



QORTI TA' L-APPELL KRIMINALI

**ONOR. IMHALLEF
JOSEPH GALEA DEBONO**

Seduta tas-26 ta' Novembru, 2009

Appell Kriminali Numru. 240/2009

**Il-Pulizija
(Spt. H. Debono)
Vs
Vincent Spiteri**

Il-Qorti,

Rat l-akkuza dedotta kontra l-appellant quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali talli f'isem il-Kontrollur tad-Dwana w il-Kummissarju tat-Taxxa fuq il-Valur Mizjud, f'dawn il-Gzejjer, wara tfittxija li saret minn Ufficjali tal-Pulizija fir-residenza msemija ta' l-istess Vincent Spiteri, fl-14 t'April, 2004, u/jew fiz-zmien ta' qabel, b'diversi atti maghmulin fi zminijiet differenti, li jiksru l-istess disposizzjoni tal-Ligi w li gew maghmula b'risoluzzjoni wahda :

a. xjentement kellu fil-pussess u/jew taht il-kontroll tieghu, flixken b'xorb alkoholiku bla dazju ta' diversi marki w kwalita' kif deskritt fin-Nota ta' Qbid 12/2005, liema importazzjoni w il-pussess taghhom huma projbiti u/jew

ristretti, w liema dazju tas-Sisa u VAT ma gewx imhallsa u/jew kawtelati. Dawn il-flixken tax-xorb alkoholiku li l-importazzjoni w il-pussess taghhom hija projbita w/jew ristretta ghandhom valur totali ta' LM 346.08,0 u Dazju w Sisa dovuta li jammonta ghal LM 585.30,0, liema dazju ma giex imhallas u/jew kawtelat u li fuqhom kellha tithallas Taxxa fuq il-Valur Mizjud, liema taxxa tammonta ghal LM 167.65, liema taxxa ma gietx imhallsa w/jew kawtelata, w dan bi ksur ta' l-artikolu 80 ta' l-Att dwar it-Taxxa fuq il-Valur Mizjud (Att Nr. XXIII ta' l-1998), kif ukoll bi ksur ta' l-artikoli 60(a)(b)(c)(k), 62(a)(b)(c)(f)(g)(h)(i) u l-paragrafu (a) tal-proviso ta' l-artikolu 62 ta' l-Ordinanza tad-Dwana Kap. 37, u l-artikoli 16 (1)(j), 16(3) u 17 ta' l-Att XVI ta' l-1995 dwar Dazju tas-Sisa tal-Ligijiet ta' Malta;

b. fl-istess perjodu taz-zmien, post u cirkostanzi, xjentement kellu filli b'xi mod jiddisponi kontra l-ligi minn flixken ta' din ix-xorta, w dan bil-hsieb illi bil-qerq seta' jahrab milli jhallas id-dazju dovut fuq dawn il-flixken ghad-dannu tal-Gvern ta' Malta.

Rat is-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali tas-26 ta' Gunju, 2009, li biha, wara li rat l-artikoli 60(a)(b)(c)(k), 62(a)(b)(c)(f)(g)(h)(i) u paragrafu (a) tal-proviso ta' l-artikolu 62 ta' l-Ordinanza tad-Dwana Kap 37 tal-Ligijiet ta' Malta, w l-artikoli 16(1)(j), 16(3) u 17 ta' l-Att XVI tal-1995 dwar Dazju tas-Sisa tal-Ligijiet ta' Malta, sabet lill-appellant hati ta' l-akkuzi migjuba kontra tieghu b'dana illi l-akkuza ntestata "b" hija minuri w nkorporata [Sic!] fl-akkuza "a", w ikkundannatu ghall-piena ta' prigunerija ta' zmien sitt (6) xhur, b'dana illi wara li rat l-artikolu 28(A) tal-Kap. 9, ordnat li dan it-terminu jkun sospiz ghal zmien sena kif ukoll ghall-multa ta' €3366.20 (LM1445.11) u ordnat il-konfiska tax-xorb meritu ta' din il-kawza.

Rat ir-rikors tal-appellant minnu pprezentat fit-8 ta' Lulju, 2009, li bih talab li din il-Qorti joghgobha thassar, tirrevoka w tannulla s-sentenza appellata w tillibera lill-appellant minn kull htija w piena.

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-segweni w cioe':-

1. illi l-Ewwel Qormi ghamlet apprezzament hazin tal-fatti mill-lat legali speċjalment meta jirrizulta b'mod car li l-appellant fil-verzjoni tiegħu kien kostanti kemm waqt ix-xhieda li ta f'dawn il-proceduri kif ukoll meta ta l-istqarrija tiegħu a tempo vergine w dan stante li x-xorb li nstab għand l-appellant kien importat legalment u allura l-fatt li min dahhal ix-xorb volontarjament jgħaddi dak ix-xorb lil terz, it-terz allura l-appellant kellu kull dritt li jaccetta l-istess xorb;

2. illi aghar minn hekk, il-Qorti ghogobha tapplika l-ligi mhux dik vigenti tallum u allura l-Kap. 337 kif emendat bl-avviz legali 344/2004, imma applikat il-ligi kif kienet qabel meta allura kienet tghid li passigier ikun jista' jimporta Malta minghajr ma jhallas id-dazju *"ilbies u hwejjeg personali wzati, li l-Kontrollur tad-Dwana jkun sodisfatt li jkunu mahsuba għal uzu personali tal-vjaggatur, izda eskluzi armi tan-nar u armi ta' kull xorta"* meta l-ligi llum titkellem car li vjaggatur jista' liberalment jimporta oggetti mportati minghajr ma jhallas dazju ta' importazzjoni mbasata l-importazzjoni ma tkunx ta' natura kummercjali w din tfisser l-oggetti mportati li jkunu ta' natura okkazzjonali w jkunu maghmula b'mod eskluziv minn oggetti għall-uzu personali tal-vjaggaturjew għall-familja tagħhom, jew minn oggetti biex jinghataw bhala rigali w dawn l-oggetti għal kull vjagg jinkludu fost oħrajn alkohol u xarbiet alkoholici, w li allura bl-applikazzjoni ta' ligi llum li dahlet fis-sehh aktar minn hames snin qabel li l-Ewwel Qorti tat id-decizjoni tagħha, kull persona li kienet vjaggatur kellha kull dritt li taghti rigal lill-terz ix-xorb alkoholiku li dahlet legalment b'importazzjoni mhux kummercjali bhal ma kien il-kaz in ezami w mhux kif iddecidiet l-Ewwel Qorti li *"ma setax jgħaddihom lil terzi"*;

3. illi l-Ewwel Qorti ghamlet zball kbir legali meta ma applikatx il-ligi li hija l-aktar wahda favorevoli fil-konfront tal-appellant li dan huwa principju kostituzzjonali, Ewropew, u johrog mill-istess gurisprudenza nostrali w anke dik Ewropeja imma applikat ligi li llum ma għadhiex

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aktar ligi, skaduta b'aktar minn hames snin u li hija aktar harxa fl-istess applikazzjoni taghha min dik kif inhi llum liema ligi tallum hija konsonanti ghall-pajjizi kollha tal-Unjoni Ewropeja;

4. salv eccezzjonijiet ohra li jistghu jigu trattati oralment.

Semghet it-trattazzjoni;

Rat in-Nota tal-Avukat Generali tad-19 t' Ottubru, 2009, li biha ddikjara li d-dhul fis-sehh ta' l-Avviz Legali 344 ta' l-2004, li gie publikat fil-Gazzetta tal-Gvern nrmru 17,613 tal-25 ta' Gunju, 2004, kien fl-1 ta' Mejju, 2004, u li ghalhekk id-dispozizzjonijiet tal-ligi precedenti kien ghadhom vigenti qabel din id-data.

Ikkonsidrat;

Illi jidher opportun li din il-Qorti l-ewwel tittratta w tiddeciedi dwar it-tieni w t-tielet aggravji tal-appellant li l-Ewwel Qorti jmissha applikat id-dispozizzjonijiet tal-Avviz Legali 344 tal-2004 ghall-fini ta' dak l-alcohol li kien jew ma kienx dazjabbli. Issa jigi rilevati li l-flixken inkriminati nstabu fil-pussess tal-appellant waqt tfittxija li saret fl-14 t' April, 2004 meta dawn l-emendi ma kienux ghadhom dahlu *in vigore*. B' dana kollu, l-appellant jargumenta li hu ghandu jibbenefika minn din il-ligi kif emendata w li nbidlet qabel ma gie processat u sentenzjat mill-Ewwel Qorti.

Illi kwistjoni analoga dwar l-applikazzjoni retroattiva ta' ligijiet jew regolamenti li jibbenefikaw lill-akkuzat giet deciza minn din il-Qorti fl-Appell Kriminali: "**Il-Pulizija vs. Edward Joseph O'Connor**" [17.11.2003], fejn il-ligi tal-Exchange Control kienet giet emendata wara l-fatti li taw lok ghall-imputazzjonijiet, b' mod li dak li kien wettaq l-appellant ma kienx baqa' aktar jikser il-ligijiet.

F' dik il-kawza, din il-Qorti kienet iccitata mill-monografija tal-Professor Sir Anthony Mamo ("NOTES ON CRIMINAL LAW" Part I, p. 32 et seq.) fejn jghid appropozitu :-

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“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 than 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 .”*

u l-Prof. Mamo izid jghid :-

“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 il-gurista mbaghad jiriferi għall-artikolu 27 tal-Kodici Kriminali li jghid (fit-test Ingliz):-

“if the punishment prescribed by the law in force at the time of the trial is different from that prescribed by the law in force at the time of the commission of the offence , the less severe of the two punishments (old Italian Text : “pena di qualita’ meno grave”) shall be applied.”

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Pero' il-Prof. Mamo umbaghad jghaddi biex jikkwalifika dawn il-principji w 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.”*

Ghalkemm dan il-gurista kien ippublika in-noti tieghu “Notes on Criminal Law” qabel ma ghaddiet l-Interpretation Act, (Kap.249) fis-sena 1975, hass li t-trattat tieghu ikun aktar shih billi rrifera ghall-pozizzjoni taht il-ligi Ingliza w zied jghid:-

“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 investigatio , legal proceeding or remedy in respect of any suchpenalty, 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.”

Fil-ligi nostrana hemm dispozizzjoni kwazi identika ghal din fl-Interpretation Act, 1975, (Kap. 249) fl-artikolu 12 (1) (d) u li tghid fit-test Ingliz li fejn xi Att li jsir ligi wara d-dhul fis-sehh tal-Interpretation Act ” *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.”*

Inoltre is-sub-artikolu (e) li wkoll jekeggja d-dispozizzjoni analogha fil-ligi Ingliza, jiddisponi li bl-istess mod l-emendi m'ghandhomx : *“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. “*

Issa l-kelma “Att”, skond l-artikolu 2 (1) jinkludi *“any order, rule, regulation, bye-law, notice or other instrument having the force of law in Malta”* u skond l-artikolu 3 (1) *“amend” includes “ repeal, add to and vary” and “repeal” used in relation to a law includes , rescind, revoke, cancel, and replace. “*

F' dan il-kaz prezenti billi l-ligi imbidlet permezz t' Avviz Legali w cioe' b' legislazzjoni sussidjarja hu rilevanti wkoll l-artikolu 9 tal-Kap. 249 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, 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

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to be done before the commencement of the subsidiary law.”

L-artikolu 12 (2) 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.”

U s-subartikolu (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.”

Kif gie ritenut fis-sentenza ta' **O' Connor** fuq citata :-

*“....., this Court is of the opinion that the solution to this problem lies in Section 9 above quoted , which says that subsidiary legislation **“MAY BE MADE TO OPERATE RETROSPECTIVELY”** (“**tista tkun retroattiva**” in the Maltese text) unless the contrary intention appears in the Act conferring that power. Now in this Court’s view , the use of the words : **“MAY BE MADE “ and “TISTA’ TKUN”** clearly imply that such a law is not necessarily retroactive automatically but may be made to be so. The only limitation to such a faculty is that no person shall be made liable to a punishment for an act which when it was done was not so punishable. Obviously for such subsidiary legislation to be retroactive therefore it would have to be expressly stated in the new law and that this*

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cannot be assumed to happen automatically in all cases of subsidiary legislation supplanting a former law."

Ezami tal-Avviz Legali 344/2004 juri li ma kien hemm ebda dikjarazzjoni li dawn l-emendi kellhom ikollhom effett retroattiv oltre dak espressament indikat. Di fatti ir-Regolament 1 (a) tal-imsemmi Avviz Legali jghid testwalment:-

"Dawn ir-regolament jistghu jissejju r-Regolamenti ta' l-2004 li Jissostitwixxu t-Tieni Skeda li tinsab ma' l-Att Dwar id-Dazju ta' Importazzjoni u ghandhom jitqiesu li dahlu fis-sehh fl-1 ta' Mejju, 2004" (sottolinear ta' din il-Qorti)

U ma tissemma ebda applikazzjoni retroattiva ghajr dik sal-1 ta' Mejju, 2004. Konsegwentement ma nistghux nassumu li l-intenzjoni tal-legizlatur kienet li jaghmel it-twessiegh ta' oggetti li jistghu jigu importati minn passiggieri bla ma jithallas dazju fuqhom aktar retroattiv minn din id-data, li ovvjament tigi hmistax il-gurnata **wara** li l-appellant instab fil-pussess tal-oggett inkriminati.

Konsegwentement, l-emendi in kwistjoni ma jeffettwawx ir-responsabbilta' kriminali, l-piena w l-konfiska li ghalihom kien soggett l-appellant ghall-ksur tal-ligi kif kienet fiz-zmien tal-allegati reati.

Ghalhekk purament mill-lat legali l-Ewwel Qorti kellha kull dritt li tapplika l-ligi kif kienet fl-14 t' April, 2004 u fiz-zmien ta' qabel u cioe' l-Att VIII/2001,ghar-rigward tal-oggetti li passiggieri setghu idahhlu maghhom "*duty free*" ghall-uzu personali taghhom.

L-oggetti in kwistjoni setghu jiddahhlu bla ma jithallas dazju fuqhom **biss ghall-uzu personali** ta' min idahhalhom u min hekk idahhalhom Malta ma setghax legalment jghaddihom lill-terzi, f' dal-kaz l-appellant, kif qed jallega li sar l-appellant.

Konsegwentement din il-Qorti ma ssib xejn x' tiicensura fl-applikazzjoni tal-ligi da parti tal-Ewwel Qorti w kwindi

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dawn it-tieni w t-tielet aggravji tal-appellant qed jigu respinti bhala infondati.

Ikkonsidrat;

Dwar l-ewwel aggravju tal-appellant li jirrigwarda l-apprezzament tal-fatti li ghamlet l-Ewwel Qorti jigi ribadut li, 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 ezami approfondit tal-istess biex tara jekk il-konkluzzjoni li tkun waslet ghalha l-Ewwel Qorti fuq il-fatti li jkunu rrizultawha setghetx tasal ghalha fuq bazi ta' ligi w ta' ragjonevolezza. Fi kliem iehor tara jekk dik il-konkluzzjoni kienetx wahda "*safe and satisfactory*" fid-dawl tar-rizultanzi.

Issa proprjament jekk wiehed jezamina sew is-sentenza appellata, ma jidhirx li l-Ewwel Qorti ddecidiet il-mertu fuq xi apprezzament ta' fatti li jmorru kontra dak li ddepona l-appellant. Imkien ma jinghid fis-sentenza li l-Ewwel Qorti ma kienetx qed takkolji l-versjoni tieghu dwar kif hu gie fil-pussess tax-xorb alkoholiku in kwistjoni. Fejn l-Ewwel Qorti bboccjat it-tezi difensjonali tal-appellant kien dwar jekk kellhiex tapplika l-Avviz Legali 344 tas-sena 2004 retroattivament jew le. L-Ewwel Qorti anzi jidher li implicitament kienet accettat it-tezi tal-appellant li kien ammassa dan il-volum konsiderevoli ta' xorb li gie akkwistat minnu minnghand kollegi tieghu w hbieb li kienu jsiefru w jgibulu magghom ix-xorb "*duty free*" - hija kemm hija stirakkjata w implawsibbli din il-versjoni fil-fehma ta' din il-Qorti. Ghalhekk dan l-ewwel aggravju dwar apprezzament hazin tal-fatti mill-Ewwel Qorti jisfuma fix-xejn u hu bla bazi ghax l-Ewwel Qorti f' ebda hin ma jidher li ghamlet xi apprezzament ta' fatti bi pregudizzju ghall-appellant. Ghalhekk anki dan l-aggravju qed jigi respint.

Illi mbaghad l-Ewwel Qorti qalet li kienet qed takkalkola l-multa fuq il-bazi tal-ligi l-antika ghax din hija aktar favorevoli ghall-appellant. Dwar din il-parti tas-sentenza ma saret ebda sottomissjoni li tikkonvinci lil din l-Qorti li

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dan il-pronunzjament tal-Ewwel Qorti ma kienx korrett u fl-interess tal-appellant.

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

< Sentenza Finali >

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