MALTA

QORTI TA' L-APPELL KRIMINALI

ONOR. IMHALLEF
JOSEPH GALEA DEBONO

Seduta tat-12 ta' Gunju, 2008

Appell Kriminali Numru. 23/2008

Il-Pulizija
(Spt. A.P. Miruzzi)
Vs
Raymond Attard

Il-Qorti,

Rat l-akkuza dedotta kontra l-appellant quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali talli fuq talba tad-Dipartiment tat-Telegrafija minghajr fili
1. fl-4 t'Ottubru, 2003, u/jew f'xi data qabel, f'dawn il-Gzejjer, kellu fil-pussess tieghu apparat tat-telegrafija minghajr fili, jigifieri "Satellite Receiver" tal-marka Echostar LT 8700 b'numru ta' serje 11626T minghajr ma kellu licenzja mahruga mid-Direttur tat-Telegrafija minghajr fili w bi ksur tal-Kapitolu 49 Art 3(1) tal-Ligijiet ta' Malta;
2. fuq talba tal-Kontrollur tad-Dwana w tal-Kummissarju tat-Taxxi fuq il-Valur Mizjud importa l-oggett hawn fuq imsemmi liema importazzjoni ta' tali oggett hija

pprojbita u/jew ristretta li ghandu valur ta’ LM48, u dazju LM12, liema dazju ma giex imhallas u/jew kawtelat. Dan bi ksur ta’ l-Artikolu 60(a)(b)(c)(k), l-Artikolu 62(a)(b)(c)(f)(g)(h)(i)(k) ta’ l-Ordinanza tad-Dwana Kap. 37 tal-Ligijiet ta’ Malta;
3. billi l-oggett imsemmi huwa soggett ukoll ghat-Taxxa fuq il-Valur Mizjud, liema taxxa tammonta ghal LM9, naqas li jhallas jew jikkawtela tali taxxa, w dan bi ksur ta’ l-Artikolu 80 ta’ l-Att dwar Taxxa fuq il-Valur Mizjud (Att. Nru. XXXIII ta’ l-1998).

Rat is-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta’ Gudikatura Kriminali tal-24 ta’ Jannar , 2008, li biha, wara li rat l-artikoli 3(1) tal-Kap 49 tal-Ligijiet ta’ Malta, l-Artikolu 60(a)(b)(c)(k) u l-Artikolu 62 (a)(b)(c)(f)(g)(h)(i)(k) ta’ l-Ordinanza tad-Dwana [Kap. 37] tal-Ligijiet ta’ Malta u l-Artikolu 80 ta’ l-Att dwar it-Taxxa fuq il-Valur Mizjud, sabet lill-appellant hati w ikkundannatu ghall-multa ta’ € 232.94 ghal fini ta’ l-ewwel reat u multa ta’ € 272.54 fil-konfront tar-reat kontra l-Ordinanza tad-Dwana b’total ta’ € 505.48 u ordnat il-konfiska ta’ l-apparat meritu ta’ din il-kawza.

Rat ir-rikors tal-appellant minnu pprezentat fl-4 ta’ Frar, 2008, li bih talab li din il-Qorti joghgobha thassar, tirrevoka w tannulla s-sentenza appellata w minnha tilliberah minn kull piena w htija.

Fliet l-atti kollha processwali.

Rat il-fedina penali aggornata tal-appellant esebita mill-prosekuzzjoni fuq ordni tal-Qorti.

Rat illi l-aggravji tal-appellant, fil-qosor, huma s-segwenti w cioe' :- li l-Ewwel Qorti ghamlet apprezzament hazin tal-provi w, ghalkemm taht il-ligi tad-Dwana l-oneru tal-prova huwa tad-difiza, dan hu sal-grad tal-probabbilita' w dan il-grad tal-prova ntlahaq mill-provi tad-difiza, nkluza x-xiehda tal-appellat. Li dwar il-Kap. 49 tal-Ligijiet ta' Malta, minghajr pregudizzju ghas-suespost, ladarba kien hemm il-konferma mir-rapprezentant tad-Dipartiment tat-Telegrafija minghajr Fili li llum ma hemmx htiega ta' licenzja ghall-uzu tas-*satellite receiver* f' Malta, kellha tapplika l-ligi kif inhi llum tal-Unjoni Ewropea u mhux dik li kienet applikabbli meta Malta ma kienetx membru tal-Unjoni Ewropeja, ghax l-akkuzat jibbenefika minn din l-ahhar ligi. Li dwar l-artikolu 80 tal-Att Dwar it-Taxxa fuq il-Valur Mizjud, ladarba kien hemm akkuza specifika li taqa' taht l-Ordinanza tad-Dwana, Kap.37, l-Ewwel Qorti ma setghetx tapplika multa addizzjonali dwar it-Taxxa fuq il-Valur Mizjud ladarba hemm il-ligi specjali.

Semghet it-trattazzjoni;

Ikkonsidrat;

Li l-ewwel aggravju tal-appellant jirrigwarda l-apprezzament tal-provi li ghamlet l-Ewwel Qorti. Issa, kif dejjem gie ritenut minn din il-Qorti, l-Qorti tal-Appell ma tissostitwix id-diskrezzjoni w l-gudizzju taghha ghal dak tal-Ewwel Qorti meta si tratta t' apprezzament tal-fatti, izda taghmel apprezzament approfondit tal-istess biex tara jekk il-konkluzzjoni li tkun waslet ghaliha l-Ewwel Qorti fuq il-fatti li jkunu rrizultawla setghetx tasal ghaliha fuq bazi ta' ligi w ta' ragjonevolezza. Fi kliem iehor tara jekk dik il-konkluzzjoni kienetx wahda *"safe and satisfactory*" fid-dawl tar-rizultanzi.

Din il-Qorti ghalhekk ghamlet tali ezami kif tenuta li taghmel..

B' mod partikolari l-appellant qed jimpunja dak li qalet l-Ewwel Qorti meta uzat il-kliem : *"b' tali mod illi x-xiehda taghha ma tistax tigi verifikata jew ikkontrollata, allura f' dak il-kaz mal-ewwel ikun hemm suspett dwar il-veracita' ta' dik ix-xiehda."*

Issa dan il-kaz jirrigwarda s-sejbien ta' tlitt *satellite receivers* fid-dar tal-appellant il-Mosta, waqt tfittxija li ghamlu impjegati tad-Dipartiment tat-Telegrafija Minghajr Fili w l-Pulizija, fl-4 t' Ottubru, 2003. Dawn kienu gew maqbuda. L-appellant kien ottjena ricevuti w dokumentazzjoni ghal tnejn minnhom izda ghall-Echostar LT 8700 serial number 11626T qatt ma gab xi dokumentazzjoni. Meta xehed quddiem l-Ewwel Qorti, l-appellant fir-rigward ta' dan l-ahhar *satellite receiver* kien qal li dan kien xtrah lokalment izda tilef ir-ricevuta u lanqas ma seta' jgib ohra minnghand min kien xtrah ghax ma jafx minn fejn kien xtrah.

L-Ewwel Qorti fis-sentenza appellata qalet li kienet qed issibha ferm difficli li temmen illi persuna Maltija tixtri apparat specjalizzat bhal dak in kwistjoni li ma tantx hu komuni f' Malta u ma tantx hawn hwienet li jinnegozjaw f' dak it-tip t' apparat, u ma tkunx taf minn fejn xtratu w li lanqas setghet tidentifika l-hanut in kwistjoni, meta f' Malta kullhadd jaf lil xulxin. Din il-Qorti taqbel perfettament ma dan l-apprezzament tal-fatti li ghamlet l-Ewwel Qorti w tikkondividieh. Ghalhekk ma tara li hemm ebda lok li tissostitwieh b' xi apprezzament differenti kif qed tigi mitluba li taghmel mill-appellant.

Ghab-bazi ta' dan l-apprezzament l-Ewwel Qorti gustament irriteniet li l-prezunzjoni li l-ligi tad-Dwana tpoggi fuq l-appellant biex jipprova li d-dazju kien gie imhallas ma gietx ribattuta f' dan il-kaz u ghalhekk l-appellant kellu jwiegeb ghall-akkuzi. Din il-Qorti thoss li l-Ewwel Qorti setghet legalment u ragjonevolment tasal ghal din il-konkluzzjoni w li allura kienet konkluzzjoni *"safe and satisfactory".*

Hu minnu li meta f' pararafu precedenti l-Ewwel Qorti uzat il-kliem : *"…pero, meta persuna tixhed quddiem il-Qorti b' tali mod illi x-xiehda taghha ma tistax tigi verifikata jew ikkontrollata, allura f' dak il-kaz mal-ewwel ikun hemm suspett dwar il-veracita' ta' dik ix-xiehda."* forsi ma kienetx preciza ghall-ahhar fil-motivazzjoni guridika ghaliex ma accettatx il-versjoni tal-appellant, pero' dan fil-fehma ta' din il-Qorti ma jbiddel xejn ghaliex l-Ewwel Qorti kellha kull dritt li ma taccettax l-ispjegazzjoni monka li ta l-appellant u li tghid li ma lahqitx il-grad tal-probabbli rikjest mid-difiza.

Ghalhekk l-ewwel aggravju tal-appellant qed jigi respint.

Illi dwar it-tieni aggravju, jidher li meta gie kommess l-allegat reat ta' pussess ta' apparat tat-telegrafija minghajr fili w cioe' is-Satellite Receiver tal-marka Echostar LT8700 bin-numru tas-serje 11626T, minghajr ma kellu licenzja mahruga mid-Direttur tat-Telegrafija, fl-4 t' Ottubru, 2003, tali licenzja kienet ghadha mehtiega bil-ligi w kien biss wara li Malta saret membru tal-Unjoni Ewropeja fl-1 ta Mejju, 2004, li dan ir-rekwizit tnehha. (ara l-Avviz Legali 422/2004 u d-depozizzjoni ta' Ivan Borg, a fol. 28). L-appellant ghalhekk jargumenta li ladarba mbidlet il-ligi sad-data tas-sentenza b' mod li hu jista' jibbenefika minnha, ma ghandux jinstab hati tar-reat dedott taht l-ewwel imputazzjoni.

Ikkonsidrat;

Li punt simili gie trattat *in extenso* minn din il-Qorti fl-Appell Kriminali fil-kawza "**Il-Pulizija vs. Edward Joseph O'Connor"** [17.11.2003]

Illi fis-sentenza taghha fil-kawza fl-ismijiet “**Il-Pulizija vs. Lawrence Cuschieri”,** [8.1.1992] il-Qorti Kostituzzjonali kienet qalet *“obiter*” li kull persuna li tkun akkuzata b' reat trid tirrisponi ghall-htija lilha addebitata skond il-ligijiet vigenti w applikabbli fiz-zmien tal-kommissjoni tal-allegat reat , kemm jekk dawk il-ligijiet ikunu ta' natura sostantiva kif ukoll jekk ikunu ta' natura procedurali, sakemm dawk il-ligijiet ma jkunux gew mibdula b' mod li jkunu jibbenefikaw lill-akuzat minnhabba bidla fil-*policy* legislattiva tal-Istat.

Kif jghid il-Professur . Sir Anthony Mamo’s “NOTES ON CRIMINAL LAW” (p. 32):-

“In fact, an apparent exception to the rule that a penal law cannot have a retrospective effect occurs when a new law enacted after the commission of the offence is less severe or more advantageous to the offender then the law in force at the time the offence was committed.

“The hypothesis is twofold:

1. the law against which the offence was committed is subsequently repealed so the act is no longer criminal;

2. the law against which the offence was committed is subsequently amended or changed so that, though the act is still criminal, the punishment or conditions of liability and prosecution are varied .”

Il-Professur Mamo jkompli jikteb :-

“The ‘communis opinio’ among continental writers is that where the law in force at the time of the commission of the offence and the subsequent law are different, the offender should be dealt with according to the law which is more favourable to him. This means that if the law in force at the time of the trial is less favourable to the accused than the law in force at the time of the commission of the offence, it is the latter law that should be applied retrospectively to his prejudice (Sic!). If, on the contrary, the new law is more favourable to the accused than the law which was in force at the time the offence was committed, then it is the new law that should be applied, for, if the old law were to be applied, it would have, as to the excess of punishment or other aggravation, an effect beyond its limit of valid operation.”

Dan l-awtur ikompli jghid b' riferenza ghall-artikolu 27 tal-Kodici Kriminali li jiddisponi li :-

“Jekk il-piena stabbilita mill-ligi li tkun issehh fiz-zmien tal-kawza u dik li kienet issehh fiz-zmien li sar ir-reat ma jkunux xorta wahda, ghandha tinghata l-piena l-anqas gravi" (fit-test Taljan antik : “pena di qualita’ meno grave”)

li skond sentenza tal-Qorti Kriminali “**Il-Pulizija vs. Agostino Bugeja”** (Vol. XXIV, p. iv. p.941) fejn kien gie ritenut li, ghalkemm dan l-artikolu jikkontempla biss il-kaz fejn il-piena fiz-zmien tal-kawza tkun differenti mill-piena fiz-zmien tal-allegat reat u ma tezisti ebda dispozizzjoni espressa tal-ligi rigwardanti l-kaz fejn, fiz-zmien tal-kawza, ir-reat ma jkunx ghadu jezisti, b' dana kollu "*arguendo a fortiori”* minn dan l-artikolu, hu car li l-akkuzat ghandu jinheles minn kull piena fl-ahhar ipotesi. Altrimenti, il-ligi tkun qed tikkontradici lilha nnifsha meta taghti effett retroattiv lill-ligi li kull ma taghmel tipprovdi ghall-piena aktar ljevi w fl-istess hin tichad dan l-effett retroattiv lill-ligi sussegwenti , li minnflok tnaqqas il-piena, attwalment telimina l-piena kompletament.

B' dana kollu l-Prof. Mamo jkompli jghid (ibid p. 34-35) :-

"….the principles above set forth concerning the application of the more favourable law ***may be set aside*** *by an express provision in the repealing or amending law . This is, In Malta, commonly done, especially in respect of enactments which operate for a short period at a time and are at short intervals amended or repealed and re-enacted. In such cases the necessity is obvious of saving unprejudiced any liability or proceedings incurred or instituted under the law so amended or repealed."*

Il-Prof. Mamo kien ippublika n-Notes on Criminal Law fis-snin erbghin, i.e. qabel ma dahlet in vigore L-Interpretation Act, (Chap. 249) fil-1975, u kien hass li t-trattat tieghu ikun aktar shih jekk jirriferi ghall-pozizzjoni taht il-ligi Ingliza dak iz-zmien applikabbli meta qal:-

"In England, the general rule is, now, that the repeal of a statute has no effect on pending proceedings. Prior to 1889, by the unqualified repeal of the Statute on which an indictment was framed, the proceedings fell to the ground and no judgement could be pronounced. A prisoner indicted for an offence against an Act which was repealed after the offence was committed, but before the prisoner was tried, could not be sentenced under the repealed Act. But as to Statutes passed since 1889, the Interpretation Act, 1889 (52 & 53 Vict. C. 63 S. 38, Ss.2) provides that where an Act *"repeals any other enactment, then, unless the contrary intention appears, the repeal shall not ….(d) effect any penalty , forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed ; or (e) affect any investigation , legal proceeding or remedy in respect of any such …..penalty, forfeiture or punishment as aforesaid" and that "any such investigation, legal proceeding or remedy may be instituted , continued or enforced and any such penalty ,* *forfeiture or punishment may be imposed as if the repealing Act had not been passed."*

Minn dak iz-zmien giet introdotta fil-ligi Maltija dispozizzjoni kwazi identika bl-Interpretation Act, 1975, (Kap. 249 tal-Ligijiet ta' Malta) li b' mod partikolari fl-artikolu 12 (1) (d) li hu kwazi identiku ghall-kliem adoperat fl- Interpretation Act Ingliza, li jiddisponi li meta xi Att mghoddi wara l-bidu fis-sehh tal-Interpretation Act tal-1975*, "ihassar xi ligi ohra, kemm il-darba ma jidhirx il-hsieb kuntrarju, it-thassir m'ghandux jolqot xi penali, konfiska jew piena li wiehed seta' jehel dwar xi reat li jkun sar kontra xi ligi hekk imhassra, jew xi responsabbilta' ghal xi penali, konfiska jew piena bhal dawk."*

Inoltre, is-sub-artikolu (e) li ukoll jekeggja d-dispozizzjoni korrispondenti tal-ligi Ingliza jghid li tali thassir m'ghandux *"jolqot kull stharrig, procediment legali jew rimedju dwar xi dritt, privilegg, obbligazzjoni, responsabbilta', penali, konfiska jew piena kif intqal qabel."* u *" kull stharrig, procediment legali , jew rimedju bhal dawk, jistghu jimbdew, jitkomplew, jew jigi nforzati, u kull penali, konfiska, jew piena bhal dawk jistghu jigu imposdti, bhallikieku l-Att li jhassar ma jkunx ghadda."*

Issa "Att" , skond l-artikolu 2 (1) ifisser *".......kull ordni,, regola, regolament , bye-law, avviz jew dokument iehor li ghandu sahha ta' ligi f' Malta "* u skond l-Artikolu 3 (1) *"temenda " tinkludi thassar , izzid jew tbiddel" u "thassar, uzata dwar ligi, tinkludi tirrexxindi, tirrevoka, thassar u tissostitwixxi"*

Issa peress li f' dan il-kaz il-bidla fil-ligi sehhet bl-Avviz Legali 422/2004 u kwindi b' leglislazzjoni sussidjarja, trid issir riferenza ghall-artikolu 9 tal-Kap.249 li tittratta dwar ligijiet sussidjarji li jiddisponi li :-

"Any law made after the commencement of this Act by virtue of a power conferred by an Act passed either before or after the commencement of this Act, <u>may,</u> unless the contrary intention appears in the Act conferring that power, <u>be made to operate retrospectively</u> to any date

which is not earlier than the commencement of such Act, or where different provisions of such Act come into operation on different dates, the commencement of the provision under which the subsidiary law is made.
"Provided that no person shall be made or become liable to any punishment in respect of anything done or omitted to be done before the commencement of the subsidiary law."

Is-Sub-artikolu (2) tal-artikolu 12 umbaghad jiddisponi li :-

"When an Act, whether passed before or after the commencement of this Act, amends any other Act passed either before or after the commencement of this Act, or any provision of such other Act, the Act or provision so amended, as well as anything done thereunder or by virtue thereof, shall unless the contrary intention appears, continue to have full effect and so continue to have effect as amended, and subject to the changes made by the amending Act."

Illi l-artikolu 9 fuq citat jghid li l-ligi sussidjarja **"tista'….tkun retroattiva**" kemm il-darba ma jkunx jidher hsieb kuntrarju fl-Att li jaghti dik is-setgha. Fil-fehma ta' din il-Qorti l-kliem : **"TISTA' TKUN**" kjarament jimplikaw li tali ligi sussidjarja mhux necessarjament tkun awtomatikament retroattiva izda tista' tigi maghmula hekk. L-unika limitazzjoni ghal din il-fakulta' hi li ebda persuna ma ghandha tigi assoggettata ghal xi piena ghal xi att meta qabel dan ma kienx espressament hekk punibbli. Ghalhekk ovvjament biex tali legislazzjoni sussidjarja tkun applikabbli retroattivament dan irid jintqal espressament fil-ligi l-gdida w dan ma jistax jigi prezunt li jkun sar awtomatikament f' kull kaz ta' legislazzjoni sussidjarja li tiehu post ligi sussidjarja ohra. Issa fil-waqt li fil-Kap.49 ma tirrizulta ebda intenzjoni kuntrarja biex legislazzjoni sussidjarja tigi reza retroattiva w kwindi dan ikun legalment possibbli skond l- Interpretation Act, biex xi emenda jew ordni jew regolament mahrug taht il-Kap.49 tkun applikabbli retroattivament, dan ikun irid jirrizulta espressament. **(**ara ukoll fl-istess sens : App. Krim. **"Il-Pulizija vs. Edward Joseph O' Connor,** [17.11.2003] u **"Il-Puliija vs. Josef Maher**" [22.3.2005])

Minn ezami tal-Avviz Legali 422/2004, li gie pubblikat fil-Gazzetta tal-Gvern tal-24 ta' Settembru, 2004, u li jghid testwalment li l-***emendi "Jitqiesu li dahlu fis-sehh fl-1 ta' Mejju, 2004"***, jidher li dan jipprovdi ghal applikazzjoni retroattiva imma biss sal-1 ta' Mejju, 2004 u ma hemm ebda referenza ghal xi applikabilita' retroattiva oltre din id-data. Ghalhekk f' dan il-kaz l-appellant m'ghandux jibbenefika mit-tibdil fil-ligi li sar bl-Avviz Legali 422/2004 u jrid jirrispondi ghan-nuqqas tieghu li rrizulta li gie kommess qabel ma dahal in vigore dan l-Avviz Legali. Kwindi dan l-aggravju qed jigi respint.

Illi dwar it-tielet aggravju , l-appellant qed jghid li ladarba kien hemm akkuza specifika taht il-ligi specjali tad-Dwana m' ghandux ukoll jehel multa taht il-ligi specjali tal-Taxxa fuq il-Valur Mizjud u l-Ewwel Qorti ma setghetx tapplika multa addizjonali dwar it-taxxa fuq il-valur mizjud.

Issa minn ezami tas-sentenza appellata, din il-Qorti ma ssibx li fil-fatt giet imposta xi multa ghat-tielet reat u cioe' dak li ma thallsitx it-taxxa fuq il-valur mizjud. Di fatti l-kliem testwali tas-sentenza appellata fil-parti tad-*"decide"* hu:-

"u tikkundanna lil-imputat ghall-multa ta' E232.94 ghall-fini tal-ewwel reat u multa ta' E272.54 fil-konfront tar-reat kontra l-Ordinanza tad-Dwana b' total ta' E505.48 u tordna l-konfiska tal-apparat mertu ta' din il-kawza".

Ghalhekk anki dan l-aggravju jidher bla bazi fattwali w ergo infondat u qed jigi ghalhekk respint.

Ghal dawn il-motivi l-appell qed jigi michud u s-sentenza appellata konfermata fl-intier taghha.

< Sentenza Finali >

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