



**QORTI TAL-MAGISTRATI (MALTA)
BHALA QORTI TA' GUDIKATURA KRIMINALI**

**MAGISTRAT DR.
LAURENCE QUINTANO**

Seduta tat-18 ta' Jannar, 2010

Numru. 75/2005

**Il-Pulizija
(Spettur Kevin Farrugia u
Spettur Raymond Aquilina)**

Vs

Richard Attard

Il-Qorti

Rat l-imputazzjonijiet kontra Richard Attard ta' 22 sena, iben Richard u Emanuela nee Buttigieg imwieleed fit-3 ta' Diċembru, 1981 u residenti 352 Triq Fleur de Lys Birkirkara u detentur tal-karta tal-identita' bin-numru 662281 (M)

Akkużat talli f'Birkirkara u f'dawn il-Gżejjer f'Lulju 2004 u fit-tmien xhur ta' qabel din id-data:

Kopja Informali ta' Sentenza

- (a) forna jew pprokura jew offra li jforni jew li jipprokura d-droga eroina, specifikata fl-ewwel Skeda ta' I-Ordinanza dwar il-Medicini Perikoluzi Kap 101 tal-Ligijiet ta' Malta, lill-persuna/i jew għall-użu ta' persuna/i mingħajr ma kellu licenzja mill-President ta' Malta, mingħajr ma kien awtorizzat bir-Regoli tal-1939 għall-Kontroll Intern tad-Drogi Perikoluži (GN 292/39) jew minn xi awtorita' mogħtija mill-President ta' Malta li jforni d-droga u ma kien fil-pussess ta' awtorizzazzjoni għall-importazzjoni jew għall-esportazzjoni maħruġ mit-Tabib Principali tal-Gvern skond id-disposizzjonijiet tas-6 Taqsima tal-Ordinanza msemmija u mingħajr ma kellu licenzja jew xort'oħra awtorizzat li jimmanifattura, jew li jforni d-droga msemmija u mingħajr ma kellu licenzja li jipprokura I-istess droga u dan bi ksur tar-Regolament 4 tar-regoli tal-1939 dwar il-Kontroll Intern tad-drogi perikoluzi (GN 292/39) kif sussegwentement emendati u bi ksur ta' I-Ordinanza dwar il-Medicini Perikoluzi Kap 101 tal-Ligijiet ta' Malta;
- (b) kellu fil-pussess tiegħu d-droga eroina specifikata fl-Ewwel Skeda tal-Ordinanza dwar il-Medicini Perikoluzi Kap 101 tal-Ligijiet ta' Malta meta ma kienx fil-pussess ta' awtorizzazzjoni għall-importazzjoni jew għall-esportazzjoni maħruġ mit-Tabib Principali tal-Gvern skond id-disposizzjonijiet tar-4 u s-6 Taqsima tal-Ordinanza u meta ma kienx bil-licenzja jew xort'oħra awtorizzat li jimmanifattura, jew li jforni d-droga msemmija u meta ma kienx b'xi mod iehor bil-licenzja mill-President ta' Malta li jkollu d-droga msemmija fil-pussess tiegħu u naqas mill-jiprova li d-droga msemmija giet fornuta lilu għall-użu tiegħu skond ir-ricetta kif provdut fir-regolamenti msemmija u dan bi ksur tar-Regolament 9 tar-regoli tal-1939 dwar il-Kontroll Intern tad-drogi perikoluzi (GN 292/39) kif sussegwentement emendati u bi ksur ta' I-Ordinanza dwar il-Medicini Perikoluzi Kap 101 tal-Ligijiet ta' Malta;

Rat l-atti kollha tal-proċess inkluż iċ-ċertifikat tat-twelid tal-imputat li jgħib in-numru 6622 tal-1981, il-fedina penali tal-imputat (fol 4), l-ordni tal-Avukat Ġenerali (fol 5), it-talba tal-Prosekuzzjoni sabiex tkun prodotta x-xhieda mogħtija minn Bernice Camilleri quddiem il-Maġistrat Dr Consuelo

Kopja Informali ta' Sentenza

Scerri Herrera, liema talba ntlaqgħet mill-Qorti (fol 8), l-ordni tal-Qorti sabiex issir kopja tal-proċess deċiż fil-konfront tal-imputat b'mod speċjali għal dak li xehdet Bernice Camilleri fl-24 t'April 2006 (ara fol 52 u 53) u ddigriet li bih il-Qorti laqgħet din it-talba (fol 53), ix-xhieda ta' Bernice Camilleri kifjdahr fis-suċċint tas-sentenza mogħtija mill-Maġistrat Dr Consuelo Scerri Herrera fil-kawża fl-ismijiet 'Il-Pulizija versus Richard Attard' tal-24 t'April 2006 (Dok MM), ix-xhieda ta' Berncie Camilleri fl-istess kawża (fol 61), il-proces verbal redatt mill-Maġistrat li qed jippresiedi l-kawża stess (fol 80 et), dwar 'Repert ta' sejba ta' balaclava fid-9 t'Awwissu 2004', u l-kopja tal-proċess fl-ismijiet 'Il-Pulizija vs Richard Attard' (fol 103).

Semgħet ix-xhieda bil-ġurament

Semgħet it-trattazzjoni tal-abbli Prosekurur u tal-abbli difensur

Ikkonsidrat

Il-Prosekuzzjoni xehdet li fid-9 t'Awwissiu 2004 ġerta Bernicce Camilleri kienet għarrfet lill-Pulizija li meta kienet tiltaqa' mal-imputat u kienet tieħu d-droga meiġħu. Hija kienet allegat li d-droga kien jippreparha l-imputat. Bernice Camilleri kienet qalet li kienet ilha tiltaqa' mal-imputat għal xi tliet xhur u kienet tieħu d-droga fl-aħħar 15-il jum. (Ara wkoll fol 41).

L-Istqarrijiet tal-imputat

Fl-ewwel stqarrija tiegħu l-imputat kien għażel lima jweġibx għal ġerti mistqosijiet dwar id-droga. Biss qal li hu ma kellux problema daqshekk serja tad-droga. (fol 17). Fitt-tieni stqarrija huwa nnega li kien xxerja d-droga ma' Bernice Camilleri (fol 19) anzi kien qalilha biex ma tiħux. Imbagħad spjega kif kien jieħu d-droga hu. Huwa kien jieħu d-drog darba fil-ġimġha u ġieli kien jeħodha meta kien ikollu xi problemi. Darba minnhom Bernice xtaqet li tieħu nifs. Kienet tieħu xi nifs jew tnejn. (fol 20).

Xehdet Bernice Camilleri (fol 23). Hija qalet li keinu jieħdu d-droga meta kienu jiltaqgħu u li d-droga smack fuq il-foil kienet iġġibha minn għand l-imputat. Dan qalitu darbtejn (fol 25 u 27). A fol 27 qalet:

‘Minn għandu hux. Kien jagħtihieli hu.’

Id-droga kien jipprepra ha l-imputat. (fol 27). L-imputat kien jaħraq id-droga fuq il-foil u hi kienet tiġibid id-duħħan. Hi qatt ma kienet ħallset flus. Daqqa keinu jeħduha waħidhom u daqqa ma’ oħrajan.

Xehdet ukoll Sarah Bianchi li hia addetta għall-Aġenzija Appoġġ. Din ix-xhud qalet x’kienet qaltilha Bernice Camilleri (fol 32).

Hawnhekk Bernice Camilleri kkonfermat li kienet qalet lis-sinjura Bianchi li l-imputat kien jeiħu l-is Mack u xi drabi kein ta xi ftit.

Xehed Marlon Camilleri (ħu Bernice Camilleri) li qal li qatt ma ra lill-imputat jagħti d-droga lil oħtu.

Il-Qorti rat ukoll ix-xhieda ta’ Bernice Camilleri kif riprodotta fis-sentenza mogħtija mill-Maġistrat Dr Consuelo Scerri Herrera fejn ix-xhud tat-dettalji fuq ir-reat ta’ pudur li l-imputat kien akkużat bih fol 4 et u f’paġina sitta hemm referenċza dwar il-problema tad-droga li kellu l-imputat. Bernice Camilleri kienet qalet li ġieli kienet tkun mal-imputat meta kien jieħu l-is Smoke u l-is Mack u ġieli marret miegħu biex jixtriha mill-Belt. Żiedet tgħid li kemmel il-darba kienet ippruvat d-droga li kien iħejji l-imputat. (Ara fol 6 tas-sentenza). Hija kienet qalet ukoll li qabel din l-esperjenza fid-droga mal-imputat, hi kienet tieħu s-smoke biss u mhux kuljum iżda l-is Mack qatt ma kienet ħaditha qabel. Hija qalet ukoll li kienet taf lill-imputat **minn xi sena qabel**. (Ara fol 11).

Barra dan is-suċċint tax-xhieda ta’ Bernice Camilleri, kienet ukoll ippreżżentata x-xhieda tagħha originali (fol 61). A fol 9 hija qalet li kienet tieħu l-is Mack minn għand l-

imputat u li ħaditha diversi drabi. Hija stess kienet titolbu d-droga. (Ara fol 6,7,8,9 tax-xhieda a fol 61).

Xehdet il-Probation Officer Carmen Nygaard li qalet li f'Marzu 2008 l-imputat ma setax jattendi l-Oasi minħabba l-pilloli li kien qed jieħu. (fol 62).

Xehed Angelo Camilleri, missier ix-xhud Bernice Camilleri, (fol 66 et) li bintu kienet qaltru li kienet ħadet id-droga xi tliet jew erba' darbiet (fol 67). Kienet hi li talbet id-droga lill-imputat.

Xehdet Carmen Camilleri, omm ix-xhud Bernice Camilleri, u kkonfermat li kien sar rapport li bintha, li kellha 14-il sena, kienet qed tiltaqa' mal-imputat, li kelli 18-il sena, li kien jabbuża mid-droga. It-tifla qatt ma kellha xi problema tad-droga qabel. (fol 72).

Reġgħet xehdet il-Probation Officer Carmen Nygaard fid-29 t'Ottubru 2008. Hija qalet li l-imputat kien daħal il-programm dak in-nhar stess li xehdet l-ewwel darba. (fol 108).

Provi Difiża

Xehdet is-Supretendent Sharon Tanti li qalet li meta kienet kellmet lil Bernice Camilleri fuq il-każ ta' 'Il-Pulizija versus Richard Attard', hija kienet kellmet ukoll lill-istess Bernice Camilleri dwar offiżi li hija qasmet xi droga. (fol 112). Lilha kienet qaltilha li kienet ħadet id-droga xi ħmistax jew tleit ġimġħat qabel. L-imputat kien jagħtiha droga minn tiegħu waqt li Bernice Camilleri qatt ma ħallset flus.

Xehdet Bernice Camilleri li qalet li tiftakar li l-imputat kien jieħu d-droga.

Xehed ukoll Angelo Camilleri li qal li ma kienx jaf jekk il-Pulizija sabux xi ħaġa fil-akrozza tal-imputat. Hu

kkonferma li bintu kienet qaltlu li l-imputat kien offrielha d-droga. (fol 122-123).

Xehed I-Ispettur Victor Aquilina li, wara li nqratlu parti mill-istqarrija tal-imputat, wiegeb li ma kienx jaf għal-liema data kienet qed issri referenza għaleix il-mistoqsijiet ma kienx għamilhom hu. Huwa qal ukoll (ara fol 131) li Bernice Camilleri kienet qalet li kient tixxerja d-droga mal-imputat. (fol 131). Kienu interrogaw lill-imputat dwar korruzzjoni u imbaġġad kienu interrogawh dwar id-droga. Huwa qal ukoll li ma kienx jiftakar jekk il-karozza tal-imputat kenitx f'idejn il-Pulizija.

Xehed I-Ispettur Kevin Farrugia li qal li ma kienx jiftakar jekk kenitx elevata xi ħaġa mill-karozza tal-imputat. Bernice Camilleri kienet irreferiet għall-użu tad-droga (fol 127). Huwa l-aktar li kien involut kien fiċ-ċirkustanzi tad-defilement.

L-imputat xehed li kien għamel programm f'Santa Marija u dan kien ghenu ħafna.sena. Wara kien sab jaħdem ukoll. (Fol 141 u 142).

Konsiderazzjonijiet tal-Qorti

L-imputazzjoni ewlenija fiċ-ċitazzjoni tirreferi għaż-żmien ‘Lulju 2004 u t-tmien xhur ta’ qabel din id-data.’

L-imputazzjoni fil-proċess deċiż fl-24 t'April, 2006 mill-Maġistrat Dr Consuelo Scerri Herrera fl-ismijiet ‘L-Ispettur Raymond Aquilina versus Richard Attard’ jirreferi għaż-żmien it-8 t'Awwissu 2004 u fix-xhur ta’ qabel’

Mix-xhieda ta’ Bernice Camilleri (li tat quddiem il-Maġistrat Dr.Consuelo Scerri Herrera) jirriżulta li hi kienet taf lill-imputat minn xi sena qabel. Peress li l-imputazzjoni fil-proċess deċiż mill-Maġistrat Dr.Consuelo Scerri Herrera kien jirreferi ‘għat-tmienja t’Awwissu 2004’, allura l-imputata kienet taf lill-imputat qisha f’Awwissu 2003.

Kopja Informali ta' Sentenza

Matul dan iż-żmien ix-xhud qalet li kienet tieħu d-droga eroina minn għand l-imputat li min-naħha tiegħu kienet qal li kienet titlobhielu hi.

Fl-istqarrija tiegħu l-imputat qal (fol 19) li huwa beda bil-vizzju tiegħu xi ħames xhur qabel l-istqarrija . Dan iwassal għad-data ta' !0 ta' Marzu 2004.

Dwar iż-żewġ imputazzjonijiet il-Qorti qed tirreferi għal dak li stqarrew jew xhedu l-imputat u Bernice Camilleri biss. B'hekk qed tiskarta dik ix-xhieda fejn xi xhud qal dak li qaltlu Bernice Camilleri.

Jekk wieħed jieħu:

- (a) Id-dati mogħtija fiż-żewġ citazzjonijiet; u
- (b) Id-dati kif joħorġu mill-istqarrija tal-imputat u x-xhieda ta' Bernice Camilleri

Allura jirriżulta li:

- (a) L-imputat tassew kellu pussess tal-eroina fil-perjodu indikat fiċ-ċitazzjoni oderna u fiċ-ċitazzjoni deċiża mill-Maġistrat Dr Consuelo Scerri Herrera;
- (b) Li l-imputat tassew ta jew qasam l-eroina (imqar jekk b'xejn) lil Bernice Camilleri diversi drabi fix-xhur indikati kemm fiċ-ċitazzjoni odjerna kif ukoll fiċ-ċitazzjoni deċiża mill-Maġistrat Dr Consuelo Scerri Herrera.

Dan l-eżercizzu sar minħabba li d-Difiża eċċepiet in-‘ne bis in idem’. L-argument bżiku tad-difiża kien li l-Prosekuzzjoni jmissħa ressget lill-imputat dwar l-imputazzjonijiet fiċ-ċitazzjoni odjerna meta l-Prosekuzzjoni ressquit fuq l-imputazzjonijiet l-oħra.

II-Punt Legali

Li l-pożizzjoni legali dwar in-ne bis in idem kif toħroġ mill-każistika tal-Qorti tal-Appell Kriminali hija s-segwenti:

(a) Meta fatt jivvola aktar minn provvediment wieħed tal-Liġi

Illi jista' jiġri li l-istess fatt jista' jivvjola aktar minn provvediment wieħed tal-liġi u għalhekk jista' joħloq diversi raġunijiet għall-inkriminazzjoni. X'inhu fatt kien spjegat fil-każ 'Rex versus Rosaria Portelli' fil-każ deċiż fit-23 ta' Frar, 1904 (Vol.XIX.P.IV p1). Il-Qorti kienet qalet hekk:

'La legge intende il fatto principale in quanto meritevole di pena, o come altri si espresse non intende semplicemente il fatto storico o naturale nei suoi diversi momenti ma il fatto giuridico nel suo complesso,'

Dwar dan il-Professur Mamo fin-Noti tiegħu dawar il-Proċedura (paġina 45) jgħid hekk:

'In any such case if the agent is tried for any one of the several violations of the law arising out of that fact, be it even the least serious, and a judgement is given, it shall not be lawful to subject the agent to another trial for the more serious violations.

This principle, first expressly affirmed in 'Rex versus Rosaria Portelli' has now become settled law.'

Fil-fatt fit-2 ta' Dicembru, 1939, l-Imħallef Harding fil-każ 'Camilleri versus Cilia'

kien qal li huwa prinċipju stabbilit fil-ġurisprudenza tagħna li meta mill-istess fatt, mibni fuq l-istess intenzjoni, jinkisru żewġ drittijiet jew aktar, m'hemmx pluralita' ta' offiżi iżda offiża waħda bil-vjolazzjoni li jkunu iżgħar jkunu assorbiti fil-vjolazzjoni l-aktar serja. U jekk persuna tkun iġġudikata għal waħda mill-vjolazzjonijiet u jkun meħlus jew jinsab ħati, is-sentenza iżżomm kull prosekuzzjoni ġdida li tista' ssir għal kull vjolazzjoni oħra, ukoll jekk il-vjolazzjoni li jkun tressaq fuqha l-ewwel darba tkun l-anqas waħda serja.

Id-difiża għamlet referenza wkoll għall-każ 'Rex versus Agatha Mifsud et' tal-15 ta' Ġunju, 1918 (VolXXIII. Part I

p.1077), kaž li huwa kkwotat ukoll mill-Professur Mamo f'pagina 44 ta' l-istess Noti citati. Il-Qorti kienet qalet hekk:

'L'eccezione sollevata dagli accusati ed accolta dalla Corte si fonda sul motivo che i fatti esposti nell'odierno atto di accusa per corruzione di minorenni sono quelli stessi che furono addotti in un precedente giudizio per adulterio pel quale furono processati e liberati.' Lejn it-tmiem tas-sentenza l-Qorti ikkwotat b'approvazzjoni dak li qalet il-High Court Inglîza f'Regina versus Miles' u qalet hekk:

'No doubt it seems a little startling that a conviction for a common assault should afford an answer to a subsequent indictment for that same assault, upon conclusive evidence that it was accompanied by an intent to murder; but reason and good sense point out that, even at the risk of occasional miscarriages of justice when once a criminal charge has been adjudicated upon by a Court having jurisdiction, that adjudicative ought to be final.....'

(b) Mill-każistika tal-Qorti Kostituzzjonali.

F'dan il-kamp żewġ deċiżjonijiet tal-Qorti Kostituzzjonali huma relevanti:

- (i) Il-Pulizija (Spettur Angelo Caurana) versus Anthony Zammit, John Woods u Ahmed Esawi Mohamed Fakri ta' l-10 ta' Jannar 2005; u
- (ii) Il-Pulizija (Spettur Jesmond Borg) versus Kevin Gatt tal-15 t'April, 2008

Fl-ewwel waħda l-Qorti Kostituzzjonali kienet sabet possibilita' ta' ksur tal-prinċipju 'ne bis in idem' minħabba li l-imputati kienu diġa' tilfu r-remission mill-perjodu ta' priġunerija tagħhom u allura, jekk jgħaddu proċeduri oħra quddiem il-Qorti, kien ikun qed jinkiser il-prinċipju msemmi. F'din id-deċiżjoni l-Qorti Kostituzzjonali kienet iffokat fuq il-kwistjoni jekk il-proċeduri li l-imputati kienu għaddew quddiem l-Awtoritajiet fil-Faċilita' Korrettiva ta'

Kordin kinux proċeduri kriminali jew le. Il-Qorti ddeċidiet li dawn kienu proċeduri kriminali u qieset ‘il-loss of remission’ bħala piena kriminali.

Fil-kawża ‘Il-Pulizija versus Kevin Gatt’ il-Qorti Kostituzzjonalist eżaminat jekk il-Kummissarju tal-Pulizija, wara li jkun ressaq persuna fuq ksur tal-kundizzjonijiet tal-liberta’ proviżżorja u dan kien punit, setax jibda proċediment ieħor billi jitlob espressament għat-telfien tal-liberta’ provviżorja għaliex fl-ewwel rikors kien għamel talba waħda. Il-Qorti Kostituzzjonalist wkoll sabet li t-tieni proċedura tikser il-prinċipju ta’ ‘ne bis in idem’.¹

(c) Mill-Każistika tal-Qorti Ewropea Dwar id-Drittijiet tal-Bniedem

Mid-deċiżjonijiet tal-Qorti Ewropea dwar id-Drittijiet tal-Bniedem il-Qorti qed tirreferi għal dawn id-deċiżjonijiet:

Ponsetti and Chesnel versus France – Deciżjoni ta’ I-14 ta’ Settembru 1999 fejn rikors li kien jallega ksur tal-priċċincipju tan-ne bis in idem għaliex kien hemm sanzjonijiet amministrattivi kif ukoll kriminali minħabba li r-rikorrent ma kienx mela d-dikjarazzjonijiet tat-taxxa **kien dikjarat mhux ammissibbli**.

Isaksen versus Norway – fejn kien hemm kundanna minħabba frodi tat-taxxa kif ukoll impożizzjoni tat-tax surcharge **kien dikjarat mhux ammissibbli**. (Deciżjoni tat-2 t’Ottubru 2003)

¹ Barra dawn iż-żewġ deciżjonijiet, il-problema kienet mistħarrġa mill-Prim’ Awla tal-Qorti Ċivili f’sentenza mogħtija fl-10 ta’ Mejju 1990 mill-Imħallef il-Professur Victor Borg Costanzi fl-ismijiet ‘John Gauci versus Kummissarju tat-Taxxi Interni et’ fejn il-Qorti kienet qalet hekk:

‘Id-dritt taħt l-artikolu 39(9) tal-Kostituzzjoni jista’ jinkiser biss jekk wara li tkun ingħatat sentenza penali li fiha jkun ġie dikjarat li l-akkużat diġa’ għadda porċeduri kriminali għal dak 1-istess reat quddiem Qorti kompetenti, huwa jerġa’ jiġi espost għal proċeduri kriminali oħra dwar dak 1-istess reat li għaliex ikun ga’ ġie misjub hati jew li minnu jkun ġie liberat.

L-eċċeżżjoni ta’ nebis in idem għandha tīgħi mistħarrġa u deċiżja mill-Qorti li quddiemha jingħieb l-akkużat u wara, jekk ikun il-każ, il-Qorti ta’ l-Appell Kriminali.

Nilsson versus Sweden – Deciżjoni tat-13 ta' Diċembru 2005 fejn instab li kien hemm konnessjoni qawwija bejn il-kundanna tar-rikorrent minħabba offiżi tat-traffiku u ssospensjoni tal-licenžja tas-sewqan għal tmintax-il xahar u **għalhekk ir-rikors kien dikjarat mhux ammissibbli.**

Storbraten versus Norway (12277/04) u Mjelde versus Norway (11143/04) fejn kien hemm kundanna kriminali għall-offiżi dwar falliment wara li kienu nħarġu ordinijiet li bihom ir-rikorrenti kien skwalifikati milli jifformaw il-kumpaniji jew li jkunu diretturi u għalhekk ir-rikorrenti allegaw ksur ta' dan il-prinċipju. **Dan il-każ kien ukoll dikjarat inammissibbli.**

U fl-aħħar il-każ 'Franz Fischer versus Austria' fejn jinħtieg li jingħataw aktar dettalji. Il-Qorti qed tipprodu l-aktar siltiet importanti:

'THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

On 6 June 1996, the applicant, whilst driving under the influence of drink, knocked down a cyclist who was fatally injured. After hitting the cyclist, the applicant drove off without stopping to give assistance and only gave himself up to the police later that night.

On 13 December 1996, the St. Pölten District Administrative Authority (*Bezirkshauptmannschaft*), finding the applicant guilty of a number of road traffic offences, ordered him to pay a fine of 22,010 Austrian schillings (ATS) with twenty days' imprisonment in default. This sentence included a fine of ATS 9,000 with nine days' imprisonment in default imposed for driving under the influence of drink, contrary to sections 5 (1) and 99 (1)(a) of the Road Traffic Act 1960 (*Straßenverkehrsordnung*).

On 18 March 1997 the St. Pölten Regional Court (*Landesgericht*) convicted the applicant under Article 81 § 2 of the Criminal Code (*Strafgesetzbuch*) of causing death by negligence "after allowing himself ... to become

intoxicated ... through the consumption of alcohol, but not to an extent which exclude[d] his responsibility ...”, and sentenced him to six months’ imprisonment.

Omissis

ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL NO. 7 TO THE CONVENTION

The applicant alleged a violation of Article 4 of Protocol No. 7 which, so far as relevant provides as follows:

“1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.”

The applicant contended that he was punished twice for driving under the influence of drink, first by the District Administrative Authority under sections 5 (1) and 99 (1)(a) of the Road Traffic Act and, secondly, by the Regional Court, which found that the special circumstance of section 81 § 2 of the Criminal Code applied. In the applicant’s view, the conviction by the criminal courts in its entirety, or at least the fact that the conviction was not limited to Article 80 of the Criminal Code, but also extended to Article 81 § 2, infringed Article 4 of Protocol No. 7. The applicant maintained that the present case was not comparable to the Oliveira v. Switzerland case (judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V) as in that case the criminal courts had quashed the fine imposed by the police magistrate and stated that, if the fine had already been paid, it was to be deducted from the second fine. However, in his case two sentences were actually imposed.

Omissis

The Court recalls that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that

have been concluded by a final decision (see the Gradinger judgment cited above, p. 65, § 53).

As the Government pointed out, the Court's approach in the Gradinger and Oliveira judgments in order to determine whether the respective applicants were tried or punished again "for an offence for which [they had] already been finally acquitted or convicted" appears somewhat contradictory. The Court recalls that in each case two sets of proceedings arose out of one traffic accident. In the Gradinger case, the applicant was first convicted by the criminal courts for causing death by negligence, but acquitted of the special element under Article 81 § 2 of "allowing himself to become intoxicated", where there was an irrebuttable presumption of intoxication with a blood alcohol level of 0.8 grams per litre. He was then convicted by the administrative authorities of driving "a vehicle under the influence of drink" contrary to sections 5 (1) and 99 (1)(a) of the Road Traffic Act, where the influence of drink is deemed present with a blood alcohol level of 0.8 grams per litre.

In the Oliveira case, the applicant was first convicted by the police magistrate for failing to control her vehicle as she had not adapted her speed to the road conditions. Subsequently, she was convicted by the criminal courts of causing physical injury by negligence.

In the Gradinger case the Court, while emphasising that the offences at issue differed in nature and aim, found a violation of Article 4 of Protocol No. 7 as both decisions were based on the same conduct (*ibid.*, §§ 54-55). In the Oliveira case it found no violation of this provision, considering that it presented a typical example of a single act constituting various offences (*concours idéal d'infractions*) which did not infringe Article 4 of Protocol No. 7, since that provision only prohibited people being tried twice for the same offence (see the Oliveira judgment, previously cited, p. 1998, § 26).

The Court observes that the wording of Article 4 of Protocol No. 7 does not refer to "the same offence" but

rather to trial and punishment “again” for an offence for which the applicant has already been finally acquitted or convicted. Thus, while it is true that the mere fact that a single act constitutes more than one offence is not contrary to this Article, the Court must not limit itself to finding that an applicant was, on the basis of one act, tried or punished for nominally different offences. The Court, like the Austrian Constitutional Court, notes that there are cases where one act, at first sight, appears to constitute more than one offence, whereas a closer examination shows that only one offence should be prosecuted because it encompasses all the wrongs contained in the others (see paragraph 14 above). An obvious example would be an act which constitutes two offences, one of which contains precisely the same elements as the other plus an additional one. There may be other cases where the offences only slightly overlap. Thus, where different offences based on one act are prosecuted consecutively, one after the final decision of the other, the Court has to examine whether or not such offences have the same essential elements.

This view is supported by the decision in the case of *Ponsetti and Chesnel v. France* (nos. 36855/97 and 41731/98 ECHR 1999-VI, [14.9.99]), relating to separate convictions for two tax offences arising out of the failure to submit a tax declaration, where the respondent Government also argued that this was an example of one act constituting more than one offence. **Nevertheless, the Court examined whether the offences in question differed in their essential elements.**

It can also be argued that this is what distinguishes the Gradinger case from the Oliveira case. In the Gradinger case the essential elements of the administrative offence of drunken driving did not differ from those constituting the special circumstances of Article 81 § 2 of the Criminal Code, namely driving a vehicle while having a blood alcohol level of 0.8 grams per litre or more. However, there was no such obvious overlap of the essential elements of the offences at issue in the Oliveira case.

In the present case, the applicant was first convicted by the administrative authority for drunken driving under sections 5 (1) and 99 (1)(a) of the Road Traffic Act. In subsequent criminal proceedings he was convicted of causing death by negligence with the special element under Article 81 § 2 of the Criminal Code of “allowing himself to become intoxicated”. The Court notes that there are two differences between the Gradinger case and the present: the proceedings were conducted in reverse order and there was no inconsistency between the factual assessment of the administrative authority and the criminal courts, as both found that the applicant had a blood alcohol level above 0.8 grams per litre.

However, the Court considers that these differences are not decisive. As said above, the question whether or not the *non bis in idem* principle is violated concerns **the relationship between the two offences** at issue and can, therefore, not depend on the order in which the respective proceedings are conducted. As regards the fact that Mr Gradinger was acquitted of the special element under Article 81 § 2 of the Criminal Code but convicted of drunken driving, whereas the present applicant was convicted of both offences, the Court repeats that Article 4 of Protocol No. 7 is not confined to the right not to be punished twice but extends to the right not to be tried twice. What is decisive in the present case is that, on the basis of one act, the applicant was tried and punished twice, since the administrative offence of drunken driving under sections 5 (1) and 99 (1)(a) of the Road Traffic Act, and the special circumstances under Article 81 § 2 of the Criminal Code, as interpreted by the courts, do not differ in their essential elements.

The Court is not convinced by the Government's argument that the case was resolved due to the reduction of the applicant's prison term by one month, being equivalent to the fine paid in the administrative proceedings. The reduction of the prison term by virtue of the Federal President's prerogative of pardons cannot alter the above finding that the applicant was tried twice

for essentially the same offence, and the fact that both his convictions stand.

The Court therefore rejects the Government's preliminary objection based on the same argument.

Finally, the Court observes that, in a case like the present, the Contracting State remains free to regulate which of the two offences shall be prosecuted. It further notes that the legal situation in Austria has changed following the Constitutional Court's judgment of 5 December 1996, so that nowadays the administrative offence of drunken driving under sections 5 (1) and 99 (1)(a) of the Road Traffic Act will not be pursued if the facts also reveal the special elements of the offence under Article 81 § 2 of the Criminal Code.

However, at the material time, the applicant was tried and punished for both offences containing the same essential elements.

There has, thus, been a violation of Article 4 of Protocol No. 7.'

Ikkonsidrat

Li ġafna mill-każistika kemm ta' Malta kif ukoll ta' barra aktar iddur dwar proċeduri doppji jew jekk 'il-piena' jew kastig mogħti kienx ta' natura kriminali. Xi deċiżjonijiet tal-Qorti Ewropea Dwar id-Drittijiet tal-Bniedem kienu kkritikati għaxx dehru kontradittorji. (Dwar dan ara; John A.E.Vervaele fl-Utrecht Law Review Volum 1 Issue Number 2 (December) 2005 <http://www.utrechtlawreview.org/page102>).

Illi skond l-artikolu 527 tal-Kap 9 jgħid hekk;

'Wara sentenza li b'kawża tillibera imputat jew akkużt, dan ma jistax għall-istess fatt ikun suġġett għal kawża oħra.'

Il-Qorti trid tistħarreg jekk l-għoti tad-droga u l-imputazzjonijiet dwar il-koruzzjoni ta' minorenni, l-offiżja

għall-pudur, ix-xiri ta' ħwejjeġ misruqa u d-dħul f'dar bla permess humiex **I-istess fatt** bħall-ispaċċjar tad-droga.

Mill-eżempji mogħtija hawn fuq jidher li I-Qrati sabu 'I-istess fatt' meta l-azzjonijiet kollha kellhom tassew x'jaqsmu mal-istess fatt. Hekk fil-każ tal-'Pulizija vs Rosaria Portelli', l-imputat kienet waddbet dish tal-fuħħar lejn Riccarda Borg. Id-dish tal-fuħħar laqt lil Ricarda Bor f'wiċċha li rriżulta f'offiża ħafia. Iżda framment laqat għajnejn John Borg li kienu għaddej għall-affari tiegħu. Dan spicċa jsorri offiżha ta' natura gravi.

Eżempju ieħor tal-istess fatt joħrog mid-deċiżjoni tal-Qorti Kostituzzjonali fejn persuna l-ewwel tressqet u nstabet ħatja li ksiret il-kondizzjonijiet tal-liberta' provviżorja u imbagħad, wara l-kundanna, l-imputat tressaq biex jitlaf il-bail.

Eżempju ieħor tal-istess fatt huwa dak fejn bniedem tressaq fuq adulterju u imbagħad, minħabba li l-adulterju sar quddiem minoreeni kien treġa' teressaq quddiem il-Qorti dwar koruzzjoni ta' minorenni.

L-istess għamlet din il-Qorti kif preseduta fil-kawża 'Il-Pulizija vs Abu Nidar' (15 ta' Settembru 2008) fejn qalet hekk:

'Fil-fehma ta' din il-Qorti l-imputazzjonijiet odjerni u dawk li dwarhom il-Qorti tat-deċiżjoni fit-28 t'April, 2006 huma prattikament I-istess fatti u huma magħqudin flimkien. Ir-reati msemmija fis-sentenza tat-28 t'April, 2006 kienu dwar it-tqeħħid tad-droga f'karozza ta' terza persuna. L-imputazzjonijiet dwar il-ħolqien ta' reat kif ukoll I-irrapurtar falz lill-Pulizija huma intrinsikament marbuta mal-pussess tad-droga aggravat, l-aggravanti tad-distanza u l-assocjazzjoni biex dan isir. Ukoll jekk dan l-imputat għandu imputazzjoni iżjed mill-ieħor – dik ta' I-ispaċċjar tal-cannabis -xejn ma jnaqqas mill-fatt li ż-żewġ proċeduri huma radikati fl-istess fatii. Il-Qorti hija tal-fehma li ma kienx hemm lok għal spezzettar f'żewġ charges.

Kien ikun mod ieħor kieku persuna nstabet titlajja' għal skopijiet ta' prostituzzjoni u wara saret tfittxija fid-dar tagħha u nstabet id-droga. Hawnhekk il-fatti mhux marbutin.'

Effettivament il-Professur Mamo fin-Noti dwar il-Proċedura Kriminali jgħid hekk:

'But it must be strongly emphasised that for the plea to succeed the fresh proceedings must be placed **on the very same fact.** (Criminal Appeal: 'Il-Pulizija vs Piscopo' 21 ta' Marzu 1953). The mere circumstances that an act is done mor or less at the same time (nello stesso contesto) as another act does not necessarily mean that they constitute one and the same fact, if the two are materially distinguishable as separate events. (v. Cr.App. 'Pulizija vs Saliba 28/2/1953 and Pol versus Cassar 9/1/1954; cf also Cr.App Police versus Attard.')²

Fis-sottomissjonijiet miktuba tagħha d-difiza rreferiet ghall-kaz 'Sergey Zoutukhin v Russia deciz mill-Grand Chamber fl-10 ta' Frar 2009 u Maresti vs Croatia tal-25 ta' Settembru 2009.

Bir-rispett kollu dawn il-kazi ma jbiddlu xejn mid-distinzjonijiet magħmula aktar 'il fuq. Fil-fatt (a fol 3), tas-sottomissjoni hemm miktub hekk:

'The difference between the terms 'same acts' or 'same cause' on the one hand and the term same offence on the other hand was held by the Court of Justice of the European Communities and the Inter-American Court of Human Rights to be an important element in favour of adopting the approach bases strictly on the identity of the material acts.'

Jekk wieħed jimxi ma' dak li ntqal f'din is-sentenza u janalizza l-fatti odjerni wieħed jirrealizza li fiz-zewg proceduri differenti ma keinx hemm 'material acts' identity'. Ir-reat ta' korruzzjoni tal-minorenni m'ghandux

² Vide Mamo Anthony Professur: Notes on Criminal Procedure page 45

x'jaqsam mar-reat tal-ispacċjar tad-droga. U m'hemmx ghaflejñ jghid wiehed aktar minn hekk.

Il-fatti tal-kaz citat l-iehor kien Dawn: l-ewwel l-imputat kien tressaq ghax iddisturba l-paci pubblika u wara tressaq akkuzat bi għiehi ta' natura gravi **waqt l-istess incident**.

Bl-ebda immaginazzjoni ma wiehed jista' jghid li dawn il-fatti għandhom x'jaqsmu mal-kaz odjern. Huwa car li wiehed jista' jfgeri gravament lil hadd iehor waqt li jkun jikser il-paci pubblika. Izda mhux bilfors li wiehed jiehu d-droga u jikkorrompi tfajla. Ir-reati jibqghu distinti u differenti u dan mhux semplicement ghax kklassifikati hekk fil-Ligi izda ghax materjalment mħumiex l-istess. Jekk ir-reati kien qed jitwettqu fl-istess zmien ma jfissirx li huma materjalemt l-istess.

Applikazzjoni tad-Dottrina għall-fatti

Il-Qorti mhix qed tara xi ness bejn l-imputazzjonijiet fiċ-ċitazzjoni li għaliha diga' kien issentenzjat l-imputat u l-ispaċċjar tad-droga. Dawn huma żewġ fatti separati u mhux l-istess fatt.

Għaldaqstant qed tiċħad l-eċċeżżjoni tad-Difiża.

Il-Qorti qed issib li l-Prosekuzzjoni ippruvat kemm l-ewwel imputazzjoni kif ukoll it-tieni imputazzjoni dedotti kontra l-imputat. Il-Qorti m'għandha ebda dubju li l-imputat kellu l-pussess tad-droga eroina għax dan amemtieh hu stess fl-istqarrija u lanqas m'għandha dubju li l-imputat spaċċja l-eroina fiż-żmien indikat fiċ-ċitazzjoni odjerna.

Il-Qorti ser timxi fuq l-iskorta tad-deċiżjoni 'Il-Pulizija versus Marco Galea' fejn il-Qorti tal-Appell Kriminali (Inferjuri) preseduta mill-Prim' Imħallef iddeċidiet li l-proviso li kien introdott bl-Att XVI tas-sena 2006 jgħodd biss għal okkażjoni ta' darba u mhux fejn hemmm ir-repetizzjoni.

Kopja Informali ta' Sentenza

Mhix difiża għall-imputat li kienet ix-xhud stess li talbitu d-droga. Lanqas ma jiswa l-argument li m'għaddewx flus bejn ix-xhud u l-imputat.

Għaldaqstant il-Qorti, wara li rat l-artikolu 17(h) tal-Kap 9, it-Taqsimiet 4 u 6, l-artikoli 22(1)(a), 22(2)(b)(i)(ii) u 22(1B) tal-Kap 101 kif ukoll ir-egoalemti 4 u 9 tal-GN 292/1939 issib lill-imputat ħati taż-żewġ imputazzjonijiet dedotti kontrih bit-tieni imputazzjoni assorbita fl-ewwel waħda. L-imputat twieled fit-3 ta' Dicembru 1981 u għalhekk f'Lulju tas-sena 2004 kellu 22 sena u seba' xhur. Għalhekk ma japplikax l-artikolu 37 tal-Kap 9.

Wara li qieset dan kollu, kif ukoll li l-imputat għandu kondotta nadifa, qed tikkundanna lill-imputat għal sitt xhur priġunerija u għall-ħlas ta'multa ta' €468 liema multa tista' titħallas b'rati ta' 50Erwo kull erba' ġimgħat bl-ewwel pagament isir fi żmien erba' ġimgħat mil-lum. Jekk xi pagament ma jitħallasx, il-bilanc jitħallas f'daqqa. Jekk xi parti mill-multa ma titħallasx din tinbidel fi priġunerija skodn il-Liġi.

< Sentenza Finali >

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