentement, importa jew dabbal, jew kellu x'taqsam f'illi jigu importati jew imdahhlin f'Malta, jew kellek fil-pussess ul jew taht il-kontroll tieghek, kif ukoll laqa' ghandu, zamm jew ukoll kellu b'xi mod x'taqsam fil-garr, twarrib, habi jew depożitu ta' sigaretti bla dazju, ji kwantità kif deskritt hawn taht, u dan, bil-brieb li jigi ffrodat il-Gvern minn Dazji u t-taxxxa li jkun imiss jithallas fuqhom, jew biex tinbeles xi projbizzjoni jew limitazzjoni tad-Dwana dwar dawn is-sigaretti, liema sigaretti instabu fuq il-Cabin Cruiser KIKA:

48 Kacca, b'50 Kartuna kull Kaxxa, b'200 sigarett kull kartuna - Richman Royal Kacca, b'50 kartuna, b-200 sigarett kall kartuna - ROCCO Kartuna, bi 8 pakketti b'20 sigarett kuli pakkett u pakkett iebor miftuh bi 17- il sigarett Richman Rayal 50 Kartuna b-200 sigarett kull kartuna - Richman Royal Kartuna, b'200 sigarett – ROCCO Dawn is-sigaretti, li l-importazzjoni u l-pussers tagħhom huma projbti ul jew restritti ul jew limitati, għandhom Valur totali ta' €14,511.02, darju tas-sisa, Darju ta' Importarsjoni u Taxa fuq il-Valur Mizjud (VAT) dovuti, li jammuntaw għal €85,064.60, €8.358.35 €19,428.11 rispettivament, fejn liema Dazji a Taxxa ma kienus ġew imhallsa jew imballsa u jew kawtelati;

4. Kif ukoll, talli b'hekk inti ikkommetta delitt punibbli bi prigunerija wagt perjodu operattiv ta' Ordni ta' Probation għal perjodu ta' tlett snin mogħtija lil mill- Magistrat Dr. N. Camilleri LL.D. nhar it-12 ta' Mejju 2016 liema sentenza saret definittiva a ma tistax tigi mibdula;
5. U talli irrenda rubek recediv ai termini tal-artikoli 49,50 tal-Kapitolu 9 tal-Ligijiet ta' Malta b'sentenzi mogħtija mill-Qrati ta' Malta, liema sentenzi saru definittivi u ma jistgħux jinbidlu.

Il-Qorti ukoll giet gentilment mitluba sabiex f'kaz ta' htija tikkundanna lill-akkużat għal hlas ta' spejjeż li jkollhom x'jaqsmu mal-hatra ta' esperti jew periti fil-proceduri bekk kif ikkontemplat fl-artikolu 533 tal-Kapitlu 9 tal-Ligijiet ta' Malta.

Rat is-sentenza tal-Qorti tal-Magistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali ta' nhar is-16 ta' Settembru 2025, fejn sabet lill-imputat hati tal-ewwel akkuża kif dedotta kontri u poggiet lil appellant taht Ordni ta' Probation skont ma jipprovdli l-artikolu 7 tal-Kap. 446 tal-Ligijiet ta' Malta għal tliet snin, filwaqt li lliberatu mit-tieni akkuża.

Rat ir-rikors tal-appell tal-appellat Clayton Azzopardi, prezentat fir-registru ta' din l-Onorabbli Qorti nhar it-12 ta' April, 2024, fejn talab lil din l-Onorabbli Qorti sabiex joghghobha tirriforma s-sentenza appellata u dana billi;

- Tikkonfermaha f'dik il-parti fejn sabet l-appellat hati tal-ewwel (01) imputazzjoni u lliberatu mir-raba' (04) imputazzjoni, u thassarha u tirrevokaha f'dik il-parti fejn illiberatu mit-tieni (02), it-tielet (03) u l-hames (05) imputazzjonijiet u tinfliggi piena skond il-ligi.

L-aggravji huma ċari u manifesti u jikkonsistu fis-segwenti:

Illi fis-sitta u ghoxrin (26) ta' Marzu 2024, l-esponent ircieva minghand il-Qorti tal-Magistrati (Malta) l-atti processwali tal-proceduri fl-ismijiet premessi u hassu aggravat bihom b'mod ċar u manifest fejn l-ewwel Onorabbli Qorti, permezz tas-sentenza tagħha kif hawn fuq riferiti, *inter alia*, għamlet enunċazzjoni żbaljata tal-ligi u tal-provi kif miġjuba li filfatt wasslet għal-helsien tal-imputat mit-tieni (02), it-tielet (03), ir-raba' (04) u l-hames imputazzjonijiet, filwaqt li sabitu hati tal-ewwel (01) imputazzjoni iżda dan limitatament talli b'nuqqas ta' hsieb, bi traskuraġni jew b'nuqqas ta' hila fl-arti jew professjoni tiegħu, jew b'nuqqas ta' tharis ta' regolamenti għamel hsara fil-vettura ta' registrazzjoni HAK378, u għaldaqstant, l-esponent qiegħed jinterponi dan l-umli appell;

Illi l-aggravju huwa ċar u manifest u jikkonsisti filli l-Qorti tal-Magistrati (Malta), fis-sentenza tagħha hawn fuq riferita, *inter alia*, għamlet interpretazzjoni hażina tal-ligi u apprezzament żbaljat tal-fatti kif miġjuba li filfatt wasslet għall-helsien tal-imputat mill-imputazzjonijiet miġjuba kontrih minhabba f'li, skond dik l-Onorabbli Qorti, il-fatti u l-provi pprezentati ma kienx fihom l-ingredjenti tar-reati hekk kif ikkontemplati fl-artikoli tal-ligi;

Illi l-ewwel Qorti iddeċidiet li tillibera lil Clayton Azzopardi minn dawn ir-reati kif prospettati mill-prosekuzzjoni, għaliex fil-fehma tagħha:

“Mill-atti jirrizulta li l-prosekuzzjoni resqet prova sodisfacenti li s-sigaretti dahlu Malta u li kienu fil-pussess u kontroll shih tal-imputat, u dan mhux biss fuq livell prima facie izda lil hinn minn kull dubju ragonevoli. L-imputat stess sahansitra ammetta li dawk is-sigaretti kienu tieghu fl-istqarrija li rrilaxxa lill-pulizija. Tressqet ukoll prova lil hinn minn kull dubju ragonevoli illi l-oggetti in kwistjoni huma filfatt sigaretti, u dan billi inhatar espert sabiex jikkonferma xkienu ezattament l-oggetti li gew elevati mill-bastiment li kien fil-pussess tal-imputat. Pero, il-prosekuzzjoni naqset milli tressaq prova prima facie li d-dazju fuq dawn is-sigaretti ma kienx thallas. Il-prosekuzzjoni produciat mhux inqas minn tlettax il-xhud li kienu involuti jew fl-intercettazzjoni tad-dahhla tas-sigaretti f'Malta, jew fl-ghodd, trasportazzjoni jew valutazzjoni taghhom. Hadd minn dawn it-tlettax -il xhud però ma semma li dawn is-sigaretti kienu jidhru li kienu sdazjati. Il-Qorti tosserva li lanqas ir-ritratti tas-sigaretti esebiti mill-prosekuzzjoni a fol 115-118 ma jghinu f'dan ir-rigward. Ir-ritratt a fol 115 juri l-genb ta' kaxxi ta' sigaretti, ir-ritratt a fol 116 juri kaxxi tal-kartun issigillati u ma jidhirx l-kontenut taghhom, filwaqt illi r-ritratt a fol 117 juri xi kaxxi ta' sigaretti izda minhabba l-kwalita u l-angolu ta' dan ir-ritratt ma jista' jigi kkonstatat xejn dwarhom ghaliex ma jidher xejn. Ghalhekk il-Qorti lanqas tista hija stess tikkonstata jekk prima facie jirrizultax li ma thallsux id-dazji u t-taxxi dovuti fuq dawn is-sigaretti.

Ghaldaqstant jidher illi l-prosekuzzjoni naqset milli tressaq prova bazika, u cioe illi d-dazj u t-taxxi dovuti fuq is-sigaretti mertu ta' din il-kawza ma thallsux mill-imputat, u dan sahansitra lanqas fuq livell prima facie. B'konsegwenza ta' dan, il-Qorti ma tistax taghmel altru hlief li tikkonkludi li l-prosekuzzjoni ma ppruvatx il-kaz taghha kontra l-imputat sal-grad rikjest mill-ligi, u b'hekk tgħaddi sabiex tillibera lill-imputat mit-tieni u t-tielet imputazzjoni.

[...]

Ir-raba u l-hames imputazzjonijiet

Permezz tar-raba' imputazzjoni l-imputat gie mixli li kkommetta delitt punibbli bi prigunerija waqt perjodu operattiv ta' Ordni ta' Probation impost permezz ta' sentenza mogħtija fit-12 ta' Mejju 2016, li saret definittiva. Wara li fliet l-atti il-Qorti sabet li kopja ta' din is-sentenza qatt ma giet ippreżentata mill-prosekuzzjoni, u wisq anqas ma tressqet prova li din is-sentenza saret definittiva.

Flir-rigward tar-reċediva, il-Qorti tosserva illi peress li l-imputat qiegħed jinstab hati ta' reat involontarju, l-addebitu tar-reċediva ma japplikax in vista ta' dak dispost fl-artikolu 52 tal-Kapitolu 9 tal-Ligijiet ta' Malta.

Għaldaqstant l-imputat qiegħed jiġi illiberat minn dawn iż-żewġ imputazzjonijiet."

Illi l-esponent ihossu aggravat dwar il-fatt li r-raġunament li għamlet l-ewwel Qorti, bid-dovut rispett kollu, kien wieħed hażin, fejn fil-fatt dik il-Qorti għamlet interpretazzjoni u apprezzament hżiena, kemm tal-ligi u tal-fatti hekk kif fil-fatt irriżultaw mill-atti proċesswali;

Illi preliminarjament, l-ewwel Qorti għamlet sew meta daret l-atti proċesswali, speċifikament l-istqarrija tal-imputat, iżda jidher li b'xi tip ta' żvista, naqset li tara li kien l-imputat stess li ammetta fl-istess stqarrija li dawn is-sigaretti kienu fil-fatt bla dazju, fil-fatt, a fol 39 tal-atti proċesswali, gie mistqarr is-segwent:

"D: Int iddikjarajthom is-sigaretti?

T: Le.¹

D: Apparti il-bierah kemm il-darba ġibt sigaretti minn barra bil-kuntribandu?

T: Qatt, din kienet l-ewwel darba"

Illi fl-istqarrija tiegħu stess, l-imputat kien iddikjara li dawn is-sigaretti kienu nxtraw bil-kuntribandu, u għaldaqstant, kienu nxtraw mingħajr ma thallas d-dazju, u din l-informazzjoni hija kkonfermata ukoll mir-ritratti eżebiti a fol 115, fejn fil-fatt jidher

¹ Enfazi mizjuda mill-esponent

il-ġenb tal-kaxxi tas-sigaretti u huwa propju fil-ġenb tal-kaxxa li wiehed ikun jista isib is-sigill tal-gvern li juri li jkun thallas id-dazju, sigill li lanqas ma nstab fuq dawn il-kaxxi;

Illi a fol 23, kif ukoll a fol 26 tal-atti proċesswali, jinstabu ukoll dokumenti pprezentati u mahlufin minn rappreżentanti tad-dwana li juru li dawn is-sigaretti ma kienx thallas d-dazju fuqhom;

Illi Mario Mifsud, spettur tad-dwana, li xehed u li x-xhieda tiegħu tinstab a fol 47 tal-atti proċesswali, stqarr is-segwenti fir-rigward tas-sigaretti misjuba:

“Hadnihom magħna, għoddejnihom, ittallajjnihom, qbilna u hadnihom for safe custody id-dwana biex imbgħad id-dwana taħmel ix-xogħol tagħha ta’ dazju. Kemm kien hemm dazju mitluf u dawn l-affarijiet.”

Illi jekk wiehed jgħaddi biex jara dak li ntqal ukoll mix-xhieda tal-prosekuzzjoni, magħdud ma dak hawn fuq espost, ma jista jasal għal ebda konklużjoni ohra għajr għal fatt li ma thallasx dazju fuq is-sigaretti;

Illi għalhekk l-ewwel Onorabbli Qorti kienet fil-verita żbaljata meta qalet li ma ġiex ippruvat, lanqas sa’ livell ta’ prima facie illi dawn is-sigaretti kienu sdazjati, u dan in vista tax-xhieda, tad-dokumenti pprezentati u jekk xejn tal-istqarrija tal-appellat stess;

Illi f’ebda stadju, l-appellat ma ta’ x’jifhem illi kien fil-fatt thallas dazju fuq dawn is-sigaretti anzi għamel l-oppost meta fil-fatt għadda biex jikkonferma li din kienet l-ewwel darba li kien importa sigaretti mingħajr dazju;

Illi minn qari tal-ġurisprudenza lokali, jirriżulta illi l-oneru li jiġi ppruvat li thallas d-dazju f’sitwazzjoni bħal dik odjerna, jinqaleb għal fuq l-appellat, fil-fatt, fis-sentenza

fl-ismijiet *Il-Pulizija vs George Bellizzi* (03/04//1971), il-Qorti tal-Appell Kriminali saħqet is-segwent:

“Il-Prosekuzzjoni m’għandiex bżonn tipprova li d-dazju fuq is-sigaretti ma kienx thallas, iżda għall-kuntrarju, in vista tal-artikolu citat tal-kap. 60 (illum 37) kien imiss lill-imputat jipprova li d-dazju relattiv kien thallas jew kellu raġuni valida jaħseb li kien thallas jew inkella b’xi mod kawtelat.”

Illi fil-każ in diżamina, jirrizulta ċar, anke mill-istqarrija citata iktar il-fuq li mhux biss ma kellux raġuni valida li jaħseb li fil-fatt kien thallas, iżda tahom dikjarazzjoni li assolutament ma kienx thallas ebda dazju fuq dawn is-sigaretti;

Illi fil-kawża fl-ismijiet **il-Pulizija vs Raymond Camilleri** tas-27 ta’ Gunju 2014, il-Qorti tal-Maġistrati (gudikatura kriminali) stqarret is-segwent fir-rigward tal-oneru tal-prova:

“Illi anke fl-Artikolu 82(2) tal-Att XXIII tal-1998 dwar it-Taxxa fuq il-Valur Miżjud, insibu li l-oneru huwa spustjat fuq l-imputat li jipprova li huwa ha l-passi kollha meħtieġa u neċessarji sabiex jotttemptra ruħu mal-liġi.”

Illi fir-rigward tal-ħames imputazzjoni, u cioe dik fir-rigward tar-reċediva, l-esponent jishaq li għaladarba, l-appellat għandu jinstab ħati tat-tieni u tielet akkuzi hekk kif dedotti kontrih, kellu jinstab ħati ukoll ta’ reċediva, liema sentenza li turi r-reċidiva tinstab a fol 114 tal-atti proċesswali

Għaldaqstant, it-tieni (02), it-tielet (03) u l-ħames (05) imputazzjoni ġew ippruvati skond il-liġi.

Ikkunsidrat:

Illi fl-ewwel lok jirrizulta li giet ipprezenta stqarrija ta' Clayton Azzopardi datata t-tmienja (8) ta' Settembru tas-sena elfejn u sittax (2016) a fol 37 et sequitur fejn l-

akkuzat ghazel li ma jikkonsultax ma' Avukat tal-ghazla tieghu qabel ma bdiet l-interrogazzjoni. Ghalhekk giet ipprezentata d-dikjarazzjoni ta' rifjut tal-jedd ghal parir legali a fol 36.

Kif inghad, l-imputat irrilaxxa stqarrija lill-Pulizija Eżekuttiva nhar t-tmienja (8) ta' Settembru tas-sena elfejn u sittax (2016), wara li nghata s-solita twissija skont il-ligi u wara li nghata l-jedd li jkun assistit minn avukat waqt l-interrogatorju tieghu, liema jedd huwa ghazel li ma jeżercitax, izda minghajr il-jedd li jkun assistit minn avukat waqt l-istess interrogatorju. Fil-fatt it-tieni jedd dahal fis-sehh fil-ligi Maltija fit-28 ta' Novembru 2016, permezz tal-Avviz Legali 401 tas-sena 2016.

Jirrizulta ukoll li l-imputat ghazel li ma jaghtix ix-xhieda tieghu quddiem l-Ewwel Qorti u ghalhekk ma jistax jinghad li b'xi mod jew iehor l-akkuzat ri-afferma dak li kien iddikjara fl-istqarrija rilaxxata.

Illi d-decizjoni ta' Qorti dwar jekk ghandhiex tigi skartata stqarrija u dikjarazzjoni moghtija mill-akkuzat u kwalunkwe referenza ghal dak li stqarr jew xehed l-akkuzat '*at pre-trial stage*' ma hijiex ibbazata fuq xi allegazzjoni ta' vulnerabbilita' bhal kif lanqas ma hija bbazata fuq xi nuqqas ta' volontarjeta' izda tali decizjoni ghandha tkun imsejsa fuq il-fatt li l-akkuzat ma kellux id-dritt li jkollu l-Avukat prezenti waqt it-tehid tal-istqarrija u ghalhekk anke fil-kaz ta' Clayton Azzopardi li kien ghazel li ma jeżercitax id-dritt li jikkonsulta ma' Avukat qabel it-tehid tal-istqarrija, ma jfissirx li kien sejjer jirrifjuta l-prezenza ta' Avukat waqt it-tehid tal-istqarrija. L-importanza li jkun hemm Avukat prezenti waqt it-tehid tal-istqarrija u f'kull stadju waqt l-investigazzjoni m'hijiex biss biex jigi accertat li l-istqarrija tkun wahda volontarja izda bhala parti integrali mid-difiza tal-akkuzat u cioe' li l-Avukat ikun jista' jistrada d-difiza tieghu mill-bidu nett tal-investigazzjoni.

Din il-Qorti tirrikonoxxi li kien hemm tibdil sostanzjali fid-decizjonijiet moghtija mill-Qorti Ewropea tad-Drittijiet tal-Bniedem. Sentenza ta' certu importanza hija dik moghtija mill-Grand Chamber tal-Qorti Ewropea tad-Drittijiet tal-Bniedem fis-

sentenza '**Bueze vs Belgium**'² fejn saret enfazi fuq il-fatt li l-fatti u l-proceduri iridu jigu evalwati fl-intier taghhom sabiex jigi determinat jekk kien hemm vjolazzjoni tad-dritt ghal smiegh xieraq. Filfatt gie meqjus li:

'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, cited above, § 274, and Simeonovi, cited above, § 120):

(a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;

(b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;

(c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;

(d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;

(e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;

(f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;

(g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;

² Deciza mill-Grand Chamber tal-Qorti Ewropea tad-Drittijiet tal-Bniedem fid-9 ta' Novembru, 2018 (Applikazzjoni numru: 71409/10)

(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.'

Fl-istess sentenza gie kkunsidrat li:

'193. In conclusion, re-emphasising the very strict scrutiny that must be applied where there are no compelling reasons to justify the restriction on the right of access to a lawyer, the Court finds that the criminal proceedings brought against the applicant, when considered as a whole, did not cure the procedural defects occurring at the pre-trial stage, among which the following can be regarded as particularly significant:

(a) The restrictions on the applicant's right of access to a lawyer were particularly extensive. He was questioned while in police custody without having been able to consult with a lawyer beforehand or to secure the presence of a lawyer, and in the course of the subsequent judicial investigation no lawyer attended his interviews or other investigative acts.

(b) In those circumstances, and without having received sufficiently clear prior information as to his right to remain silent, the applicant gave detailed statements while in police custody. He subsequently presented different versions of the facts and made statements which, even though they were not self-incriminating stricto sensu, substantially affected his position as regards, in particular, the charge of the attempted murder of C.L.

(c) All of the statements in question were admitted in evidence by the Assize Court without conducting an appropriate examination of the circumstances in which the statements had been given, or of the impact of the absence of a lawyer.

(d) While the Court of Cassation examined the admissibility of the prosecution case, also seeking to ascertain whether the right to a fair trial had been respected, it focused on the absence of a lawyer during the period in police custody without assessing the consequences for the applicant's defence rights of the lawyer's absence during his police interviews, examinations by the investigating judge and other acts performed in the course of the subsequent judicial investigation.

(e) *The statements given by the applicant played an important role in the indictment and, as regards the count of the attempted murder of C.L., constituted an integral part of the evidence on which the applicant's conviction was based.*

(f) *In the trial before the Assize Court, the jurors did not receive any directions or guidance as to how the applicant's statements and their evidential value should be assessed.*

194. *The Court finds it important to emphasise, as it has done in other cases under Article 6 § 1 of the Convention in which an assessment of the overall fairness of the proceedings was at issue, that it is not for the Court to act as a court of fourth instance (see Schatschaschwili, cited above, § 124). In carrying out such an assessment, as required by Article 6 § 1, it must nevertheless carefully look at how the domestic proceedings were conducted, and very strict scrutiny is called for where the restriction on the right of access to a lawyer is not based on any compelling reasons. In the present case, it is the combination of the various above-mentioned factors, and not each one taken separately, which rendered the proceedings unfair as a whole.*

(iv) General conclusion

195. *Accordingly, there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.'*

Ghalhekk skont din is-sentenza, ir-restrizzjoni ghal access ta' Avukat waqt l-interrogatorju ma jfissirx awtomatikament li kien hemm lezjoni tad-dritt ghas-smiegh xieraq izda l-Qorti trid tqis ukoll l-'*overall fairness*' tal-proceduri sabiex tiddetermina jekk kienx hemm lezjoni o meno.

F'dan ir-rigward, il-Qorti tal-Appell Kriminali fis-sentenza fl-ismijiet '**Il-Pulizija Vs Maximilian Ciantar**'³ wara li ghamlet referenza ghal din is-sentenza u cioe' dik fl-ismijiet '**Philippe Bueze vs Belgium**'⁴ qieset:

'Illi ghalkemm illum kif inghad il-ligi regghet giet emendata u dan sabiex jigi fis-sehh fil-ligi domestika d-dritt komunitarju fir-rigward u sabiex ukoll ir-restrizzjoni sistematika dwar id-dritt ghall-avukat jigi regolat, madanakollu fiz-zmien meta giet rilaxxjata l-istqarrija tal-

³ Deciza mill-Qorti tal-Appell Kriminali fis-27 ta' Frar, 2019 (Appell Numru: 514/2017)

⁴ Deciza mill-Grand Chamber fid-9 ta' Novembru, 2018 (Numru: 71409/10)

appellant kien hemm dritt, ghalkemm wiehed iktar ristrett, tal-persuna suspettata biex tikkonferixxi mal-avukat tal-fiducja taghha fil-hin precedenti l-interrogatorju mill-pulizija. Illi allura din il-Qorti fid-dawl tal-pronunzjament surriferit tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem ma tistax a priori tiskarta stqarrija ta' persuna li tkun inghatat l-jedd tikkonsulta ma' avukat qabel ma tigi interrogata, izda fejn l-avukat taghha ma kienx prezenti filwaqt tal-interrogazzjoni, u dan ghaliex allegatament jista' jkun hemm lezjoni tad-dritt taghha ghal smigh xieraq, billi kif mistqarr f'dan il-pronunzjament kull kaz irid jitqies ghalih u cioe' allura billi jigi mistharreg f'kull kaz individwalment jekk bil-fatt illi l-persuna akkuzata ma kellhiex l-avukat prezenti waqt it-tehid tal-istqarrija dan setax impinga fuq is-smigh xieraq iktar 'il quddiem tul il-proceduri penali istitwiti kontra taghha.

Din il-Qorti ma ghandhiex funzjonijiet kostituzzjonali u allura ma ghandhiex il-poter tistharreg jekk ikunx sehħ lezjoni tad-dritt ta' smigh xieraq jew jekk potenzjalment dan jistax isehħ u dan f'kaz fejn xi forma ta' assistenza legali tkun giet moghtija. Ma tistax il-Qorti ta' kompetenza penali tiddeciedi a priori illi bil-fatt wahdu illi fiz-zmien li l-persuna akkuzata tkun giet interrogata ma kellhiex il-jedd ikollha l-avukat prezenti maghha dan awtomatikament kien vjolattiv tal-jedd taghha ghal smigh xieraq meta l-Qorti Ewropeja issa qed tidderigi il-qradi domestici jindagaw jekk il-proceduri fl-intier taghhom kenux gusti fil-konfront tal-akkuzat bit-test allura li irid jigi segwiet fuq zewg binarji u cioe':

- 1. the existence of compelling reasons for the right to be withheld*
- 2. the overall fairness of the proceedings.*

Jinghad biss f'dan il-kaz illi l-appellant kien abbilment assistit tul dawn il-proceduri kriminali istitwiti kontra tieghu. Fl-ebda mument tul il-proceduri ma jqanqal il-kwistjoni dwar il-valur probatorju tal-istqarrija minnu rilaxxjata biex b'hekk il-Qorti ghandha quddiemha prova li qatt ma giet ikkontestata. Illi maghdud dan madanakollu l-Qorti tosserva li l-appellant kien ikkonsulta mal-avukat tal-fiducja tieghu qabel ma gie interrogat. F'dak iz-zmien huwa kellu sitta u ghoxrin sena u diga` kellu irregistrati kontra tieghu hdax-il kundanna biex b'hekk ma jistax jitqies li kien bniedem vulnerabbli. L-appellant qatt ma jikkontendi illi hu jew l-avukat tieghu ma gewx mgħarrfa mill-pulizija dwar in-natura tal-akkuzi migjuba fil-konfront tieghu jew tal-provi li l-pulizija kellhom f'idejhom. Fuq kollox dak mistqarr mill-appellant fl-istqarrija

minnu rilaxxjata huwa biss korroborazzjoni ta' dak li jikkontendu l-vittmi billi dawn kienu x-xhieda ewlenija f'dan il-kaz meta jistqarru li gharfu lill-appellant bhala wiehed mill-hallelin.

Illi finalment ghalkemm il-ligi f'dak iz-zmien ma kenitx tippermetti lill-avukat li jkun prezenti waqt it-tehid tal-istqarrija, madanakollu ghandu jinghad illi l-ligi kif inhi illum ma tantx toffri dik l-assistenza effettiva bil-fatt illi l-avukat ikun prezenti mal-persuna suspettata waqt li din tkun qed tigi interrogata bil-proviso ghall-artikolu 355AUA (8)(c) tal-Kodici Kriminali jiddisponi hekk:

"Id-dritt tal-avukat li jipparteċipa b'mod effettiv ma għandux jinftiehem bhala dritt tal-avukat li jostakola l-interrogazzjoni jew li jissuggerixxi twegibiet jew reazzjonijiet ohra għall-interrogazzjoni u kull mistoqsija jew rimarka ohra mill-avukat għandha, hlief f'ċirkostanzi eċċezzjonali, issir wara li l-Pulizija Eżekuttiva jew awtorità ohra investigattiva jew awtorità ġudizzjarja jkunu ddikjaraw li ma għandhomx aktar mistoqsijiet."

Fil-fatt minn qari tad-Direttiva tal-Unjoni Ewropeja dwar id-Dritt tal-assistenza legali, ghalkemm din giet tramandata kwazi kelma b'kelma fil-ligi taghna, madanakollu dana l-proviso ma jirriaffigura imkien fl-artikolu 3 tad-Direttiva, li gie trasportat fl-artikolu 355AUA tal-Kodici Kriminali.

Din il-Qorti sejra taghmel referenza ghal Joint concurring opinion tal-Imhalfin Yudkivska, Vučinić, Turković and Hüseyinov ghas-sentenza fl-ismijiet **'Beuze v. Belgium'**⁴ fejn fost affarijiet ohra ikkunsidraw li:

'22. In sum, we believe that it is vital to make a distinction between the systematic defects and the particular defects which are found in individual cases as a result of targeted and context-specific restrictions (e.g. in terrorism cases) or as a result of mistakes and shortcomings in individual cases. It is not correct for the Court to consider the overall fairness of an individual applicant's case when a systematic ban exists, affecting every other individual in the applicant's position and in the absence of any assessment by the relevant national authorities.

23. The formulation of the exception is extremely clear: any derogation must be justified by compelling reasons pertaining to an urgent need to avert danger for the life or physical integrity of one or more people. In addition, any derogation must comply with the principle of proportionality, which implies that the competent authority must always choose the alternative

that least restricts the right of access to a lawyer and must limit the duration of the restriction as much as possible. In accordance with the Court's case-law, no derogation may be based exclusively on the type or seriousness of the offence and any decision to derogate requires a case-by-case assessment by the competent authority. Finally, derogations may only be authorised by a reasoned decision of a judicial authority.

24. The Court must apply a strict approach to a blanket prohibition on the right to legal assistance; otherwise we will end up in conflict with the overall direction of both the case-law of the Court and EU law.'

Fis-sentenza fl-ismijiet 'Paul Anthony Caruana v. Avukat Ġenerali, Kummissarju tal-Pulizija, Registratur tal-Qrati u Tribunali Kriminali'⁵ il-Qorti Kostituzzjonali ghamlet referenza ghas-sentenza fuq citata fl-ismijiet 'BEUZE VS Belgium'⁶ u kkunsidrat li:

'18. Din hija interpretazzjoni li hija eqreb mal-posizzjoni li kienet hadet din il-qorti qabel is-sentenza ta' Borg milli mal-interpretazzjoni mogħtija mir-Raba' Sezzjoni f'Borg u effettivament tfisser li kellha raġuni il-Qorti Kostituzzjonali ta' Malta fil-posizzjoni li kienet hadet fil-każ ta' Muscat u fis-sentenzi li segwew, qabel ma kienet kostretta tbiddel dik l-interpretazzjoni fid-dawl ta' Borg.

19. Uħud mill-imħallfin membri tal-qorti li tat is-sentenza ta' Beuze, f'opinjoni għalihom, ikkritikaw is-sentenza fejn qalet illi, f'kull każ, trid tqis il-proċess fit-totalità tiegħu u mhux biss in-nuqqas ta' għajnuna ta' avukat, għax dehrilhom illi, iżjed milli preċiżazzjoni tal-interpretazzjoni ta' Salduz fid-dawl ta' Ibrahim, is-sentenza ta' Beuze hija kapo- volġiment ta' dik il-ġurisprudenza. Hu x'inh, hijiex preċiżazzjoni, elaborazzjoni, evoluzzjoni jew kapovolġiment, din hija sa issa l-aħħar kelma, u taġhti raġun lill-Qorti Kostituzzjonali ta' Malta fil-ġuris- prudenza li segwiet is-sentenza ta' Muscat.

20. Fid-dawl ta' dawn il-konsiderazzjonijiet, l-aggravju tal-attur – safejn iġid illi “l-fatt wahdu illi persuna li tkun instabet hatja ma tkunx thalliet tikkonsulta ma' avukat tal-fiduċja tagħha fil-mument tal-investigazzjoni u l-ġhotja ta' stqarrija lill-pulizija, minhabba restrizzjoni sistematika fil- liġi maltija, awtomatikament ikun ifisser illi saret vjolażżjoni tad-

⁵ Deciza mill-Qorti Kostituzzjonali fil-31 ta' Mejju, 2019 (Rikors kostituzzjonali numru: 64/2014 JRM)

⁶ Deciza mill-Grand Chamber tal-Qorti Ewropea tad-Drittijiet tal-Bniedem fid-9 ta' Novembru, 2018 (Applikazzjoni numru: 71409/10)

dritt fondamentali tas-smiġ xieraq ta' dik l-istess persuna taht l-artikolu 6 tal-Konvenzjoni Ewropea" – huwa ħażin u huwa miċħud.¹

Fl-istess sentenza, il-Qorti qieset li kien hemm raguni tajba għall-attur li ma thallix ikellem avukat qabel jew waqt l-ewwel interrogazzjoni u dan sabiex issir controlled delivery lil terza persuna li kienet tipprovdil lill-attur bid-droga. Ikkunsidrat li ma saret ebda allegazzjoni li l-istqarrija saret fic-cirkostanzi mmsemmija fl-artikolu 658 tal-Kodici Kriminali għalkemm issa jgħid li kien xurban u fis-sakra meta għamel l-istqarrija. In oltre' kkunsidrat li l-istqarrija ma kinitx ir-raguni li wasslet għal kundanna tal-attur izda li l-attur ammetta l-htija. Din l-ammissjoni saret fil-prezenza tal-Avukat wara konsulta miegħu u quddiem Magistrat li wissieh bil-konsegwenzi tal-ammissjoni u tah l-opportunità li jiehodha lura. Il-Qorti kkonfermat li ma kien hemm ebda ksur tal-jedd tal-attur għal smiġ xieraq.

Din il-Qorti tagħmel referenza ukoll għas-sentenza fl-ismijiet 'Stephen Pirotta v. L-Avukat Generali u l-Kummissarju tal-Pulizija'⁷ fejn il-Qorti wara li qieset guriprudenza tal-Qorti Ewropeja fis-sezzjoni Magħquda, ikkunsidrat li:

'Effettivamente, dan ifisser illi – kontra dak li qalet l-ewwel qorti fis-silta miġjuba fuq – il-fatt waħdu li ma tkunx thalliet tingħata l-għajnuna ta' avukat waqt l-interrogazzjoni, ukoll jekk ma kienx hemm raġunijiet impellenti għal dan in-nuqqas, u dik l-istqarrija ntuzat fil-proċess, ma huwiex biżżejjed biex, ipso facto, jinsab ksur tal-jedd għal smiġ xieraq: trid tqis il-proċess fit-totalità tiegħu ("having regard to the development of the proceedings as a whole").'

Il-Qorti qieset li l-attur ma garrab ebda ksur tal-jedd tiegħu taht l-artikolu 39 tal-Kostituzzjoni jew l-artikolu 6 tal-Konvenzjoni Ewropea. Ikkunsidrat li:

'Fil-kaz' tallum ma jista' jkun hemm ebda dell ta' dubju li l-attur kien ħati tal-imputazzjonijiet imressqa kontra tiegħu, kif wara kollox għarfet l-ewwel qorti stess. L-ewwel qorti għarfet ukoll illi l-qradi ta' ġurisdizzjoni kriminali waslu għall-konkluzjoni tal-htija tal-attur bis-saħħa ta' xieħda ohra barra l-istqarrija tiegħu. Meqjus il-proċess kriminali fl-intier tiegħu, ma jistax jingħad illi l-attur ma ngħatax smiġ xieraq: kellu għarfien tal-provi kollha mressqa kontrih u ma ntweriex li nżamm mistur xi taġħrif li kellha l-pulizija; kellu għajnuna ta' avukat waqt il-proċess quddiem il-qorti; kellu fakoltà jressaq xieħda u jagħmel konto-eżami tax-xieħda tal-

⁷ Deciza mill-Qorti Kostituzzjonali fis-27 ta' Settembru, 2019 (Rikors kostituzzjonali numru: 13/2016 JRM)

prosekuzzjoni; instab hati bis-sahha ta' xiehda oggettiva li, ukoll jekk ma tqisx l-ammissjoni tieghu, rabtitu mal-incident u ma setghetx thalli dubju dwar il-htija tieghu.'

Fis-sentenza moghtija ricentement fl-ismijiet 'Farrugia vs. Malta'⁸ u reza finali fis-sebgha (7) ta' Ottubru tas-sena elfejn u dsatax (2019) mill-Qorti Ewropea tad-Drittijiet tal-Bniedem gie kkunsidrat li:

'98. Prior to the recent Beuze judgment, in a number of cases, the Court found that systematic restrictions on the right of access to a lawyer had led, ab initio, to a violation of the Convention (see, in particular, Dayanan v. Turkey, no. 7377/03, § 33, 13 October 2009 and Boz v. Turkey, no. 2039/04, § 35, 9 February 2010). That same approach was followed by the Court in relation to the Maltese context in Borg (no.37537/13, 12 January 2016).

99. Subsequently, being confronted with a certain divergence in the approach to be followed in cases dealing with the right of access to a lawyer, the Court had occasion to further examine the matter in Ibrahim and Others, Simeonovi and more recently in Beuze, all cited above, where the Court departed from the principle set out in the preceding paragraph. In Beuze, the most recent authority on the matter, the Grand Chamber gave prominence to the examination of the overall fairness approach and confirmed the applicability of a two stage test, namely whether there are compelling reasons to justify the restriction as well as the examination of the overall fairness and provided further clarification as to each of those stages and the relationship between them, as explained below.

(i) Concept of compelling reasons

100. The criterion of “compelling reasons” is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the suspect’s first police interview, restrictions on access to a lawyer are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case. A finding of compelling reasons cannot stem from the mere existence of legislation precluding the presence of a lawyer. The fact that there is a general and mandatory restriction on the right of access to a lawyer, having a statutory basis, does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment,

⁸ Deciza mill-Qorti Ewropea tad-Drittijiet tal-Bniedem fl-4 ta' Gunju, 2019 (Applikazzjoni numru: 63041/13)

whether there are any compelling reasons. Where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to a compelling reason to restrict access to legal advice for the purposes of Article 6 of the Convention (see Beuze, cited above, §§ 142-143).

(ii) The fairness of the proceedings as a whole and the relationship between the two stages of the test

101. 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 (see Beuze, cited above, § 145).

102. The Court further emphasises that where access to a lawyer was delayed, and where the suspect was not notified of the right to legal assistance, the privilege against self-incrimination or the right to remain silent, it will be even more difficult for the Government to show that the proceedings as a whole were fair (ibid., § 146).

103. As the Court has already observed, subject to respect for the overall fairness of the proceedings, the conditions for the application of Article 6 §§ 1 and 3 (c) during police custody and the pre-trial proceedings will depend on the specific nature of those two phases and on the circumstances of the case (ibid., § 149).

(iii) Relevant factors for the overall fairness assessment

104. 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:

(a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;

- (b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;*
- (c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;*
- (d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;*
- (e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;*
- (f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;*
- (g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;*
- (h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;*
- (i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and*
- (j) other relevant procedural safeguards afforded by domestic law and practice (ibid., § 150).'*¹

Fl-istess sentenza gie kkunsidrat ukoll li:

¹118. However, the nature of the statements and their use is of particular relevance in the present case. The Court notes that they did not contain any confessions nor was their content self-incriminating. However, the privilege against self-incrimination is not confined to actual confessions or to remarks which are directly incriminating; for statements to be regarded as self-incriminating it is sufficient for them to have substantially affected the accused's position (see, for example, *Schmid-Laffer v. Switzerland*, no. 41269/08, § 37, 16 June 2015). Indeed, the statements given by the applicant, at pre-trial stage in the absence of a lawyer, were relied on

by the Court of Criminal Appeal in connection with the applicant's credibility. In particular, in its judgment the Court of Criminal Appeal had noted certain inconsistencies in his statements of 1 and 2 February 2002 (see paragraph 22 above) and it had considered that he was not reliable as the applicant had replied in an evasive and hesitant way to police questions concerning his business, profitability, rent, and profits of the previous year (see paragraph 26 above). Nevertheless, the Court cannot but note that the Court of Criminal Appeal had found that A.F.'s statements had been enough to determine the applicant's guilt. In consequence its assessment of the applicant's credibility on the basis of his pre-trial statements can be considered as having been made *ex abundanti cautela* (out of an abundance of caution). In the light of the Court of Criminal Appeal's finding concerning the sufficiency of A.F.'s statements, the Court considers that the use it made of the applicant's statements to assess his credibility cannot be considered as having substantially affected his position.

(iii) Conclusion

119. In conclusion, while very strict scrutiny must be applied where there are no compelling reasons to justify the restriction on the right of access to a lawyer, the Court, in the specific circumstances of the case, finds that having taken into account the combination of the various above-mentioned factors, despite the lack of procedural safeguards relevant to the instant case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer.

120. There has therefore been no violation of Article 6 §§ 1 and 3 (c) of the Convention.'

Interessanti hija l-joint dissenting opinion tal-Imhallfin Serghides u Pinto de Albuquerque fejn fost kunsiderazzjonijiet ohra dwar din is-sentenza, ikkunsidraw li:

'10. In any event, we are of the view that the right to a lawyer at the pre-trial stage does not hinge, in any way or form, on the state of vulnerability of the defendant. Nothing in the Convention makes the Article 6 § 3 (c) right dependent on such vulnerability. Such an abusive and restrictive interpretation of that right contradicts its essence. Every defendant, vulnerable or not, has a right, at the pre-trial stage, to a lawyer who will advise him or her on the defence strategy to be followed.

11. Secondly, the majority state that *“The applicant did not allege, either before the domestic courts or before [the Court], that the Police had exerted any pressure on him, nor that the evidence obtained had been in violation of another Convention provision”*⁹

12. We disagree with this argument. The fact that a defendant has not been pressured by the police does not limit his or her right to a lawyer. Legal assistance in a criminal procedure is indispensable not only to counter pressure by the police or any other evidence obtained in violation of the Convention, but to define a strategy for the defence and adapt it to every incident throughout the entire proceedings. The police are expected to act lawfully, regardless of the manner in which a defendant presents his or her defence, with or without the benefit of legal assistance. The one has simply nothing to do with the other. Lawful conduct by the police is not a valuable argument on which to restrict the exercise of a Convention right by the defence. Ultimately, this argument by the majority reflects a very restrictive conception of the role of the lawyer in criminal procedure.

13. Thirdly, the majority state that *“in the present case, the applicant was informed repeatedly in a sufficiently explicit manner of his right to remain silent and the privilege against self-incrimination”*¹⁰.

14. Again, we cannot accept this argument. The right to remain silent is not interchangeable with the right to a lawyer. These are two very different rights. Legal assistance at the pre-trial stage of a criminal procedure is essential to inform the defendant of the advantages and disadvantages, from the perspective of the defence strategy, of speaking out or remaining silent. In other words, the right to a lawyer is instrumental in effective protection of the right to remain silent (and of the privilege against self-incrimination).

15. In short, the fact that the applicant was informed of his right to remain silent if he so desired and the fact that the applicant did not claim that any pressure was exerted on him have nothing to do with his procedural right under Article 6 § 3 (c) of the Convention to have access to a lawyer. Those facts are irrelevant for the purpose of curing the breach of this right. In our view, it is a fundamental mistake at stage two not to take seriously into account the finding of stage

⁹ § 111 of the present judgment. (Din ir-referenza tinsab fin-nota ta' qiegh il-pagna enumerata hmistax (15) fil-joint dissenting opinion tas-sentenza citata)

¹⁰ §112 of the present judgment. (Din ir-referenza tinsab fin-nota ta' qiegh il-pagna enumerata sittax (16) fil-joint dissenting opinion tas-sentenza citata)

one, especially when the test applied should be a very strict scrutiny¹¹. Otherwise, what is the point of having two stages!?'

Illi l-izvillup fl-interpretazzjonijiet dwar il-jedd ta' smiegh xieraq kif moghtija mill-Qorti Ewropea tad-Drittijiet tal-Bniedem fosthom fis-sentenzi sucitati fl-ismijiet 'Beuze vs Belgium' moghtija mill-Grand Chamber u s-sentenza tal-Qorti Ewropea tad-Drittijiet tal-Bniedem fl-ismijiet 'Farrugia vs. Malta' gia gie rifless fil-pozizzjoni li l-Qorti Kostituzzjonali u l-Prim'Awla tal-Qorti Civili (Sede Kostituzzjonali) qeghdin jiehdu meta jikkunsidraw jekk kienx hemm ksur tal-jedd ta' smiegh xieraq. Jirrizulta li hemm zvuillup fis-sens li l-fatt li stqarrija tkun ittiedet minghajr il-prezenza tal-Avukat skont dawn l-ahhar sentenzi mhumieq awtomatikament jigu kkunsidrati bhala li jiksru d-dritt ghal smiegh xieraq izda li qiegħed jittiedet kont tal-proceduri fit-totalita' tagħhom sabieq jigi determinat jekk kienx hemm lezzjoni o meno tad-dritt ghal smiegh xieraq.

Din il-Qorti fid-digriet tagħha tal-hamsa (5) ta' Frar tas-sena elfejn u dsatax (2019) ghamlet referenza għas-sentenzi tal-Qorti Kriminali u Qorti tal-Appell Kriminali fl-ismijiet **'Ir-Repubblika ta' Malta v. Martino Aiello'**¹². Dak iz-zmien ir-referenza kostituzzjonali kienet għada pendent. Din illum il-gurnata hija deciza tant li l-Qorti Kostituzzjonali hadet linja diversi minn dik mittiedha primarjament mill-Qorti Kriminali. Filfatt il-Prim'Awla tal-Qorti Civili (Sede Kostituzzjonali)¹³ iddeciediet ir-referenza Kostituzzjonali billi iddikjarat li fic-cirkostanzi tal-kaz mhux ser ikun jirrizulta ebda lezzjoni tad-dritt fondamentali tal-akkuzat Martino Aiello għal smiegh xieraq kif sancit bl-artikolu 39 tal-Kostituzzjoni ta' Malta u l-artikolu 6 tal-Konvenzjoni Ewropea għall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali jekk isir uzu fil-guri kontra tiegħu mill-istqarrija li huwa rrilaxxja lil pulizija fid-dsatax (19) ta' Ottubru tas-sena elfejn u erbatax (2014) wara li fost kunsiderazzjonijiet ohra, ikkunsidrat li:

¹¹ §108 of the present judgment. (Din ir-referenza tinsab fin-nota ta' qiegħ il-pagna enumerata sbatax (17) fil-joint dissenting opinion tas-sentenza citata)

¹² Sentenza preliminari deciza mill-Qorti Kriminali fid-9 ta' Mejju, 2017 (Att ta' Akkuza numru: 13/2015) u decizjoni tal-Qorti tal-Appell Kriminali tad-9 ta' April, 2018 (Att ta' Akkuza: 13/2015)

¹³ Fl-ismijiet 'Ir-Repubblika ta' Malta vs Martino Aiello' fis-17 ta' Ottubru, 2019 (Referenza Kostituzzjonali Numru: 38/2018 AF)

'Applikati dawn il-prinċipji għall-kawża li għandha quddiemha llum, din il-Qorti hija tal-fehma li ma ġiex muri li bl-użu tal-istqarrija tiegħu fil-ġuri kontra l-akkużat ser jiġi mittiefes id-dritt tiegħu għal smiġh xieraq.

Qabel xejn, din il-Qorti tgħid illi ma jirrizultax li kien hemm raġunijiet tajbin li jzommu lill-akkużat milli jkollu avukat preżenti waqt l-interrogazzjoni u waqt li kien qiegħed jagħti l-istqarrija. L-uniku raġuni li Martino Aiello ma setax ikun mgħejjun minn avukat kienet li, dak iż-żmien, il-liġi ma kienitx tippermetti li l-akkużat ikun hekk mgħejjun f'dak l-istadju imma seta' jikkonsulta ma' avukat biss qabel l-interrogazzjoni, xi haġa li mhux kontestat li Martino Aiello rrifjuta li jagħmel.

Madanakollu, il-posizzjoni ġurisprudenzjali kurrenti turi li m'għadux il-każ li l-fatt waħdu li l-liġi ma kienitx tippermetti l-assistenza ta' avukat qabel jew waqt l-interrogazzjoni, awtomatikament iwassal sabiex jinstab li kien hemm ksur tad-dritt għal smiġh xieraq, kif qiegħed jippretendi l-akkużat, imma din il-Qorti għandha tqis diversi fatturi qabel tasal għall-konkluzjoni tagħha.

Kif diġà ntqal, dan il-każ huwa kemmxejn differenti mill-każ ta' Aldo Pistella in kwantu li Martino Aiello kien fil-fatt irrinunzja għad-dritt tiegħu li jikkonsulta ma' avukat qabel ma ġie interrogat mill-Pulizija u assolutament ma ġiex muri li huwa xtaq li jkollu avukat preżenti waqt l-interrogazzjoni jew waqt li kien qiegħed jirrilaxxa l-istqarrija.

Propriu dwar ir-rinunzja, fil-każ ta' Paskal vs Ukraine, tal-15 ta' Settembru 2011, il-Qorti Ewropea qalet hekk:

"neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial, as long as a waiver of the right is given in an unequivocal manner and was attended by the minimum safeguards commensurate to its importance."

L-akkużat naqas milli juri wkoll li huwa għandu jitqies bħala persuna vulnerabbli. Fil-fatt, meta xehed quddiem din il-Qorti, tista' tgħid li ma semma xejn dwar iċ-ċirkostanzi tal-arrest tiegħu flimkien ma' martu mal wasla tagħhom hawn Malta. Martino Aiello la kien minorenni u lanqas kien ibati minn xi forma oħra ta' vulnerabilità fiż-żmien in kwistjoni. Lanqas jirrizulta xi prova fis-sens li ċ-ċirkostanzi li fihom ittiegħdet l-istqarrija kienu għalih intimidanti. L-istqarrija ngħatat volontarjament, mingħajr theddid, wegħdi jew promessi ta'

vantaġġi u wara li ngħata d-debita twissija skont il-liġi, u cioè li ma kienx obligat jittellem sakemm ma kienx hekk jixtieq, iżda li dak li kien ser jgħid seta' jingieb bħala prova kontrih. Lanqas ma għie muri li l-akkuzat ma kienx qiegħed jifhem l-import taċ-ċirkostanzi li kien jinsab fihom. Il-Qorti tinnotta wkoll illi Martino Aiello ma qajjem l-ebda lment dwar l-istqarrija li kien irrilaxxa qabel ma għie deċiż il-każ ta' Borg vs Malta imma huwa talab lill-Qorti Kriminali sabiex ikun jista' jressaq eċċezzjoni dwar l-inammissibilità tal-istqarrija biss minhabba dak deċiż mill-Qorti Ewropea fl-imsemmija każ. Imma kif rajna, din il-ġurisprudenza m'għadhiex applikabbli inkondizzjonatament safejn l-akkuzat qiegħed jippretendi li l-istqarrija tiegħu mhijiex ammissibbli bħala prova abbażi tal-fatt waħdu li dak iż-żmien ma setax ikun assistit minn avukat waqt l-interrogazzjoni u waqt li kien qiegħed jirrilaxxa l-istqarrija. Anzi, għandhom jittieħdu in konsiderazzjoni diversi fatturi li flimkien jagħmlu ċ-ċirkostanzi tal-każ.

Martino Aiello fl-ebda stadju ma kkontesta l-awtenticità tal-prova li gābet il-Prosekuzzjoni kontrih, liema prova mhijiex limitata għall-istqarrija in kwistjoni. Lanqas ma oppona għall-preżentata ta' dik l-evidenza. L-assjem tal-provi ser ikun evalwat minn Imħallef u għalhekk, minn persuna b'għarfien għoli tal-proċedura legali u l-liġi Maltija.

Finalment, il-Qorti tqis illi huwa indubbjament fl-interess pubbliku li jiġi investigat u imressaq sabiex jiġi ġudikat mill-Qorti ta' ġurisdizzjoni kriminali l-akkuzat li nqabad in flagrante jitttraffika d-droga f'Malta.

Għaldaqstant, il-Qorti ssib li l-akkuzat Martino Aiello ma rnexxilux juri li tassew ser iġarrab ksur tad-dritt tiegħu għal smiġħ xieraq bl-użu fil-ġuri kontra tiegħu tal-istqarrija li rrilaxxa fid-19 ta' Ottubru 2014.'

Din id-decizjoni giet konfermata mill-Qorti tal-Appell fis-27 ta' Marzu 2020.

Fis-sentenza fl-ismijiet '**Graziella Attard v. Avukat Ġenerali**'¹⁴ fejn għalkemm il-kawza ma kinitx titratta biss stqarrija rilaxxata mingħajr l-assistenza legali izda anke mingħajr l-opportunita' li tikkomunika ma' Avukat tal-fiducja tagħha, il-Qorti Kostituzzjonali qieset li:

'10. Madankollu, billi ċ-ċirkostanzi fejn il-persuna interrogata tista' ma titħalliex tkellem avukat huma l-eċċezzjoni aktar milli r-regola, u din il- qorti għandha s-setgħa li tagħti rimedju

¹⁴ Deciza mill-Qorti Kostituzzjonali fis-27 ta' Settembru, 2019 (Rikors mahluf numru: 83/2016 LSO)

fejn issib li disposizzjoni li thares dritt fundamentali mhux biss “qiegħda tigi” izda wkoll meta “tkun x’aktarx sejra tigi miksura”, din il-qorti hija tal-fehma, kif osservat fis-sentenza mogħtija fl-24 ta’ Gunju 2016 fl-ismijiet *Malcolm Said v. Avukat Ġenerali*¹⁵, illi ma jkunx għaqli – partikolarment fid-dawl ta’ inkonsistenzi fis-sentenzi tal-Qorti Ewropea li johloq element ta’ imprevedibilità, kif jixhdu l-posizzjonijiet konfliġġenti li ħadet fil-każ ta’ Borg u f’dak ta’ Beuze – illi l-proċess kriminali jithalla jitkompla bil- produzzjoni tal-istqarrija mogħtija mill-attriċi lill-pulizija għaliex tqis illi, fiċ-ċirkostanzi, in-nuqqas ta’ għajjnuna ta’ avukat ma kienx nuqqas li ma jista’ jkollu ebda konsegwenza ta’ preġudizzju għall-attriċi, aktar u aktar meta fl-istqarrija ammettiet sehma fir-reat.

11. Għaldaqstant tipprovdli dwar dan l-aggravju tal-avukat Ġenerali billi tgħid illi, għalkemm ma seħħ ebda ksur tal-jedd tal-attriċi għal smiġħ xieraq meta tteħditilha stqarrija, madankollu dik l-istqarrija ma għand- hiex tibqa’ fl-inkartament tal-kawża kontriha.'

L-istess Qorti qieset li:

'18. Il-qorti tqis illi l-ordni li l-istqarrija titneħħa mill-inkartament, aktar milli rimedju għal ksur li, wara kollox, għadu ma seħħx, huwa garanzija tal- integrità tal-proċess u wkoll fl-interess pubbliku, biex ma jiġrix l- proċess kontra l-attriċi jkollu jithassar wara li jintemm, b’hele ta’ ħin u riżorsi, li tkun forma oħra ta’ ingustizzja għax il-liġijiet għandhom iħarsu mhux biss lil min hu mixli b’reat izda wkoll lil min jista’ jkun vittima ta’ reat.

19. Il-qorti għalhekk terġa’ ttenni li ma jkunx għaqli li jsir użu mill-istqarrija waqt il-proċess kriminali, u għal din ir-raġuni tiċhad ukoll dan l-aħħar aggravju.'

11. Għaldaqstant tipprovdli dwar dan l-aggravju tal-avukat Ġenerali billi tgħid illi, għalkemm ma seħħ ebda ksur tal-jedd tal-attriċi għal smiġħ xieraq meta tteħditilha stqarrija, madankollu dik l-istqarrija ma għand- hiex tibqa’ fl-inkartament tal-kawża kontriha.'

Illi din il-Qorti temfasizza li d-dritt li suspettat ikollu Avukat prezenti minn stadju bikri tal-investigazzjoni mhijiex limitata għal persuni kkunsidrati vulnerabbli. Anke persuni li kellhom diversi kundanni precedenti kontra tagħhom u li għalhekk huma

¹⁵ Rik. kost. 74/2014. (Din ir-referenza tinsab fin-nota ta' qiegħ il-pagna enumerata sitta (6) fis-sentenza citata.)

intizi fil-mod ta' kif jittiehdu l-interrogazzjonijiet kif ukoll persuni li l-Avukat Generali jirreferi ghalihom bhala b'esperjenza f'varji oqsma tan-negozju ukoll ghandhom dritt li jkollhom Avukat prezenti minn stadju bikri tal-investigazzjoni. Il-ligi ma tidistingwix bejn persuna u ohra. Huwa d-dritt ta' kull persuna li jkun assistit minn Avukat anke matul l-interrogazzjoni. M'huwiex kontestat li fiz-zmien li ttiehdet l-istqarrija, l-ligi ma kinitx taghti jedd lis-suspettat biex ikollu Avukat prezenti waqt it-tehid tal-istqarrija. Biss pero' issa li l-ligi tipprovdi ghal dan id-dritt, huwa rikonoxxut u accettat li d-dritt ghal smiegh xieraq ghandu jigi rispettata minn stadju bikri tal-investigazzjoni.

Din il-Qorti filwaqt li tirrikonoxxi li kien hemm zvilupp sinifikattiv f'dawn l-ahhar snin, fejn il-Qorti qeghdin iharsu lejn il-proceduri fit-totalita' taghhom sabiex jigi deciz jekk kienx hemm lezzjoni tad-dritt ghal smiegh xieraq, din il-Qorti tissottolinea li bl-ebda mod ma hemm uniformita' fil-kunsiderazzjonijiet u decizjonijiet tal-Qorti dwar jekk stqarrijiet u dikjarazzjonijiet mehuda matul l-investigazzjoni minghajr id-dritt tal-prezenta tal-Avukat jilledux id-dritt ghal smiegh xieraq. Din il-Qorti ma ghandha l-ebda kompetenza biex tiddeciedi dwar lezzjoni o meno ta' dritt fundamentali izda trid tiddeciedi biss jekk ghandhiex tiehu in konjizzjoni stqarrijiet u dikjarazzjonijiet ohra fl-istadju tal-investigazzjoni minghajr id-dritt li suspettati jkun assistiti minn Avukat. Din il-Qorti ghalhekk tqis li gialadarba qieghdin fi stadju ta' revizjoni, filwaqt li bl-ebda mod ma hija tiddikjara li sehh xi ksur tad-dritt ghal smiegh xieraq, tiddeciedi li sabiex ma jkunx hemm ir-riskju ta' xi ksur, l-stqarrija moghtija minghajr il-prezenza tal-Avukat bhala inammissibli.

Illi stabbilit dak supra ghar-rigward l-inammissibilita' tal-stqarrija ta' l-imputat jifdal imbaghad sabiex din il-Qorti tara jekk hemmx provi ohra prodotti li setghu jwasslu ghas-sejbien ta' htija tal-imputat.

Illi din il-Qorti taghmel referenza ghas-sentenza moghtija fl-20 ta' Dicembru 2022 fl-ismijiet **Il-Pulizija vs. Vincent Farrugia et** (Numru 17/2022) fejn din il-Qorti diversament preseduta qalet hekk:

"11. Imbagħad l-artikolu 638 tal-Kodiċi Kriminali jagħmilha ċara li huwa fid-dover tal-Prosekuzzjoni li ggħib il-provi kollha u l-aħjar prova possibbli sabiex il-grad tal-prova tal-

Prosekuzzjoni jintlaħaq b'suċċess. Jekk daww il-provi jkunu jikkonsistu prinċipalment fil-verżjoni ta' xhud waħdieni, il-Qorti xorta waħda tista' tasal sal-grad ta' prova rikjest fi proċedimenti kriminali, jekk dak ix-xhud ikun ġie emnut; u dan peress li f'din l-eventwalita', din ix-xieħda ssir biżżejjed biex tagħmel prova shiħa u kompluta minn kollox, daqs kemm kieku l-fatt ġie ppruvat minn żewġ xhieħa jew aktar. Fil-fatt l-artikolu 638(2) tal-Kodiċi Kriminali jgħid li xhud wieħed waħdu, jekk emnut, huwa suffiċjenti sabiex fuq ix-xieħda tiegħu l-Qorti tkun tista' ssib ħtija." Illi tajjeb jiġi mfakkar li Qorti tista' tkun selettiva f'dak li temmen mill-verżjonijiet mogħtija mix-xhieħa li jitressqu quddiemha. Minbarra dan kif inhu ormai stabbilit fil-ġurisprudenza nostrana mhux kull kunflitt fil-provi għandu jmur a favur tal-appellant.

F'dan ir-rigward din il-Qorti tagħmel referenza għas-sentenza mogħtija fil-31 ta' Ottubru 2022 fl-ismijiet **Il-Pulizija vs. Clive Caruana** (Numru 360/2018) fejn din il-Qorti diversament preseduta qalet hekk:

"5. [...] L-ewwel Qorti korrettament kkunsidrat li mhux kunflitt fil-provi għandu jwassal għall-liberatorja u għamlet referenza għall-ġurisprudenza in rigward. Iżżid din il-Qorti tosseroa illi kif kostantament ritenut l-ewwel Qorti kienet korretta in rigward. Għaliex "mhux kull kunflitt fil-provi għandu awtomatikament iwassal għall-liberazzjoni tal-persuna akkużat. Imma l-Qorti, f'każ ta' kunflitt ta' provi trid tevalwa l-provi skond il-kriterji enunċjati fl-artikolu 637 tal-Kap. 9 u tasal għall-konkluzzjoni dwar lil min trid temmen u f'hiex ser temmnju jew ma temmnux" (ara **Il-Pulizija vs. Joseph Thorne** App Krim 9.07.2003 u **Ir-Repubblika ta' Malta vs. Dennis Pandolfino et** Qrt Krimi. 19.10.2006). Inoltre kif ritenut mill-ġurisprudenza abbraccjata minn din il-Qorti, min ser jiġġudika jista' jemmen lix-xhud f'kollox jew f'parti u jekk ma jemminx lix-xhud f'parti mix-xieħda tiegħu ma jfissirx li ma jistax ikun emnut f'parti oħra. Issa, l-ewwel Qorti, kienet fil-piena liberta' li tagħmel dan l-eżerċizzju u minkejja li sabet inkonsistenzi fil-fatti kif rakkontati mill-parte civile, xorta waħda emmnitha fil-parti li biha nkriminat lill-imputat."

Issa kif ġie ritenut ripetutament minn din il-Qorti diversament preseduta w anki kif illum preseduta," principju fundamentali applikabbli fl-appelli kriminali huwa li l-Qorti ta' l-Appell ma tiddisturbax facilment l-apprezzament tal-provi magħmul mill-Ewwel Qorti, izda tagħmel apprezzament approfondit ta' l-istess biex tara jekk l-Ewwel Qorti setgħetx, legalment u ragonevolment, tasal għall-konkluzzjoni li tkun

waslet ghaluha.” (App. Krim. **Il Pulizija vs. Joseph Zahra**¹⁶ u ohrajn.) Il-Qorti tvarja tali apprezzament jekk tqis li fuq il-provi prodotti quddiem l-Ewwel Qorti u minnha traskritti ma jkunx “safe and satisfactory” li tinstab il-htija addebitata lill-appellanti.

Illi l-*letters to prosecute* misjuba a fol 23 u a fol 26 tal-process certament ma ghandhomx wehedhom jitqiesu bhala prova tal-akkuzi dedotti kontra l-imputat.

Illi l-Avukat Generali fir-rikors tal-appell tieghu jaghmel referenza x-xhieda ta’ Mario Mifsud a fol 47 fejn jghid li minnha hemm prova li s-sigaretti kienu bla dazju. Ta min jghid li Mario Mifsud jghid: “*biex imbaghad id-dwana taghmel ix-xoghol taghha ta’ dazju*”. Dan ifisser li skont Mifsud kien hemm ufficjali ohra li ghamlu xoghol ulterjuri sabiex jigi stabbilit jekk kienx thallas id-dazju o meno izda pero’ minn qari tax-xhieda kollha prodotti mill-prosekuzzjoni hadd ma kkonferma li dawn is-sigaretti kienu proprju bla dazju.

Illi ghalhekk jirrizulta li mkien fl-atti ma hemm prova li s-sigaretti kienu tabilhaqq bla dazju u ghalhekk kienet korretta l-Ewwel Qorti meta hija ma sabitx lill-imputat hati tat-tieni u tat-tielet imputazzjoni dedotta kontra l-imputat.

Illi konsegwenza tal-fatt li l-imputat ma nstabx hati tat-tieni u tat-tielet imputazzjoni huwa ma jistax jinstab hati tal-hames imputazzjoni stante illi l-imputat instab hati ta’ reat involontarju (l-ewwel akkuza) u ghalhekk l-addebitu tar-recediva ma japplikax.

Fic-cirkostanzi ghalhekk l-appell qed jigi michud w s-sentenza appellata konfermata.

Dr Consuelo Scerri Herrera
Onor Imhallef

Maria Grech
Deputat Registratur

¹⁶ Deciz nhar l-10 ta Mejju 2002