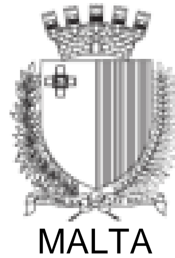

MALTA

QORTI TA' L-APPELL KRIMINALI

ONOR. IMHALLEF
JOSEPH GALEA DEBONO

Seduta tas-26 ta' Marzu, 2009

Appell Kriminali Numru. 43/2009

Il-Pulizija
(Spt. M. Curmi)
Vs
Neville Cutajar

Il-Qorti,
Rat l-akkuza dedotta kontra l-appellant quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali talli fid-9 t'Ottubru, 2007, fil-hanut bl-isem "Movie Mania DVD Rentals" sitwat 7, Triq Guzeppi Portelli, Lija, ffalsifika jew biddel minghajr il-kunsens tas-sid, l-ismijiet, il-marki jew sinjali distintivi tax-xoghol tal-mohh jew prodott ta' industrija, jew manifattura, jew xjentement ghamel uzu ta' sinjali, tabelli jew emblemi li jkun fihom indikazzjoni li tista' tqarraq lix-xerrej dwar ix-xorta tal-merkanzija, jew biegh tali merkanzija, jew xjentement qieghed fic-cirkolazzjoni, biegh jew zamm ghandu ghall-bejgh jew importa ghal hsieb ta' kummerc, merkanzija b'marka, sinjal jew emblema imxebbhin b'qerq u cioe' numru ta' DVDs u DVD

sleeves, ai termini ta' l-artikolu 298(1) tal-Kodici Kriminali, Kap. 9 tal-Ligijiet ta' Malta;
Fl-istess data, lok u cirkostanzi, bi qliegh jew bi skop ta' kummerc, stampa, immanifattura, idduplika jew mod iehor irriproduca jew ikkopja jew biegh, qassam jew mod iehor offra ghal bejgh jew biex jitqassam, xi artikolu jew xi haga ohra bi ksur tal-jeddijiet li johorgu mid-drittijiet ta' l-awtur li jkollha persuna ohra w protetti bil-ligi ta' Malta jew tahtha, ai termini ta' l-artikolu 298B tal-Kodici Kriminali, Kap. 9 tal-Ligijiet ta' Malta;

Rat is-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali tas-6 ta' Frar, 2009, li biha, fuq l-istess ammissjoni tieghu, sabet lill-appellant hati skond l-akkuza w wara li rat l-artikoli 298(1) u 298B tal-Kap. 9 tal-Ligijiet ta' Malta, kkundannatu ghal multa ta' LM4,000 (ekwivalenti ghal €9317.49) li ghandhom jithallsu b'rati mensili fuq perjodu ta' sitt (6) xhur.
Il-Qorti ordnat il-konfiska w distruzzjoni ta' l-oggetti elevati mill-prosekuzzjoni w cioe' elfejn, mija, hamsa w disghin (2195) DVDs, waqt li ordnat il-konfiska ta' 1 DVD "cloner", 4 bay konsistenti minn 1 "master", 3 "burners", "controller", "power supply" u 4 DVDs kontenenti fihom u hdax (11)-il "sleeve tad-DVD imsemmija f'Dok. MC1.

Rat ir-rikors tal-appellant minnu pprezentat fit-18 ta' Frar, 2009, li bih talab li din il-Qorti joghgobha tirriforma s-sentenza appellata billi thassaraha w tirrevokaha in kwantu l-piena li giet inflitta w minflok timponi piena gusta ghall-kaz odjern, u tikkonfermaha fil-bqija.

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 dwar il-piena erogata huma, fil-qosor, is-segwenti w cioe' :- li l-Ewwel Qorti ma semmietx il-kondotta nadifa tal-appellant, salv xi ksur tar-regolamenti tat-traffiku, w naqset li taghti piz lix-xhieda tal-appellant fejn hu ammetta l-akkuzi w spjega ukoll li mhux id-DVD's kollha kemm huma kienu ser jintuzaw ghall-

iskopijiet imsemmija fl-akkuzi migjuba kontra tieghu. Inoltre, ghamel referenza ghall-kawza ohra fl-ismijiet "Il-Pulizija vs. Martin Cachia" [30.4.2008] li ghalkemm dak l-akkuzat kien gie misjub hati anki ta' akkuzi ohra barra dawk simili ghal tal-appellant, wehel biss ghaxart elef Ewro. Ghalhekk kien hemm lok li l-piena fil-konfront tal-appellant kellha tigi ridotta.

Semghet it-trattazzjoni.

Ikkonsidrat;

Illi dan l-appell hu limitat ghall-piena. Illi dejjem gie ritenut li mhux normali li din il-Qorti tal-Appell tvarja d-diskrezjoni tal-Ewwel Qorti jekk il-piena erogata tkun tirrientra fil-parametri tal-ligi w ma tkunx manifestament eccessiva. Kif gie ritenut fl-Appell Kriminali (Superjuri): "**Ir-Repubblika ta' Malta vs. Carmen Butler"** [26.2.2009] :-

"Il-Qorti tal-Appell Kriminali, bhala regola, ma tiddisturbax il-piena erogata mill-Ewwel Qorti, sakemm dik il-piena ma tkunx manifestament sproporzjonata jew sakemm ma jirrizultax li l-Ewwel Qorti tkun naqset milli taghti importanza lil xi aspett partikolari tal-kaz (u anki, possibilment, lil xi cirkostanza sussegwenti ghas-sentenza tal-Ewwel Qorti) li jkun jincidi b' mod partikolari fuq il-piena, S' intendi, 'sentencing is an art rather than a science' u wiehed ma jistax jippretendi xi precizjoni matematika jew identita' perfetta fit-tqabbil tal-fatti ta' kaz ma iehor, jew ta' piena erogata f' kaz ma dik erogata f' kaz iehor." (Ara wkoll **"Ir-Repubblika ta' Malta vs. Bernard sive Benny Attard"** [20.3.2009] App. Krim. Superjuri)"

Illi l-piena ghar-reat dedott fl-ewwel imputazzjoni li jaqa' taht l-artikolu 298 (1) hi dik ta' prigunerija minn erba xhur sa sena. Il-piena ghat-tieni reat li ammetta l-htija tieghu l-appellant u cioe' dak li jaqa' taht l-artikolu 298B tal-Kodici Kriminali hi dik ta' prigunerija ta' mhux izjed minn sena jew multa ta' mhux izjed minn Ewro 11,646.87c jew dik il-multa w prigunerija flimkien. Ghalhekk apparti li l-multa erogata minnflok il-piena karcerarja jew flimkien mal-piena karcerarja ghat-tieni imputazzjoni kienet tidhol fil-

parametri tal-ligi, l-Ewwel Qorti ma applikatx il-piena tal-prigunerija applikabbli ghall-ewwel reat, kif suppost ghamlet. Ghalhekk zgur li l-piena ma hix wahda li tohrog mill-parametri tal-ligi.

Illi kuntrarjament ghal dak li hemm fir-rikors l-Ewwel Qorti fis-sentenza appellata, qieset il-punt tal-fedina penali pjuttost nadifa, hlief ghal xi ksur tar-regolamenti tat-traffiku, sollevata mid-difiza. Ghalhekk dan l-aggravju hu infondat.

Illi umbaghad fil-waqt li l-Ewwel Qorti qalet li qed tqis l-ammissjoni bikrija, din il-Qorti tara li din ma kienet ammissjoni bikrija xejn ghax l-appellant irregistra ammissjoni biss wara li lahqu xehdu x-xhieda tal-prosekuzzjoni w madwar erba' xhur wara li kien gie akkuzat quddiem l-Ewwel Qorti w wiegeb li ma kienx hati. (ara fols.10 u 65 tal-process).

Umbaghad, meta l-appellant jghid fix-xiehda tieghu li d-DVD's li sabulu l-Pulizija waqt is-*search* kienu ghar-rimi, din, fil-fehma tal-Qorti, apparti li hija trovatura w li ftit li xejn tikkonvinci, ma taghmilx differenza ghar-rejita' w sewwa ghamlet l-Ewwel Qorti jekk ma hadithiex in konsiderazzjoni, meta giet biex teroga l-piena.

Illi ghar-rigward tal-paraguni ma sentenzi ohra moghtija fi processi differenti, fejn ovvjament il-fatti speciji ma jkunu qatt l-istess, din il-Qorti taghmel referenza ghall-insenjament tal-Qorti tal-Appell Kriminali (kolleggjali) fis-sentenzi taghha fil-kawzi "**Ir-Repubblika ta' Malta vs. Omissis u Brian Godfrey Bartolo"** [14.11.2002] u **"The Republic of Malta vs. Omissis and Perry Ingomar Toornstra"** [12.6.2003], fejn fiz-zewg kazijiet gew citati b'approvazzjoni brani mill-**BLACKSTONE'S CRIMINAL PRACTICE** u minn **ARCHBOLD , "Criminal Pleading , Evidence and Practice"**, li jezaminaw x' jghidu l-Qrati Inglizi f' sitwazzjonijiet simili, biex wiehed jislet certi linji ta' gwida.

Hekk fil-**BLACKSTONE'S** 2001, (para. D22.47 p.1650) jinghid :-

"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 judgement 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 Crim 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' (*Dickenson* [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."

ARCHBOLD (2001 para. 5-174,p.571 jikkumenta 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 one wrong with the administration of justice ?" (per Lawton LJ 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.) <u>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 :</u> see R. v. Stroud , 65 Cr. App. R. 150 C.A. It appears to have been ignored in more recent decisions, such as in R. v. Wood … Fawcett, ante and Broadbridge , ante. <u>The present position seems to be that the court will entertain submissions based on disparity of sentences between offenders involved in the same case,</u> 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." (sottolinear ta' din il-Qorti).

Ikkonsidrat;

F' dan il-kaz l-unika sentenza li l-appellant qed jiccita biex jigbed xi paragun maghha ma kienetx inghatat fl-istess process u lanqas mill-istess gudikant u lanqas ma nghatat fl-istess jum w din il-Qorti ma tarax li tista' taghmel paraguni ma sentenza moghtija fuq fattispecji ghal kollox differenti. Kif gja gie appropozitu citat aktar il quddiem f' din is-sentenza:-

"…wiehed ma jistax jippretendi xi precizjoni matematika jew identita' perfetta fit-tqabbil tal-fatti ta' kaz ma iehor, jew ta' piena erogata f' kaz ma dik erogata f' kaz iehor."

Ghalhekk ma tarax li hemm raguni biex tiddisturba d-diskrezjoni tal-Ewwel Qorti fl-erogazzjoni tal-piena li hi manifestament ferm inqas minn dak li seta' jigi kundannat ghaliha l-appellant fejn addirittura kien hemm piena karcerarja minima ta' erba xhur ghall-ewwel imputazzjoni w din, ghal xi raguni, ma gietx applikata mill-Ewwel Qorti.

Ghal dawn il-motivi din il-Qorti qed tichad l-appell u tikkonferma s-sentenza appellata.

< Sentenza Finali >

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