



## **QORTI TA' L-APPELL KRIMINALI**

**ONOR. IMHALLEF  
JOSEPH GALEA DEBONO**

Seduta tas-17 ta' Settembru, 2008

Appell Kriminali Numru. 94/2008

**Il-Pulizija  
(Spt. A. Miruzzi)  
Vs  
Damian Gouder  
Charles Giordimaina**

Il-Qorti,

Rat l-akkuza dedotta kontra l-appellanti quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali talli :-

fil-5 ta' Jannar 2005 u jew fil-perijodu ta' qabel, f'din id-data, f'Malta, assocjaw irwiehhom ma' xi persuna jew persuni, f'Malta, jew barra minn Malta, bil-ghan illi jaghmlu delitt f'Malta li ghalih hemm il-piena ta' prigunerija u li ma kienx delitt taht l-Att dwar l-istampa.

fuq talba ta' Kontrollur tad-Dwana u l-Kummissarju tat-Taxxi fuq il-Valur Mizjud tal-5 ta' Jannar 2005 jew fil-granet ta' qabel din id-data mal-wasla taghhom fil-mitjar

Internazzjonali ta' Malta, xjentement bil-ko-operazzjoni ta' xulxin jew ta' individwu jew individwi ohra, naqqsu illi jiddikjaraw lill-ufficjal tad-dwana, kwantita' ta' glud, ta' l-ghasafar u l-annimali li l-importazzjoni taghhom hija projibita jew ristretta.

Dawn ghandhom il-valur ta' Lm17,554 dazzu xejn illi fuqhom kellha tithallas taxxa fuq il-valur mizjud liema taxxa tammonta ghal Lm3,159.72c, liema taxxa ma gietx imhallsa u jew kawtolata u dana bil-ksur ta' l-Artiklu 60(a), (b), (c), (k); Artiklu 62 (a), (b), (c), (f), (g), (h), (i), (k). ta' l-Ordinanza tad-Dwana Kapitlu 37, kif ukoll ta' l-Avviz Legali 44/1982 u l-Artiklu 80 ta' l-Att dwar it-Taxxa fuq l-Valur Mizjud (Att numru XXIII, tan-1998);

fl-istess perijodu, fuq l-istess cirkostanzi, kellhom fil-pussess taghhom xi ghasafar, hajjin jew mejtin, jew parti minn xi ghasafar jekk ma jkunux xi ghasafar inkluzi fl-iskeda 1, 2, jew 3 li jinstabu mar-regolamenti tan-1993 dwar il-Harsien ta' l-Ghasafar u tal-Fniek Selvaggi, Avviz Legali 126/93, kemm il-darba ma jippruvawx lil dawk l-ghasafar jew parti minnhom kienu impurtati b'mod legittimu jew kienu imrobbija fil-maqful jew li kienu rregistrati mad-dipartiment skond il-paragrafu 5 tar-regolament 17 ta' dawn ir-regolamenti u tal-ksur u ta' l-Avviz Legali 146/193, Artiklu 12 sub inciz 1, kif sussegwentement emendati;

fl-istess perijodu fuq l-istess cirkostanzi, kienu mportaw jew garrew, jew kellhom fil-pussess taghhom xi ghasafar hajjin, jew mejtin, jew parti ta' ghasafar li mhumix imsemmija fl-iskeda 1, 2 tar-regolamenti tan-1993 dwar il-Harsien ta' l-Ghasafar u tal-Fniek Selvaggi, Avviz Legali 126/93, kemm il-darba ma ippruvawx lil dawk l-ghasafar jew parti minnhom kienu mpurtati b'mod legittimu jew kienu imrobbija fil-magħluq u dawn gew irregistrati fir-regolament u tal-ksur u ta' l-Avviz Legali 146/193, Artiklu 12 sub inciz 2, kif sussegwentement emendati.

fl-istess perijodu, lok u cirkostanzi, kienu mportaw xi ghasafar hajjin, jew mejtin, jew parti minnhom meta ma humiex imrobbija fil-magħluq fil-pajjiz minn fejn ikunu

originaw u huma protetti mill-pajjiz ta' origini taghhom u l-esportazzjoni taghhom mill-pajjiz li kienu gew esportati kienet wahda mhux awtorizzata u dana bi ksur ta' l-Avviz Legali 146/1993, Artiklu 12 sub inciz 3 kif sussegwentement emendat;

fl-istess perijodu, fuq l-istess cirkostanzi, ftehm u jew ippruvaw, jew ghenu, jew hajru, jew taw parir jew qabdu lil xi persuni ohra sabiex jiksru d-dispozizzjonijiet tar-regolamenti tan-1993 dwar il-Harsien ta' l-Ghasafar u tal-Fniek Selvaggi, jew biex jonqos milli jikkonforma ma' wiehed minn dawn id-dispozizzjonijiet (inkluz xi ordni legittimament moghtija bis-sahha ta' xi dispozizzjoni ta' xi regolamenti) jew biex tikser xi restrizzjoni, koezzjoni, jew htiega imputata minn dawn ir-regolamenti, jew bis-sahha taghhom u dana bi ksur ta' l-Avviz Legali 146/1993, Artiklu 25, kif sussegwentement emendat;

fl-istess perijodu, lok u cirkostanzi, importaw/esportaw mill-gdid xi ezemplari, ukoll jekk dan mhumie x imsemmiha fl-Anness mar-Regolamenti Principali ta' l-Avviz Legali 263 tat-2004 minghajr ma applikaw ma' l-Awtorita' Amministrattiva bil-miktub fuq formoli disponibili ghaldaqstant minn dik l-Awtorita'.

fl-istess perijodu, lok u cirkostanzi, kellhom fil-pussess taghhom xi ezemplari li l-importazzjoni taghhom taqa' taht l-Avviz Legali 236 tat-2004 u naqqsu illi jzommu fil-pussess taghhom u ghal zmien kollu illi dawk l-ezemplari kienu fil-pussess taghhom; kull permess certifikat b'licenzja illi jkollhom x'jaqsmu ma' l-importazzjoni ta' dawk l-ezemplari.

Rat is-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali tat-28 ta' Marzu, 2008, li biha, wara li rat l-artikoli 60(a)(b)(c) u (k), 62(a)(b)(c)(f)(g)(h)(i) u (k), 62 proviso (c) tal-Kap. 37 tal-Ligijiet ta' Malta, l-artikolu 80 tal-Att tat-Taxxa fuq il-Valur Mizjud, Att XXIII tan-1998, artikolu 12 (1) u 17 (5), 12(2), 12(3), artikolu 25 tal-Avviz Legali 146/1993, l-Avviz Legali 236 tat-2004, sabet lill-appellanti hatja skond l-akkuzi dedotti kontra taghhom, u kkundannathom ihallsu LM1000 multa kull wiehed.

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Inoltre, l-Qorti ordnat is-sospensjoni tal-licenzja ta' l-appellanti ghal sena a terminu ta' regolament 25(3) ta' l-Avviz Legali 146/1993.

Rat ir-rikors tal-appellanti minnhom ipprezentat fid-9 t'April, 2008, li bih talbu li din il-Qorti joghgobha tirrifirma s-sentenza appellata billi thassaraha, tirrevokaha w tannullaha w kwindi tillibera lill-appellanti skond il-Ligi minn dawn l-imputazzjonijiet, htija w piena w, minghajr pregudizzju, f'kaz illi dan l-appell ma jintlaqax, tirrifirmaha fir-rigward tal-pieni nflitti minn l-Ewwel Qorti w tinfliggi piena aktar idoneja w anqas harxa w li tirispekkja l-kaz in ezami.

Fliet l-atti kollha processwali.

Rat il-fedini penali aggornati tal-appellanti esebiti mill-prosekuzzjoni fuq ordni tal-Qorti.

Rat il-verbal li bih Dr. David Gatt ghall-appellanti ddikjara li l-appellanti kienu qed jirtiraw it-talba ghat-thassir, revoka w annullar tas-sentenza appellata w kienu qed jillimitaw it-talba taghhom ghat-talba sussidjarja ghar-riforma fil-piena.

Rat illi l-aggravju dwar il-piena, fil-qosor, huwa s-segwent i :- Li l-prosekuzzjoni la fl-akkuzi kif dedotti kontra l-appellanti , u wisq inqas fil-mori tal-kawza , qatt ma talbet lill-Qorti tal-Magistrati sabiex f' kaz ta' htija tordna s-sospensjoni tal-licenzji mahruga fil-konfront taz-zewg appellanti. L-Avviz Legali 79/2006 fl-artikolu [recte: regolament] 27 (3) (a) jipprovdi illi persuna misjuba hatja l-ewwel darba, cioe' fejn ir-reat addebitat ikun l-ewwel wiehed li dwaru imputat jinstab hati, ghandha tkun soggetta ghall-piena ta' multa ta' mhux inqas minn LM50 izda mhux izjed minn LM500. Iz-zewg appellanti qatt ma kellhom sentenza ta' htija qabel dan l-incident. Ghaldaqstant il-piena applikata kienet wahda li tirtirwarda imputati recidivi w mhux kif inhu l-kaz odjern. Is-sospensjoni tal-licenzja hija indikattiva ta' recidiva kif inhu provvdut fl-istess artikolu [recte : regolament] 27 (3) (b).

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Ghalhekk huma talbu sussidjarjament li, f' kaz li l-appell taghhom ma jintlaqax, din il-Qorti tinfliggi piena aktar idonea w anqas harxa w li tirispekkja l-kaz in ezami.

Semghet it-trattazzjoni;

Rat in-Nota tal-Avukat Generali tal-15 ta' Lulju, 2008;

Rat in-Nota tal-appellanti tat-30 ta' Lulju, 2008.

Rat l-ordni Taghha biex il-kawza tigi rikjamata ghall-udjenza tal-lum ghas-sentenza;

Ikkonsidrat;

Illi trattandosi ta' appell dwar il-piena jigi ribadit li l-principju regolatur hu li din il-Qorti f'materia ta' piena normalment ma tid-disturbax id-diskrezzjoni tal-Ewwel Qorti li tkun semghet w ivvalutat il-provi traskritti w tkun ghamlet l-apprezzament taghha dwar il-grad ta' htija tal-akkuzat u tal-piena adegwata xierqa skond il-kaz, sakemm tali piena ma tkunx tohrog barra mill-parametri tal-ligi w/jew tkun manifestament sproporzjonata.

F' dan il-kaz l-aggravju tal-appellanti jidher li hu limitat ghal dik il-parti tas-sentenza appellata fejn l-Ewwel Qorti ordnat is-sospensjoni tal-licenzja tal-imputati ghal sena ghat-terminu tar-Regolament 25 (3) tal-Avviz Legali 146/1993 u ma jirrizultawx aggravji ohra relatati mal-piena fir-rikors tal-appell konguntiv taz-zewg appellanti.

Illi l-appellanti qed jinvokaw l-applikazzjoni tar-Regolament 27 (3) (a) tal-Avviz Legali 79/2006, li ovvjament dahal in vigore wara li gew kommessi r-reati ammessi mill-appellanti, li gew kommessi fil-5 ta' Jannar, 2005 u/jew fil-periodu ta' qabel din id-data. Mill-banda l-ohra l-Avukat Generali fin-Nota tieghu qed jissottometti li ghar-reati ammessi mill-appellanti kien applikabbli l-Avviz Legali 146/1993, u l-Avviz Legali 236/2004, kif del resto jidher anki mill-artikoli citati fis-sentenza appellata. L-Avviz Legali 79/2006 ma ghandux applikazzjoni retroattiva.

Ikkonsidrat;

Illi l-kwistjoni tal-applikazzjoni retroattiva ta' regolamenti giet trattata *in extenso* minn din il-Qorti fl-Appell Kriminali : "**Il-Pulizija vs. Edward Joseph O' Connor**" [17.11.2003] fejn gie citat b' approvazzjoni Il-Prof. Sir A. Mamo (Notes on Criminal Law (1958) Vol. I , 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."*

*"Although Prof. Mamo published his Notes on Criminal Law in the late 1940's, i.e. before the enactment of the Interpretation Act, (Chap. 249) which came into force decades later in 1975, he felt that his treatise should be more complete by referring to the position under English Law and he went on to say that :-*

*"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.”*

*Now an almost identical provision to this just quoted was introduced by the Maltese Interpretation Act, 1975,(Chapter 249 of the Laws of Malta) which the Attorney General is invoking to rebut O’Connor’s argument on this score. In particular he refers to Section 12 (1) (d) which is almost identical in wording to the English Interpretation Act and which states that where an Act passed after the commencement of the Interpretation Act of 1975, ” repeals any other law, then unless the contrary intention appears, the repeal shall not “affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any law so repealed or any liability thereto.”*

*Moreover, subsection (e) which also echoes the corresponding English provision, goes on to state that it shall likewise not “affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy may be instituted, continued and enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed. “*

*Now “Act” , according to Section 2 (1) includes ...”any order, rule, regulation, bye-law, notice or other instrument having the force of law in Malta” and according to Section 3 (1) “amend” includes “ repeal, add to and vary” and “repeal” used in relation to a law includes , rescind, revoke, cancel, and replace. “*

*As the change in the law under review was brought about by Legal Notice amending a previous Legal Notice and hence by virtue of subsidiary legislation, one has to refer also to Section 9 of Chapter 249 which deals with subsidiary legislation. This section states that : -*

*“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, may, unless the contrary intention appears in the Act conferring that power, be made to operate retrospectively 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.”*

*Sub-section (2) of Section 12 then states that :-*

*“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.”*

*And subsection (3) :-*

*“for the purposes of subarticle (2) “amended” means and includes any amendment, modification , change, alteration , addition or deletion , in whatsoever form or manner it is made and howsoever expressed , and includes also a provision whereby an Act or a provision thereof is substituted or replaced or repealed and substituted , or repealed and a different provision made in place thereof.”*

Din il-Qorti ccitat estensivament minn din is-sentenza biex ma jkunx hemm dubju dwar dan il-punt. Kif gie hemm ritenut skond l-artikolu 9 tal-Kap.249 fuq citat, legislazzjoni sussidjarja **“tista tkun retroattiva”** : (**“MAY BE MADE**



**TO OPERATE RETROSPECTIVELY” fit-test Ingliz)** sakemm ma jkunx jirrizulta l-kuntrarju mill-Att li jikkonferixxi dak il-poter. Fil-fehma ta' din il-Qorti, l-uzu tal-kliem : **“TISTA’ TKUN” (“MAY BE MADE”** fit-test Ingliz) kjarament jimplika li tali ligi ma tkunx necessarjament retroattiva imma tista' issir hekk. L-unika limitazzjoni ghal tali fakolta' hi li hadd ma jista' jigi assoggettat ghal xi piena ghal xi att li ma kienx hekk punibbli meta gie kommess. Ovvjament biex tali legislazzjoni sussidjarja tkun retroattiva irid jintqal espressament fil-ligi l-gdida w wiehed ma jistax jassumi dan awtomatikament f' kull kaz ta' legislazzjoni sussidjarja li tissostitwixxi ligi precedenti.

Issa f' dan il-kaz ir-Regolament 29 tal-Avviz Legali 79/2006, li hassar ir-Regolamenti ta' l-1993 dwar l-Ghasafar u l-Fenek Salvagg, jipprovdi espressament fil-paragrafu (b) tal-proviso li:-

**"kull responsabbilita' ghal xi piena taht xi dispozizzjoni tar-Regolamenti ta' l-1993 dwar l-Ghasafar u l-Fenek Salvagg, ghandha tibqa' fis-sehh minkejja t-thassir tar-regolamenti imsemmija"**

Ghalhekk mhux biss dawn ir-regolamenti tal-2006 ma nghatawx effett retroattiv izda bil-paragrafu appena citat gew salvagwardati w perpetwati l-pieni li kienu jezistu fir-regolamenti tal-1993, kif emendati, ghar-reati kommessi taht ir-regim ta' dawk ir-regolamenti.

Fin-nota taghhom l-appellanti jibdew biex jissottomettu li meta gew kommessi r-reati ammessi, l-Avviz Legali 146/1993 *"kien wiehed diga sorveljat"* [ recte : sorvolat ? ] *"b' divesi avvizi legali precedenti"*. Pero' dan mhux il-kaz ghaliex l-Avvizi Legali li saru bejn is-sena 1993 u s-sena 2005, kienu biss jemendaw l-Avviz Legali 146/1993 u mhux ihassruh. Ghalhekk ir-regolamenti principali, ossia l-ligi bazika, kienu w baqghu dawk kontenuti fl-Avviz Legali 146/1993 kif emendat.

Illi fost l-emendi li saru ghall-Avviz Legali 146/1993 kien hemm proprju dik li saret bl-Avviz Legali 41/2003 li bir-regolament 20, awmenta l-piena fil-kaz tal-ewwel reat

minn massimu ta' multa ta' LM500 ghall multa ta' **LM1000** u l-konfiska tal-*corpus delicti*. Inoltre l-Qorti nghatat is-setgha li tkun " **...tista' tordna s-sospensjoni tal-licenzja jew permess ghal zmien mhux inqas minn sena.**" u dan anki fil-kaz tal-ewwel reat.

Il-Prosekuzzjoni kellha kull dritt li tigbed l-attenzjoni tal-Qorti ghall-dan l-Avviz Legali 41/2003 li emenda l-piena kontemplata fir-regolament 25 (2) (a) tal-Avviz Legali 146/1993 , ghaliex din l-emenda kienet dahlet in vigore qabel il-kommissjoni tar-reati ammessi w ergo applikabbli ghalihom , imma dejjem ir-regolament principali baqa' dak kontenut fl-Avviz Legali 146/1993 indikat fic-citazzjoni w citat fis-sentenza appellata. Ghalhekk ma hemm ebda kontradizzjoni apparenti jew reali li jaccennaw ghalha l-appellanti fin-nota taghhom.

Illi lanqas ma ghandha rilevanza s-sottomissjoni tal-appellanti meta, fin-nota taghhom, jghidu li l-Ispettur Prosekutur Alex Miruzzi ma talabx lill-Ewwel Qorti biex tissospendi l-licenzja tal-appellanti. Ma jirrizultax li biex il-Qorti taghmel ordni simili trid issir talba *ad hoc* mill-prosekuzzjoni kif donnhom jippretrendu li kellu jsir l-appellanti imma l-kliem tal-ligi jindika bic-car li l-Qorti tista' teroga tali sospensjoni tal-licenzja "*marte propria*". Ghalhekk l-Ewwel Qorti agixxiet fit-termini tal-ligi meta ordnat ukoll is-sospensjoni tal-licenzji tal-appellanti.

Finalment l-appell, kif issa ridimensjonat, jirrigwarda biss l-erogazzjoni tal-piena w ghalhekk din il-Qorti tara li mhux il-kaz li tikkonsidra sottomissjonijiet kontenuti fin-nota tal-appellanti li jinvolvi ezami mill-gdid tal-mertu dwar htija o meno w dana partikolarment meta wiehed iqis li l-appellanti stess kienu ammettew il-htija taghhom quddiem l-Ewwel Qorti bla ebda rizervi.

Illi wiehed irid umbaghad iqis ukoll li f' dan il-kaz si trattava ta' importazzjoni illegali ta' mija w sebgha w sittin ezemplari ta' ghasafar u zewg mammiferi minn Damian Gouder u ta' tlitt mija, sitta w tletin ezemplari ta' ghasfur u tmin ezemplari ta' mammiferi minn Charles Giordmaina li, skond l-ammissjoni taghhom stess, saret minghajr l-ebda

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awtorizzazzjoni mill-pajjiz tal-origini taghhom. Ghalhekk l-Ewwel Qorti kienet altru milli gustifikata li tapplika l-piena tal-multa fil-massimu taghha w tordna tali sospensjoni tal-licenzji tal-appellanti.

Ghal dawn il-motivi din il-Qorti ma tarax li hemm xi raguni valida jew legali ghaliex ghandha tiddisturba d-diskrezjoni tal-Ewwel Qorti fl-erogazzjoni tal-piena w partikolarment fl-ordni tas-sospensjoni tal-licenzji tal-appellanti ghal zmien sena.

Konsegwentement l-appell taz-zewg appellanti qed jigi michud u s-sentenza appellata qed tigi konfermata fl-intier taghha, b' dana li it-terminu ta' sena sospensjoni tal-licenzji jibda' jiddekorri minn nofs il-lejl tal-lum.

**< Sentenza Finali >**

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