MALTA

QORTI TA' L-APPELL KRIMINALI

ONOR. IMHALLEF
DAVID SCICLUNA

Seduta tal-25 ta' Marzu, 2009

Appell Kriminali Numru. 107/2008

Il-Pulizija

v.

… omissis …
Joshua Fardell

Il-Qorti,

Rat l-imputazzjonijiet migjuba mill-Pulizija Ezekuttiva kontra Joshua Fardell talli:

(1) Gewwa z-Zejtun matul il-lejl ta’ bejn it-18 u d-19 ta’ Ottubru 2005 ikkommetta serq ta’ cash register ta’ l-ghamla Sereno kif ukoll is-somma ta’ madwar Lm60 ghad-detriment ta’ David Gatt miz-Zejtun liema serq hu kwalifikat bil-mezz, hin u valur li jeccedi l-mitt lira (Lm100) izda anqas minn elf lira (Lm1,000);

(2) F’dawn l-ahhar xhur, f’dawn il-Gzejjer, xjentement laqa’ ghandu jew xtara hwejjeg misruqa, mehuda b’qerq jew akkwistati b’reat, sew jekk dan sar f’Malta jew barra minn Malta jew xjentement b’kull mod li jkun indahal biex ibighhom jew imexxihom u cioe` oggetti misruqa mill-imsemmi fond proprjeta` ta’ David Gatt miz-Zejtun;

(3) Fl-istess data, hin u cirkostanzi volontarjament hassru, ghamlu hsara jew gharrqu hwejjeg haddiehor, mobbli jew immobbli, liema hsara teccedi l-Lm5 izda anqas minn Lm50 u dan ghad-dannu ta’ l-imsemmi David Gatt;

Rat is-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta’ Gudikatura Kriminali tad-9 ta’ April 2008, li permezz taghha dik il-Qorti, wara li rat l-artikoli 261(b)(c)(f), 263, 267, 270, 278(2), 325(1)(d), 334(a) tal-Kap. 9 tal-Ligijiet ta’ Malta, sabet lill-imsemmi Joshua Fardell hati ta’ l-ewwel u t-tielet imputazzjonijiet bit-tielet imputazzjoni assorbita fl-ewwel wahda ai termini ta’ l-artikolu 17(h) tal-Kap. 9 waqt li t-tieni imputazzjoni hija alternattiva ghall-ewwel wahda u l-ewwel Qorti ma haditx konjizzjoni taghha, u kkundannatu ghal disa’ xhur prigunerija effettiva b’rakkomandazzjoni li jibda programm ta’ rijabilitazzjoni fiz-zmien l-aktar malajr li jippermettu r-regolamenti;

Rat ir-rikors ta’ appell ta’ l-imsemmi Joshua Fardell ipprezentat fil-21 ta’ April 2008 li permezz tieghu talab li din il-Qorti tirriforma s-sentenza appellata in kwantu tirrigwarda lilu billi tikkonfermaha f’dik il-parti fejn sabitu hati ta’ l-ewwel u t-tielet imputazzjonijiet b’dan li din l-ahhar imputazzjoni kienet assorbita fl-ewwel wahda u fejn astjeniet milli tiehu konjizzjoni tat-tieni imputazzjoni u tirrevokaha f’dik il-parti fejn ikkundannatu ghal piena ta’ prigunerija ghal disa’ xhur u tvarja l-istess sentenza f’dik il-parti fejn tikkoncerna l-piena;

Rat l-atti kollha tal-kawza;

Semghet it-trattazzjoni tad-difensuri tal-partijiet;

Ikkunsidrat:

L-aggravju ta’ l-appellant jirrigwarda l-piena nflitta fuqu mill-ewwel Qorti. Jghid li l-piena kienet wisq gravuza tenut kont ic-cirkostanzi tal-kaz. Jghid li ghalkemm l-ewwel Qorti osservat fis-sentenza taghha li kienet qed tiehu in konsiderazzjoni l-ammissjoni bikrija ta’ l-appellant, il-kooperazzjoni tieghu mal-Pulizija u l-fatt li l-oggetti misruqa gew ritornati lid-derubat, ma jidhirx li dawn il-fatturi nghataw il-kunsiderazzjoni misthoqqa meta ssentenzjatu. Jikkontendi li l-ewwel Qorti giet indebitament influwenzata mir-rapport ta’ l-ufficjal tal-probation. Difatti, fuq is-suggerimenti ta’ l-ufficjal tal-probation, l-ewwel Qorti poggiet lill-ko-imputat Mario Caruana taht probation ghal tliet snin filwaqt illi lill-appellant ikkundannatu ghal prigunerija b’rakkomandazzjoni li jibda programm ta’ rijabilitazzjoni. L-appellant jikkummenta li dan ifisser illi huwa gie kkundannat mill-ufficjal tal-probation, u dan f’kaz li kien jindika li kellha tinghata piena alternattiva.

Hawnhekk mela l-appellant qieghed jilmenta mid-disparita` fis-sentenza li nghatatlu meta paragunata ma’ dik li nghatat lill-ko-imputat li sahansitra nstab hati li sar recidiv, kif ukoll mill-fatt li l-ewwel Qorti mxiet ezattament kif issuggerixxa l-ufficjal tal-probation.

Dwar id-disparita` f’sentenzi, f’**Blackstone’s Criminal Practice, 2004** (para. D23.49 p. 1697) jinghad:

“A marked difference in the sentences given to joint offenders is sometimes used as a ground of appeal by the offender receiving the heavier sentence. The approach of the Court of Appeal to such appeals has not been entirely consistent. The dominant line of authority is represented by *Stroud* (1977) 65 Cr App R 150. In his judgment in that case, Scarman LJ stated that disparity can never in itself be a sufficient ground of appeal - the question for the Court of Appeal is simply whether the sentence received by the appellant was wrong in principle or manifestly excessive. If it was not, the appeal should be dismissed, even though a co-offender was, in the

Court of Appeal's view, treated with undue leniency. To reduce the heavier sentence would simply result in two rather than one, over-lenient penalties. As his lordship put it, 'The appellant's proposition is that where you have one wrong sentence and one right sentence, this court should produce two wrong sentences. That is a submission which this court cannot accept'. Other similar decisions include *Brown* [1975] Crim LR 177, *Hair* [1978] Crim LR 698 and *Weekes* (1980) 74 Cr App R 161…. However, despite the above line of authority, cases continue to occur in which the Court of Appeal seems to regard disparity as at least a factor in whether or not to allow an appeal (see, for example, *Wood* (1983) 5 Cr App R (S) 381). The true position may be that, if the appealed sentence was clearly in the right band, disparity with a co-offender's sentence will be disregarded and any appeal dismissed, but where a sentence was, on any view, somewhat severe, the fact that a co-offender was more leniently dealt with may tip the scales and result in a reduction.

"Most cases of disparity arise out of co-offenders being sentenced by different judges on different occasions. Where, however, co-offenders are dealt with together by the same judge, the court may be more willing to allow an appeal on the basis of disparity. The question then is whether the offender sentenced more heavily has been left with 'an understandable and burning sense of grievance' (*Dickinson* [1977] Crim LR 303). If he has, the Court of Appeal will at least consider reducing his sentence. Even so, the prime question remains one of whether the appealed sentence was in itself too severe. Thus, in *Nooy* (1982) 4 Cr App R (S) 308, appeals against terms of 18 months and nine months imposed on N and S at the same time as their almost equally culpable co-offenders received three months were dismissed. Lawton LJ said:

"'There is authority for saying that if a disparity of sentence is such that appellants have a grievance,

that is a factor to be taken into account. Undoubtedly, it is a factor to be taken into account, but the important factor for the court to consider is whether the sentences which were in fact passed were the right sentences.'"

Imbaghad f'**Archbold**, **Criminal Pleading, Evidence and Practice, 2006** (para. 5-106, p. 589) naqraw hekk:

"Where an offender has received a sentence which is not open to criticism when considered in isolation, but which is significantly more severe than has been imposed on his accomplice, and there is no reason for the differentiation, the Court of Appeal may reduce the sentence, but only if the disparity is serious. The current formulation of the test has been stated in the form of the question: 'would right-thinking members of the public, with full knowledge of the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice?' (per Lawton L.J. in *R. v. Fawcett*, 5 Cr. App.R.(S) 158 C.A.). The court will not make comparisons with sentences passed in the Crown Courts in cases unconnected with that of the appellant (see *R. v. Large*, 3 Cr.App.R.(S) 80, C.A.). There is some authority for the view that disparity will be entertained as a ground of appeal only in relation to sentences passed on different offenders on the same occasion: see *R.v. Stroud*, 65 Cr. App.R. 150, C.A. It appears to have been ignored in more recent decisions, such as *R. v. Wood,* 5 Cr.App.R.(S) 381. C.A., *Fawcett*, ante, and *Broadbridge*, ante. The present position seems to be that the court will entertain submissions based on disparity of sentence between offenders involved in the same case, irrespective of whether they were sentenced on the same occasion or by the same judge, so long as the test stated in *Fawcett* is satisfied."

Fil-kaz in ezami jista' jinghad li **"something had gone wrong with the administration of justice"** bil-fatt li

wiehed mill-ko-imputati tqieghed taht probation u l-iehor inghata sentenza ta’ prigunerija?

Jirrizulta li z-zewg ko-imputati tressqu quddiem l-ewwel Qorti fl-24 ta’ Mejju 2006 u ammettew mill-ewwel. Saret talba biex isir *pre-sentencing investigation report* u din it-talba giet milqugha mill-ewwel Qorti.

Fit-8 ta’ Novembru 2006 gie pprezentat ir-rapport dwar il-ko-imputat Mario Caruana mnejn irrizulta li kien ghamel progress sostanzjali u ma kienx ghadu jabbuza mid-droga izda li kien mehtieg li jzomm kuntatt mal-CARITAS, u ghalhekk l-ufficjal tal-probation Ivan Sultana rrakkomanda li jitqieghed taht probation. Fl-istess jum Ivan Sultana xehed li Joshua Fardell, l-appellant, ma kkooperax mieghu, ma zammx l-appuntamenti kif suppost u ghalhekk ma setax ihejji r-rapport.

Ir-rapport dwar l-appellant gie pprezentat fis-27 ta’ Frar 2007. Minnu u mix-xiehda ta’ Ivan Sultana rrizulta li l-appellant ghandu problema ta’ abbuz tad-droga u ma ghandu l-ebda tip ta’ motivazzjoni biex jaghmel xi haga. Falla diversi appuntamenti kemm ma’ l-ufficjal tal-probation u ma kkonkluda ebda pjan mal-CARITAS b’success. Kien proprju dan li wassal lill-ufficjal tal-probation jirrakkomanda sentenza ta’ prigunerija bil-ghan li tul is-sentenza jinghata l-possibilita` li jibbenefika minn programm residenzjali.

L-ewwel Qorti pero` ma waqfitx hemm izda tat aktar zmien biex tara jekk l-appellant kienx b’xi mod jimmotiva ruhu biex jaghmel programm ta’ rijabilitazzjoni. Fl-20 ta’ Gunju 2007 rega’ xehed Ivan Sultana fejn indika li Mario Caruana (li, kif kien xehed fis-27 ta’ Frar 2007, kien naqas jaghmel urine test li ordnalu l-ufficjal tal-probation) ikkollabora bis-shih u zamm l-appuntamenti. Mill-banda l-ohra dwar l-appellant qal li regghu ppruvaw iressquh mal-CARITAS, sar *case conference* mal-*care worker* tieghu u sar *care plan* biex jimxi mieghu, izda falla diversi appuntamenti mal-CARITAS u l-*care worker* infurmat lill-ufficjal tal-probation li l-appellant ma kellu motivazzjoni ta’ xejn.

Ivan Sultana rega' xehed fis-7 ta' Novembru 2007, qal li l-appellant ma zammx appuntamenti mieghu u li ghalkemm il-gimgha ta' qabel kellu jidhol ix-shelter tal-CARITAS, irrifjuta li jidhol. "Kull haga li ppruvajna naghmlulu lil dan anke mal-CARITAS, dan irrifjuta li jaghmel totalment xejn." Xehed ukoll fl-14 ta' Novembru 2007 fejn qal bla tlaqliq li "min-naha tal-Probation Services uzajna r-rizorsi kollha taghna u ma nafx x'nistghu naghmlu iktar fuqu."

Minn dan kollu huwa evidenti li l-ewwel Qorti ghamlet dak li setghet sabiex l-appellant ikollu l-opportunita` jehles mill-probema ta' l-abbuz tad-droga, problema li mhijiex biss wahda personali ghall-appellant innifsu izda li jkollha riperkussjonijiet fuq il-bqija tas-socjeta`. L-ewwel Qorti kellha necessarjament tiddifferenzja bejn l-appellant u l-ko-imputat Mario Caruana. Dan ta' l-ahhar ikkoopera u deher determinat li jbiddel triqtu filwaqt illi l-appellant ma wera motivazzjoni ta' xejn. L-appellant ghalhekk kien ingust mal-ufficjal tal-probation meta qal li l-imputati gew iggudikati u ssentenzjati mill-ufficjal tal-probation. Kienet id-difiza li talbet *pre-sentencing investigation report*. Kien l-appellant li ma weriex ruhu lest li jehles mill-problema ta' l-abbuz tad-droga. Min wera ruhu hekk lest inghata l-fiducja misthoqqha mill-Qorti. Min ma weriex ruhu hekk lest ma setax jinghata tali fiducja. Jigifieri l-appellant prattikament ikkundanna lilu nnifsu. Sfortunatament l-anqas f'dan l-istadju ta' l-appell ma saret xi turija da parti ta' l-appellant li huwa lest ibiddel fehmtu. Mhuwiex bizzejjed li d-difensur tieghu jitlob li jinghata almenu sentenza sospiza ta' prigunerija b'ordni ta' supervizjoni. Jekk l-appellant ma kkooperax kif mistenni ma' l-ufficjal tal-probation tul il-perijodu li kien quddiem l-ewwel Qorti, din il-Qorti ma tistax tistenna li issa se jikkoopera. Ghalhekk din il-Qorti tittama li fil-perijodu ta' prigunerija li gie nflitt mill-ewwel Qorti u li din il-Qorti sejra tikkonferma, ikun hu stess li sa fl-ahhar juri li jixtieq u li ghandu motivazzjoni bizzejjed biex jibda u jittermina programm residenzjali kontra l-abbuz tad-droga.

Ghal dawn il-motivi :

Tiddeciedi billi tichad l-appell u tikkonferma s-sentenza appellata fl-intier taghha.

< Sentenza Finali >

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