MALTA

QORTI TA' L-APPELL KRIMINALI

S.T.O. PRIM IMHALLEF
VINCENT DE GAETANO

ONOR. IMHALLEF
DAVID SCICLUNA

ONOR. IMHALLEF
JOSEPH R. MICALLEF

Seduta tat-2 ta' Settembru, 2010

Numru 3/2007

Ir-Repubblika ta' Malta

v.

Brooks Lia

Il-Qorti:

1. Rat l-Att ta' Akkuza migjub fil-Qorti Kriminali mill-Avukat Generali fit-18 ta' Jannar 2007 kontra Brooks Lia li permezz tieghu l-istess Avukat Generali akkuzah b'tentattiv ta' omicidju volontarju, u cioe` talli dolozament, bil-hsieb li joqtol persuna jew bil-hsieb li jqieghed il-hajja

taghha f'periklu car, wera dan il-hsieb b'atti esterni u ta bidu ghall-esekuzzjoni tad-delitt liema delitt ma giex esegwit minhabba xi haga accidentali u indipendenti mill-volonta` tieghu;

2. Rat is-sentenza tal-Qorti Kriminali tat-28 ta' Mejju 2008 li permezz taghha dik il-Qorti, wara li rat il-verdett tal-gurati li bih b'seba' (7) voti favur u zewg (2) kontra sabu lill-imsemmi Brooks Lia hati skond l-imsemmi Att ta' Akkuza, iddikjarat lill-istess Brooks Lia hati talli fit-2 ta' Novembru, 2001, ghall-habta tal-hdax u nofs ta' filghodu gewwa San Gwann, dolozament, bil-hsieb li joqtol lil N.B. jew bil-hsieb li jqieghed il-hajja taghha f'periklu car, wera dan il-hsieb b'atti esterni u ta bidu ghall-esekuzzjoni tad-delitt, liema delitt ma giex ezegwit minhabba xi haga accidentali u indipendenti mill-volonta` tieghu.

3. Rat illi bl-istess sentenza l-ewwel Qorti, wara li rat l-artikoli 41(1)(a), 211, 23 u 533 tal-Kap 9 tal-Ligijiet ta' Malta, ikkundannat lill-hati Brooks Lia ghall-piena ta' tlettax-il (13) sena prigunerija, b'dana li minn dan il-perijodu jrid jinqata' kull zmien li hu ghamel taht arrest preventiv biss in konnessjoni ma dan ir-reat kif ukoll li jhallas is-somma ta' elf u tmienja u tletin euro u erbgha w tletin centezmi (€1038.34) import tal-ispejjez tal-perizji nkorsi tul il-process tal-hati a tenur tal-artikolu 533 tal-Kap. 9 tal-Ligijiet ta' Malta. L-ewwel Qorti ordnat ukoll li jekk l-ispejjez tal-perizji ma jithallsux fi zmien hmistax il-jum mid-data tas-sentenza appellata, jigu konvertiti f'terminu ta' prigunerija skond il-ligi;

4. Rat illi l-ewwel Qorti waslet ghal din id-decizjoni wara li rat il-fedina penali aggornata tal-hati esebita mill-prosekuzzjoni fuq ordni tal-Qorti u ezaminata mid-difiza, u qieset is-segwenti:

"Qieset is-sottomissjonijiet tal-prosekuzzjoni w id-difiza dwar il-piena li jinsabu kollha registrati w senjatament, imma mhux biss, is-segwenti.

"L-abbli difensur Dr. Anglu Farrugia ssottometta li :-

1. il-verdett ma kienx wiehed unanimu;
2. li l-kawza nqatghet seba' snin wara li sar il-kaz;
3. li l-vittma ikkontribwit b'mod qawwi ghal dak li gralha;
4. li wiehed irid iqis it-temperament tal-hati meta sar il-kaz peress li anke hu kien ha d-droga;
5. li llum il-hati qed jahdem u ghamel program ta' riabilitazzjoni mill-vizzju tad-droga;
6. li l-vittma wara dan l-incident regghet ghamlet l-istess haga;

"L-abbli prosekutur Dr. Anthony Barbara invece ssottometta li :-

1. hawn si trattava ta' zewg persuni li kienu qed jaghmlu reat flimkien u cioe` l-ikkunsmar tad-droga erojina u li wiehed kien qed jikkontribwixxi b'mod u l-ohra b'mod iehor;
2. meta l-vittma hassa hazin, minflok rebah l-altruizmu fil-hati pprevalixxa l-egoizmu w minflok hadha l-isptar mill-ewwel, remiha kif ghamel b'mod illi baqghet hemm ghal hin twil u meta nstabet kienet sekondi l-boghod mill-mewt;
3. li l-hati baqa' jara l-interessi tieghu sa l-ahhar u ghalkemm seta' informa lill-Pulizija mal-ewwel b'dak li kien gara appena marru ghandu, baqa' jittratieni sa tard filghaxija w wara li N.B. giet salvata biex ammetta l-involviment tieghu, minkejja li kien ben sapevoli tal-perikolu kollu li kienet tinsab fih;
4. illi mbaghad mill-fedina penali aggornata tal-hati jirrizulta li dan ma tghallem xejn mill-opportunitajiet li nghatawlu mill-Qrati w baqa' jikkommetti reat fuq iehor bejn il-1991 u sahsansitra wara dan l-incident sat-2006. Forsi ghalhekk umbaghad wiehed jifhem ghaliex f'dan il-kaz il-hati kien daqshekk egoista fl-agir tieghu;
5. ghalhekk f'dan il-kaz kien importanti li jkun hemm linja gwida mill-Qorti Kriminali li taghti messagg car, b'piena adegwata, li turi li akkost li min ikun involut ikun jista' jigi f'certu inkwiet minhabba li hu jkun involut f'tehid tad-droga, jkun jaqbillu li jkun

altruwista mill-ewwel biex jevita l-perikolu aktar serju tal-mewt ta' min ikollu mieghu w jaghmel minn kollox biex jipprotegi l-hajja ta' dik il-persuna.

"Qieset dak li rrisponda Dr. Farrugia w cioe` li jista' jaghti l-kaz li l-messagg li taghti l-Qorti b'dan il-mod li qed jissuggerixxi l-prosekutur, ikun wiehed li jipproduci effetti differenti.

"Ikkonsidrat

"Illi huwa minnu li f'dan il-kaz kien hemm partecipazzjoni attiva tal-vittma fit-tehid tad-droga dak inhar u li dan wassal biex hi giet fi stat ta' kollass u dipendenza fuq il-hati. Pero`, appena avverra ruhu dan il-fatt, inholqot u giet kreata sitwazzjoni fejn il-hati, li minn kliemu stess kien jaf xi jfisser dan l-istat ta' kollass u x'perikolu kien jimporta, gie responsabbilizzat biex jaghmel dak kollu possibbli halli jsalva l-hajja tal-vittma li kellu mieghu peress illi dina kienet kompletament dipendenti fuqu dak il-hin u kienet f'post li kien taht il-kontroll tieghu kemm fid-dar tar-residenza tieghu kif ukoll meta dahhalha fil-karrozza tieghu w kien hu biss li seta' jipprokuralaha l-assistenza medika tempestiva li hu risaput li tezisti u li ssalvalha hajjitha. Minflok ghamel dan, tefaghha go "car park" privat li jintuza biss f'okkazjonijiet specjali meta jkun hemm xi funzjoni gor-Razzett l-Abjad u li fih dak il-hin la kien hemm karrozzi w lanqas nies. Inoltre poggiha f'post ferm il-gewwa go dan il-"car park" kif irrizulta waqt l-access fejn kienet pratikament invizibbli ghal min jghaddi mit-triq quddiem il-fetha tal-"car park" bil-mixi w, aktar u aktar, difficilment vizibbli ghal min jghaddi jsuq vettura b'mod li ftit li xejn kienu ic-"chances" li jaraha xi hadd.

"Illi hu preokkupanti ukoll li mill-fedina penali tal-hati jirrizulta li hu nstab hati mill-Qrati mhux inqas minn dsatax-il darba ghall-reati kommessi mill-1990 sa l-2006, fejn huwa apparti li nghata pieni pekunjarji w tpogga taht *probation* diversi drabi, gie sentenzjat ghal piena ta' prigunerija hames darbiet. Li hu terga'

aktar preokkupanti hu li ghaxra minn dawn ir-reati gew addirittura kommessi mit-2001 'l hawn u cioe` wara l-incident mertu ta' din il-kawza li dwaru hu kien jaf li qed jiffaccja proceduri ghal tentattiv ta' omicidju. Dan il-fatt jimmilita serjament kontra konsiderazzjonijiet ta' piena ljevi ghax juri li lanqas incident trawmatiku bhal dan ma serva biex jiskossja l-kuxjenza tal-hati w twasslu biex ibiddel hajtu."

5. Rat ir-rikors ta' appell ta' l-imsemmi Brooks Lia pprezentat fit-18 ta' Gunju 2008 fejn talab li din il-Qorti thassar u tikkancella l-verdett tal-gurati kif ukoll thassar u tikkancella s-sentenza appellata u minflok tordna li jigu registrati sentenza u verdett ta' liberazzjoni, jew alternattivament tissostitwixxi l-istess verdett b'verdett iehor ta' htija izda ta' reat iehor minuri li huwa kompriz u involut fl-Att ta' Akkuza u taghti s-sentenza relattiva skond il-kaz; rat l-atti l-ohra tal-kawza; semghet it-trattazzjoni; ikkunsidrat:

6. L-aggravji ta' l-appellant huma fil-qosor is-segwenti: (1) li matul il-kawza sehhet irregolarita` jew kien hemm interpretazzjoni jew applikazzjoni skoretta tal-ligi li seta' kellha influwenza fuq il-verdett; (2) li gie misjub hati hazin fuq il-fatti tal-kawza; u (3) li, minghajr pregudizzju, il-piena nflitta kienet eccessivament gravuza. Dawn l-aggravji sejrin jigu kkunsidrati *seriatim*.

7. Taht l-ewwel aggravju l-appellant ghandu tliet ilmenti, tnejn minnhom li jirrigwardaw l-indirizz ta' l-Imhallef li ppresjeda l-guri u wiehed dwar digriet li permezz tieghu l-ewwel Qorti cahdet talba ta' l-appellant biex dokument jigi dikjarat inammissibbli. L-appellant jispjega l-ewwel ilment tieghu hekk:

"i. L-ewwel irregolarita` li sehhet fil-fehma tal-esponent kienet waqt l-indirizz tal-imhallef sedenti lill-gurati u dan ghaliex l-istess indirizz, bl-akbar rigward u b'kull rispett dovut, kien wiehed manifestament zbilancjat u li serjament ippregudika l-kaz tad-difiza peress illi fl-assjem tieghu kien f'aktar minn okkazjoni wahda nklinat b'mod suggestiv lejn

il-htija tal-akkuzat. In effetti ma jistax ma josservax l-esponent illi tabilhaqq fl-istess indirizz il-gurati gew addirittura mistiedna b'mod pjuttost emfatiku sabiex jikkunsidraw linja ta' prosekuzzjoni li lanqas giet offruta mill-prosekuzzjoni stess. In effetti anki minn semplici qari ta' l-Att ta' Akkuza odjern jidher illi l-prosekuzzjoni kienet qieghda taddebita l-akkuza ta' attentat ta' omicidju lill-esponent minhabba l-azzjoni (u mhux l-ommissjoni) tieghu konsistenti fit-tehid ta' N.B. fil-parkegg.

"Skond il-prosekuzzjoni kien b'din l-azzjoni illi l-esponenti zied mal-grad ta' periklu li fih kienet tinsab hajjet N.B. (li pero` sa dak l-istadju kien *self-induced* mill-istess vittma) u kien ghalhekk illi ta' dan l-att huwa kellu jwiegeb ghal attentat ta' qtil. Pero` fil-kors ta' l-indirizz tieghu lill-gurati, l-Imhallef sedenti ghamel enfazi partikolari sabiex huma jikkunsidraw l-ommissjoni tal-esponent meta huwa naqas illi *di persona propria* jiehu lil N.B. l-Isptar jew li jibqa' maghha sakemm tigi l-ghajnuna medika (apparti li dan il-punt ta' l-indirizz huwa mertu tat-tieni parti ta' dan l-aggravju). Mhux hekk biss izda l-Imhallef sedenti mar oltre u addirittura ta ordni lill-gurati sabiex dwar dak li jirrigwarda l-ommissjoni bhala l-element oggettiv tar-reat in dizamina, huma kellhom jiskartaw dak kollu li kienet resqet id-difiza ghall-kunsiderazzjoni taghhom.

"F'okkazjonijiet ohra fil-kors ta' l-istess indirizz saru kummenti negattivi dwar il-verzjoni jew is-sekwenza tal-fatti li kienet qieghda titressaq mid-difiza, b'mod partikolari izda mhux biss ghal dak li jirrigwarda l-ewwel telefonata li saret lid-dipartiment tal-emergenza tal-Isptar u li fiha gie rapurtat li kien hemm tfajla mitlufa minn sensieha f'Tal-Balal. Din kienet it-telefonata li skond l-istess akkuzat (*a tempo vergine* waqt li kien qed jirrilaxxja l-istqarrija lill-Pulizija) u anki d-difiza tieghu sahqu kienet saret mill-istess akkuzat ezatt wara li kien halla lil N.B. fil-parkegg. Ovvjament dan il-punt ta' fatt kien ta' importanza kbira ghad-difiza ghaliex fl-ewwel lok kien jitfa' dawl qawwi fuq l-intenzjoni li kien hemm wara l-azzjonijiet tal-esponent, kif ukoll ghaliex fit-tieni lok din l-azzjoni (it-telefonata) kienet tezonerah minn dik ir-responsabilta` li skond l-Imhallef sedenti huwa f'salt wiehed kien assuma minhabba l-

posizzjoni li sab ruhu fiha. Madankollu, minkejja s-sensittivita` ta' dan il-punt ta' fatt, fil-kors ta' l-indirizz saru numru ta' kummenti mhux gustifikati li kienu serjament ixejnu d-difiza tal-esponent fuq dan il-punt."

8. L-ewwelnett ghalkemm huwa minnu illi fl-Att ta' Akkuza ma jinghad xejn fil-parti narrativa dwar xi "ommissjoni" da parti ta' l-appellant li setghet twassal ghal sejbien ta' htija skond l-Att ta' Akkuza, izda, kif dejjem inghad, l-Avukat Generali mhux marbut li jipprova bil-*punto e virgola* l-fatti kif narrati fil-parti espositiva. Li hu importanti hu li l-fatti jirrigwardaw l-akkuza addebitata lill-akkuzat. F'dan il-kaz, il-fatti jirrigwardaw tentattiv ta' omicidju volontarju, u l-akkuza hija dik ta' tentattiv ta' omicidju volontarju. Omicidju volontarju, ossia bhal f'dal kaz, it-tentattiv tieghu, jista' jsir kemm permezz ta' azzjoni kif ukoll permezz ta' ommissjoni. Mill-indirizz ta' l-Imhallef li ppresjeda l-guri jirrizulta li dan il-fattur gie dibattut mill-prosekuzzjoni peress li fl-indirizz insibu referenza ghal dak li qalet il-prosekuzzjoni fis-sens illi t-tentattiv ta' omicidju f'dan il-kaz kien kemm ir-rizultat ta' l-azzjoni ta' l-appellant li jitfa' lil N.B. fl-ghalqa kif ukoll ir-rizultat ta' l-inazzjoni tieghu li jassigura li N.B. tigi provduta bil-kura medika li kellha bzonn.

9. L-appellant jilmenta li l-Imhallef li ppresjeda l-guri wera pregudizzju kontra t-tezi tad-difiza. Issa, fit-termini ta' l-artikolu 465 tal-Kodici Kriminali l-funzjoni ta' l-Imhallef fil-guri fl-istadju ta' l-indirizz hija li jfisser lill-guri x-xorta u l-elementi tar-reat migjub fl-att ta' akkuza, kif ukoll kull punt iehor tal-ligi li f'dak il-kaz partikolari jkollu x'jaqsam mad-dmirijiet tal-guri u li jigbor fil-qosor, bil-mod li jidhirlu mehtieg, ix-xiehda tax-xhieda u l-provi li jkunu marbutin maghhom, ifisser lill-guri s-setghat li ghandu fil-kaz partikolari, u jaghmel kull osservazzjoni ohra li tiswa biex triegi u turi lill-guri kif ghandu jaqdi sewwa d-dmirijiet tieghu. Il-gurati ghandhom, b'hekk, jitpoggew fl-ahjar posizzjoni possibbli, kemm ghal dik li hi ligi, kif ukoll ghal dawk li huma fatti, biex ikunu jistghu jaslu ghal verdett b'serenita` u bl-inqas komplikazzjonijiet u konfuzjoni possibbli. Ghalhekk l-Imhallef li ppresjeda l-guri m'ghamel xejn irregolari meta, fost punti ohra, inkluz x'kienu l-

argumenti tad-difiza, qieghed ukoll ghall-konsiderazzjoni tal-gurati t-tezi tal-prosekuzzjoni illi hawn seta' ukoll kien kaz ta' tentattiv ta' omicidju volontarju minhabba ommissjoni.

10. Rosemary Pattenden, fil-ktieb taghha **Judicial Discretion and Criminal Litigation** (OUP 1990), tghid:

"Whatever mode of summing-up the judge employs he must ensure that the defence is outlined fairly. How this is done is governed by open-ended rules. The judge must put the 'substance' of the defence, however weak, save where the accused has failed to discharge an evidential burden. '[T]hat does not mean to say he is to paint in the details or to comment on every argument which has been used or to remind them of the whole of the evidence which has been given…' (per Goddard LCJ, *Clayton-Wright* (1948) 33 Cr App R 22 p. 29). As the New Zealand Court of Appeal stressed in *R. v. Ryan* (per Richmond J., [1973] 2 NZLR 611 at p. 615): *'Each case obviously must be judged having regard to its own particular facts. In some cases it may be sufficient for the Judge to refer in the most general terms to the issues raised by the defence, but in others it may be necessary for him not merely to point out in broad terms what the defence is but to refer to the salient facts and especially those upon which the accused based his defence. Again, an election by the Judge to embark on a discussion of the evidence and inferences therefrom which are favourable to the Crown may throw upon him the duty of making some reference to any important features of the case which militate against those inferences'.*

"The summing-up, in other words, should look balanced, and any defence which is not merely fanciful or speculative, particularly in a homicide trial, must be put to the jury…The Judge can, of course, comment adversely on an unconvincing defence…" (pp. 178-180).

11. U f'**Blackstone's Criminal Practice 2004** [1]**,** naqraw:

Provided he emphasises that the jury are entitled to ignore his opinions, the judge may comment on the evidence in a way which indicates his own views. Convictions have been upheld notwithstanding robust comments to the detriment of the defence case (e.g. *O'Donnell* (1917) 12 Cr App R 219, in which it was held that the judge was within his rights to tell the jury that the accused's story was a 'remarkable one' and contrary to previous statements that he had made). However, the judge must not be so critical as to effectively withdraw the issue of guilt or innocence from the jury (*Canny* (1945) 30 Cr App R 143, in which a conviction was quashed because the judge repeatedly told the jury that the defence case was absurd and that there was no foundation for defence allegations against the prosecution witnesses). It is the judge's duty to state matters 'clearly, impartially and logically', and not to indulge in inappropriate sarcasm or extravagant comment (*Berrada* (1989) 91 Cr App R 131)."

12. Imbaghad Simon Brown, L.J. f*R. v. Nelson* [1997] Crim. L. R. 234, CA (kif ikkwotat f'**Archbold's Criminal Pleading, Evidence and Practice 2003**, p. 464 para. 4-376, u li mieghu din il-Qorti taqbel perfettament), jghid:

"Every defendant, we repeat, has the right to have his defence, whatever it may be, faithfully and accurately placed before the jury. But that is not to say that he is entitled to have it rehearsed blandly and uncritically in the summing up. No defendant has the right to demand that the judge shall conceal from the jury such difficulties and deficiencies as are apparent in his case. Of course, the judge must remain impartial. But if common sense and reason demonstrate that a given defence is riddled with implausibilities, inconsistencies and illogicalities … there is no reason for the judge to withhold from the jury the benefit of

[1] Para. D16.16, pagna 1484 – 1485.

his own powers of logic and analysis. Why should pointing out those matters be thought to smack of partiality? To play a case straight down the middle requires only that a judge gives full and fair weight to the evidence and arguments of each side. The judge is not required to top up the case for one side so as to correct any substantial imbalance. He has no duty to cloud the merits either by obscuring the strengths of one side or the weaknesses of the other. Impartiality means no more and no less than that the judge shall fairly state and analyse the case for both sides. Justice moreover requires that he assists the jury to reach a logical and reasoned conclusion on the evidence."

13. Din il-Qorti ezaminat l-indirizz ta' l-Imhallef li ppresjeda l-guri u, filwaqt illi huwa minnu illi hemm xi istanzi fejn huwa kien enfatiku dwar xi punt jew iehor, fl-ebda hin ma uzurpa l-funzjoni tal-gurati. Fil-fatt il-gurati thallew liberi li jaghmlu l-evalwazzjoni li kellhom jaghmlu tal-provi migjuba. Kull ma ghamel l-Imhallef li ppresjeda l-guri kien li jghinhom *"to reach a logical and reasoned conclusion on the evidence"*. Ghalhekk l-ewwel ilment huwa michud.

14. It-tieni lment jirrigwarda l-ispjegazzjoni li ta l-Imhallef li ppresjeda l-guri tar-reat ta' omicidju, jew it-tentattiv tieghu, bl-ommissjoni tal-agent. Jghid:

"ii. Illi t-tieni lment tal-esponent dwar l-indirizz lill-gurati jittratta dwar dik li fl-umli fehma tieghu kienet interpretazzjoni skorretta tal-ligi li sehhet meta beda jigi spjegat lill-gurati kif jista' jkun hemm ir-reat tal-omicidju (jew it-tentattiv tieghu) bl-ommissjoni tal-agent. L-interpretazzjoni legali tal-Imhallef sedenti li giet moghtija fil-kors tal-indirizz tinsab ben riflessa fl-ewwel paragrafu tal-kunsiderazzjonijiet tal-Qorti li jwasslu ghad-*decide* fis-sentenza appellata u li qed jigu hawn kwotati *verbatim*:

'Illi huwa minnu li f'dan il-kaz kien hemm partecipazzjoni attiva tal-vittma fit-tehid tad-droga dak inhar u li dan wassal biex hi giet fi stat ta' kollass u dipendenza fuq il-hati. Pero', ***appena avverra ruhu dan il-fatt, inholqot u***

giet kreata sitwazzjoni fejn il-hati, li minn kliemu stess kien jaf xi jfisser dan l-istat ta' kollass u x'perikolu kien jimporta, gie responsabbilizzat biex jaghmel dak kollu possibbli halli jsalva l-hajja tal-vittma li kellu mieghu *peress illi dina kienet kompletament dipendenti fuqu dak il-hin u kienet f'post li kien taht il-kontroll tieghu kemm fid-dar tar-residenza tieghu kif ukoll meta dahhalha fil-karrozza tieghu w kien hu biss li seta' jipprokuralaha l-assistenza medika tempestiva li hu risaput li tezisti u li ssalvalha hajjitha.'*

"Bl-akbar rispett l-esponent ihoss li dak li qieghed jigi spjegat lill-gurati kien aktar konfacjenti mar-reat ta' l-*omesso soccorso* (li huwa reat abbraccjat f'gurisdizzjonijiet esteri) u zgur li ma kienx jinkwadra fl-interpretazzjoni legali ta' l-elementi kostituttivi tal-omicidju volontarju. L-esponent ma jistax jifhem kif jista' jinghad illi guridikament huwa possibbli illi persuna tikkommetti permezz ta' ommissjoni reat li jirrikjedi intenzjoni specifika meta r-responsabilta` tieghu sabiex jiehu azzjoni (u li allura huwa susegwentement ommetta milli jiehu) ma tkunx tezisti hlief fl-eventwalita` ta' bdil ta' cirkostanzi li f'salt wiehed jimponu r-responsabilta` ta' l-azzjoni fuq dik il-persuna li eventwalment tommetti milli taghmilha.

"Hija ferm differenti s-sitwazzjoni, per ezempju, tal-genitur illi bl-ommissjoni tieghu jhalli volontarjament lil ibnu jmut bil-guh. Hemmhekk sa mill-bidu tar-relazzjoni guridika bejn il-genitur u l-iben kienet tinkombi fuq il-genitur ir-responsabilta` li huwa ma jommettix milli jsostni u jitma' lil ibnu. Ezempju iehor li jista' jinghata huwa dak tal-gwardjan tal-habs li sa mill-bidu tar-relazzjoni tieghu mal-habsi tezisti fuqu r-responabilta` legali illi huwa ma jommettix milli jaghmel certu affarijiet fl-interess tal-habsi fil-kustodja tieghu. Ghalhekk jidher illi s-suggett attiv tar-reat li ser jigi kommess b'ommissjoni, irid ikun tenut u obbligat bil-ligi jew b'ordni iehor bil-kustodja jew il-kura ta' persuna ohra li tkun f'sitwazzjoni ta' inkapacita` sabiex tikkonfigura b'xi mod il-possibilta` li jezisti r-reat ta' omicidju kommess bl-ommissjoni voluta."

15. L-ewwelnett jigi ribadit illi fl-argumentazzjoni taghha quddiem l-ewwel Qorti l-prosekuzzjoni kienet qed issostni illi kien hemm kemm atti diretti kif ukoll ommissjoni da parti ta' l-appellant. L-ewwel Qorti fil-fatt spjegat b'mod car kemm il-linja tal-prosekuzzjoni kif ukoll dik tad-difiza. Kwantu mbaghad il-linja illi r-reat seta' gie kommess b'ommissjoni, huwa evidenti illi l-ispjegazzjoni li ta l-Imhallef li ppresjeda l-guri segwiet it-taghlim ta' din il-Qorti fis-sentenza fl-ismijiet **Ir-Repubblika ta' Malta v. Concetta Decelis et** tal-25 ta' Settembru 2008. Dak kien kaz ta' omicidju volontarju *per via di* ommissjoni taht it-tieni forma kontemplata fl-artikolu 211 tal-Kap. 9 tal-Ligijiet ta' Malta, cioe` fejn l-intenzjoni hi dik li tqieghed il-hajja ta' persuna f'perikolu car, dik l-intenzjoni li nirreferu ghaliha bhala intenzjoni pozittiva indiretta. Hemm gie konkluz li "ghalkemm certament l-appellanti ma riditx il-mewt ta' Rachel Bowdler hija kienet *reckless* dwar il-konsegwenzi ta' l-agir taghha, ossia l-ommissjoni voluta taghha li ssejjah minnufih l-ghajnuna medika bir-riskju rejali li dik l-ommissjoni taghha kienet twassal ghall-mewt ta' Bowdler, u dan ghall-motiv li ma riditx lil binha jerga' jkollu problemi mal-gustizzja." F'dik is-sentenza din il-Qorti hadet in konsiderazzjoni, *inter alia*, is-segwenti:

"Bhalma jghid il-Prof. Sir Anthony Mamo[2]: *"The knowledge that the act is likely to kill, or the recklessness whether death, clearly foreseen as probable, shall ensue or not, is properly treated by the law on the same footing as the positive intention to kill."* U bhalma jispjega Gerald Gordon fil-ktieb tieghu **The Criminal Law of Scotland** fil-kuntest tal-kuncett ta' *"recklessness"* (li fil-ligi Skocciza *"is advertent and involves foresight of the risk"*[3] u li ghalhekk hu tista' tghid identiku ghall-kuncett taghna ta' intenzjoni pozittiva indiretta[4]):

""When the reasonable man is used as a test of subjective recklessness the position is that if the reasonable man would have foreseen the risk, it will

[2] Notes on Criminal Law, p. 221.
[3] Para. 7.45, p. 241; "…negligence is inadvertent and involves an absence of such foresight."
[4] Ara **Ir-Repubblika ta' Malta v. Salvatore sive Salvu Gauci**, 8 ta' Lulju 2004.

be accepted as a fact that the accused foresaw it, unless there is strong evidence to the contrary. But if the accused can show that in fact he did not foresee the risk, then it is illogical to characterise him as reckless on the ground that a reasonable man would have foreseen it. As Hall[5] says, *'In the determination of these questions, the introduction of the "reasonable man" is not a substitute for the defendant's awareness that his conduct increased the risk of harm any more than it is a substitute for the determination of intention, where that is material. It is a* method *used to determine those operative facts in the minds of normal persons'*.

"'Since evidence of the accused's state of mind must normally consist of objective facts from which the jury will draw an inference as to his state of mind, the more careless the accused's behaviour the more likely it is that he will be regarded as reckless, since the more likely it will be that he foresaw the risk involved. A man who kills another by punching him on the jaw may be believed when he says that he did not foresee the risk of death; but a man who kills another by striking him on the skull with a hatchet will be hard put to it to persuade a jury that he did not realise that what he was doing might be fatal. In *Robertson and Donoghue* Lord Justice-Clerk Cooper directed the jury that "In judging whether…reckless indifference is present you would take into account the nature of the violence used, the condition of the victim when it was used, and the circumstances under which the assault was committed". All these are objective factors affecting the degree of the carelessness of what the accused did, viewed as something likely to cause death. The jury proceed by way of syllogism to infer from these objective factors that the accused was subjectively reckless, and the major premise is that a reasonable man would have foreseen the risk. So they argue: all reasonable men would foresee the risk of death as a result of what the

[5] Hall, J., ***General Principles of Criminal Law*** 2nd ed., Indianapolis, 1960, p. 120.

accused did; the accused is (*ex hypothesi*) a reasonable man; therefore the accused foresaw the risk."[6]

"Biex jaslu ghall-konkluzjoni li hawn si trattava ta' omicidju volontarju, il-gurati kellhom ikunu konvinti moralment li (1) jew l-appellanti rat il-mewt bhala konsegwenza ta' ghemilha u riedet dik il-mewt ta' Bowdler, jew (2) li hija rat il-mewt bhala konsegwenza probabbli ta' ghemilha u ghalkemm ma riditx il-mewt hija xorta wahda ommettiet milli taghmel dawk l-atti li kienet taf li probabbilment kienu ser jiskansaw lil Bowdler mill-mewt.

"Kif diga` nghad, il-kwistjoni hawn kienet jekk l-appellanti kellhiex l-intenzjoni pozittiva indiretta mehtiega skond it-tieni forma ta' omicidju volontarju.

"Jirrizulta mill-provi l-ewwelnett li l-appellanti volontarjament assumiet *"a duty of care"* ta' Rachel Bowdler….

"Tajjeb hawn li ssir referenza ghal dak li jinghad mill-awturi Timothy H. Jones u Michael G. A. Christie fil-ktieb taghhom **Criminal Law** mis-serje **Greens Concise Scots Law**[7] dwar il-kuncett ta' *duty of care* jew *duty to act*:

"*"There are also instances where the common law would probably impose a duty to act. This will be the case where an individual has undertaken to do something upon which the health and safety of others depends. Examples of this are the cases of* ***William Hardie****, where a charge of culpable homicide brought against an Inspector of Poor who had ignored the deceased's application for poor relief was held to be relevant, and an English case,* ***R. v. Instan****, where a fatal omission by a niece to provide food and medical attention for her invalid aunt resulted in a manslaughter (equivalent to culpable homicide) conviction. The crimes in these two examples were committed by failing to fulfil a legal duty. In* ***William***

[6] Gerald Gordon, *op. cit.* para. 7.53, pp. 245-246.
[7] W. Green/Sweet & Maxwell, Edinburgh 1996, p. 46.

Hardie *the legal duty was derived from a contract. The failure to act was not just a breach of contract with his employer, however, but provided the basis for a conviction: the duty of care also extended to members of the public he was paid to protect. In* ***Instan*** *the duty had been assumed voluntarily. This would seem to imply that if someone agreed to look after a neighbour's child and the child drowned in the bath while that child-minder was watching television, then a conviction for culpable homicide could ensue. This scenario could be analysed either in terms of a voluntary assumption of a duty of care or of a contractual obligation."*

"U f'**Blackstone's Criminal Practice 2004** naqraw[8]:

"*"If a person voluntarily undertakes to care for another who is unable to care for himself as a result of age, illness or other infirmity, he may thereby incur a duty to discharge that undertaking, at least until such time as he hands it over to someone else. In* ***Instan*** *[1893] 1 QB 450, D lived with her aunt, who was suddenly taken ill with gangrene in her leg and became unable either to feed herself or to call for help. D did not give her any food, nor did she call for medical help, even though she remained in the house and continued to eat her aunt's food. She was convicted of manslaughter. The principle laid down in* ***Instan*** *was applied and extended in* ***Stone*** *[1977] QB 354. Stone's sister, Fanny, came to live with him and his mistress, Dobinson. Fanny was suffering from anorexia, but was initially able to look after herself. Gradually, however, her condition deteriorated, until she became bed-ridden. She needed medical help, but none was summoned and she eventually died in squalor, covered in bed sores and filth. Stone and Dobinson were each convicted of her manslaughter and the Court of Appeal upheld their convictions. Because they had taken Fanny into their home, they had assumed a duty of care for her and had been grossly negligent in the performance of that duty. The fact that Fanny was Stone's sister was merely incidental to this."*

[8] Para. A1.14 p. 9.

"Imbaghad f'**Archbold – Criminal Pleading, Evidence and Practice 2006**[9] jinghad dwar id-*duty of care*:

"*"The duty of care belongs more to the fields of contract and tort than to this work. However, the following should be noted.*

"(a) It is in general for the judge to decide whether there is evidence capable of giving rise to a duty of care, and, if there is, it is for the judge to give the jury appropriate directions, but it is for the jury to decide, in the light of those directions, whether the defendant in fact owed the deceased a duty of care; but there might be exceptional cases where a duty of care obviously existed, as between doctor and patient or where Parliament had imposed a statutory duty, and, in such cases, the judge could properly direct the jury as to the existence of the duty: ***R. v. Willoughby*** *[2005] 1 Cr.App.R. 29, CA. See also* ***R. v. Khan and Khan, ante****, and* ***R. v. Sinclair****, 148 N.L.J. 1353, CA (978400/2/4 Yf).*

"(b) A person may become liable for manslaughter by neglect of a positive duty arising from the nature of his occupation: ***R. v. Lowe*** *(1850) 3 C. & K. 123 (an engineer in charge of the lift in a mine left it in the care of an ignorant boy);* ***R. v. Markus*** *(1864) 4 F. & F. 356 (a doctor absenting himself for the purpose of sport or some similar activity left unattended a patient whom he knew to be in a precarious condition);* ***R. v. Curtis*** *(1885) 15 Cox 746 (a local authority officer neglected to provide medical assistance to a destitute person). To hold that a person who supplied controlled drugs to another, owed the other a duty of care when the other, having consumed the drugs in his presence, was in obvious need of medical attention, would undoubtedly enlarge the class of persons to whom a duty of care was owed:* ***R. v. Khan and Khan, ante. Cf. R. v. Sinclair, ante****: whilst there is no authority holding that a medically unqualified person is under a duty to render assistance to a stranger or could come under such*

[9] p.1799 -1800, para. 19-111.

duty by virtue of the passage of time, a person who had been instrumental in his friend obtaining a fatal overdose of drugs, and who remained with him throughout the period of unconsciousness might come under such duty; and ***R. v. Ruffell*** *[2003] 2 Cr.App.R.(S.) 53, CA: where the appellant, an experienced drug user, and the deceased, a friend who had been clean for some time, went to the appellant's family home, after an evening's drinking and there injected themselves with heroin, following which the deceased became ill, whereupon the appellant took steps to revive him, it had been open to the jury to find that the appellant had assumed a duty of care towards the deceased."*

16. Ikkunsidrat dan kollu, din il-Qorti ma tqisx illi t-tieni ilment ta' l-appellant huwa fondat.

17. It-tielet ilment jirrigwarda digriet li tat l-ewwel Qorti dwar l-ammissibilita` ta' dokument:

"iii. Illi finalment taht dan il-gravam l-esponent jilmenta minn digriet li nghata fil-kors tal-guri fejn il-Qorti cahdet oggezzjoni minnu ssollevata dwar l-inammissibilta` ta' dokument li kien gie esebit minn rapprezentant tal-Isptar u liema dokument kien jikkonsisti f'notamenti li jittiehdu dwar dettalji ta' telefonati li jidhlu fid-dipartiment tal-emergenza fl-isptar. L-ammissibilta` o meno ta' dan id-dokument zgur li kien ser ikollha effett qawwi fuq il-verdett peress illi din il-prova kienet relatata mal-kwistjoni taz-zewg telefonati li kienu saru li fihom gie rappurtat illi kien hemm tfajla mitlufa minn sensieha u li kienet tehtieg l-ghajnuna. F'dan il-kaz id-difiza oggezzjonat li jinghata lill-gurati d-dokument li kien fih in-noti dwar it-telefonata li d-difiza ssostni li saret mill-esponent ezatt wara li huwa halla lil N.B. fil-parkegg u dan ghaliex dawn in-notamenti kienu saru minn awtur injot li ma kienx ingieb biex jikkonferma dak hemm kontenut, kif ukoll ghaliex daqstant kienet injota l-persuna li rceviet it-telefonata in kwistjoni u ghalhekk apparti li dan id-dokument kien jikkostitwixxi *documentary hearsay*, id-difiza giet prekluza milli jkollha xi forma ta' kontroll fuq il-kontenut tal-istess, liema kontenut ingieb a konjizzjoni tal-gurati ghad-decizjoni taghhom. Il-Qorti minkejja dan kollu

ddekretat li tali dokument kien wiehed ammissibbli bhala dokument governattiv, decizjoni din li fl-umli fehma tal-esponent, kienet tikkostitwixxi rregolarita` u/jew interpretazzjoni skorretta tal-ligi li zgur kellha effett fuq il-verdett."

18. Id-digriet in kwistjoni nghata mill-ewwel Qorti fis-26 ta' Mejju 2008. Jirrizulta li sar verbal minn Dott. Roberto Montalto fejn oggezzjona li ssir referenza ghad-dokument li jinsab a fol. 261 ta' l-atti tal-kumpilazzjoni billi ma jirrizultax minn min gie redatt, u dan b'referenza ghax-xiehda li kienet ser tinghata mit-tabib Dr. Robert Camilleri. L-ewwel Qorti semghet ix-xiehda ta' Dr. Camilleri fl-assenza tal-gurati dwar dan il-punt imbaghad ghaddiet biex taghti dan id-digriet:

"Il-Qorti, wara li semghet it-testimonjanza ta' Dr. Robert Camilleri fl-assenza tal-gurati dwar l-opposizzjoni li ssir referenza a fol. 261; billi hi sodisfacenti (*recte:* sodisfatta) li din hi kopja fidila rilaxxata mix-xhud wara li hu ghamel ricerka fir-records tal-Isptar ghal xi telefonati li saru u li setghu kellhom x'jaqsmu ma' dan il-kaz u ghalhekk tirritjeni li dan hu kopja ufficjali governattiv u huwa ammissibbli bhala prova. Inoltre tirrileva li ma saret ebda oggezzjoni dwar l-ammissibilita` ta' dan id-dokumenti fi stadju opportun tal-eccezzjonijiet preliminari."

Minbarra hekk jirrizulta illi waqt li kien qieghed jixhed Dr. Robert Camilleri, il-ktieb li minnu saret il-kopja tad-dokument in kwistjoni gie prodott ukoll. Frankament din il-Qorti ma ssib xejn x'ticcensura fid-digriet ta' l-ewwel Qorti. Dan id-dokument kien *record* ufficjali tal-infromazzjoni li kienet waslet, u fil-forma li kienet waslet, lil min kien responsabbli jipprovdi servizz ta' ambulanza, u ghalhekk mhux biss kien relevanti ghall-kaz izda fil-konfront tieghu ma kienet tapplika ebda *"exclusionary rule of evidence"*.

19. It-tieni aggravju ta' l-appellant huwa li l-appellant gie misjub hati hazin fuq il-fatti tal-kawza. Jghid illi dik li effettivament setghet tkun il-kagun tal-mewt ta' N.B. kienet l-*overdose* ta' droga eroina li hija stess kienet ingeriet volontarjament u indipendentement. L-agir attribwibbli lill-

appellant kien biss limitat ghall-garr tal-vittma mir-residenza ta' missieru ghall-parkegg u ghat-telefonata sussegwenti li biha huwa talab b'mod anonimu l-assistenza medika li ghal xi raguni baqghet ma waslitx ghaliex it-tim mediku li hareg fuq dan ir-rapport naqas milli jsib lil N.B.. L-appellant jghid li jemmen illi minn din is-sensiela ta' fatti kien impossibbli jew ahjar irragjonevoli li min kien ser jiggudika fuq il-fatti jasal ghall-konkluzjoni illi huwa qatt kellu l-intenzjoni specifika li jnehhi volontarjament il-hajja ta' N.B. Fil-fehma tieghu, l-azzjonijiet tieghu kienu jidhru illi saru minghajr ebda intenzjoni li jikkagunalha hsara, u dan jirrizulta mill-fatt illi kien proprju hu l-ewwel persuna illi cempel ghall-assistenza medika. Dan, skond l-appellant, juri illi mhux biss ma riedx li N.B. titlef hajjitha izda li addirittura huwa anqas kellu intenzjoni li jikkagunalha hsara. Il-fatt li l-ambulanza ma sabitx lil N.B. meta harget fuq din it-telefonata m'ghandu b'ebda mod jitqies sabiex tigi stabbilita xi forma ta' intenzjoni specifika jew generika.

20. L-appellant, pero`, jghid illi minkejja dan u minghajr pregudizzju, jemmen illi jekk jigi skartat dak li nghad fil-paragrafu precedenti, huwa se mai u fl-aghar ipotezi seta' jigi dikjarat hati biss (1) jew li agixxa b'intenzjoni generika li jikkaguna hsara lil N.B. fit-termini ta' l-artikolu 216(a) jew (b) ghaliex l-azzjonijiet tieghu (in addizzjoni ma' dawk gja` kommessi fuqha nnifisha minn N.B.) setghu gabu l-mewt jew id-debbulizza permanenti fis-sahha jew f'xi parti tal-gisem ta' N.B., (2) jew illi huwa agixxa bi traskuragni u b'negligenza u kkaguna l-hsara imsemmija fuq il-persuna ta' N.B.

21. Dan it-tieni aggravju ta' l-appellant jirrikjedi apprezzament mill-gdid tal-provi. Dak li din il-Qorti trid tara huwa jekk il-gurati, ben indirizzati, setghux legalment u ragjonevolment jaslu ghall-konkluzjoni li effettivament waslu ghaliha[10]. In ezekuzzjoni ta' din il-funzjoni taghha,

[10] Ara, fost ohrajn, l-Appelli Kriminali Superjuri: **Ir-Repubblika ta' Malta v. Rida Salem Suleiman Shoaib**, 15 ta' Jannar 2009; **Ir-Repubblika ta' Malta v. Paul Hili**, 19 ta' Gunju 2008; **Ir-Repubblika ta' Malta v. Etienne Carter**, 14 ta' Dicembru 2004 **Ir-Repubblika ta' Malta v. Domenic Briffa**, 16 ta' Ottubru 2003; **Ir-Repubblika ta' Malta**

din il-Qorti ezaminat dettaljatament l-atti processwali, inkluzi t-traskrizzjonijiet tax-xiehda, it-traskrizzjonijiet tad-difiza u tal-kontro-replika, ezaminat ukoll id-dokumenti esibiti u l-atti tal-kumpilazzjoni (inkluzi l-atti ta' l-Inkjesta) kif ukoll id-deposizzjonijiet ta' dawk ix-xhieda li x-xiehda taghhom waqt il-guri ma gietx traskritta, hasbet fit-tul fuq is-sottomissjonijiet tal-partijiet, u l-osservazzjonijiet taghha huma dawn li gejjin:

(i) Il-gurati, wara deliberazzjoni dwar dak kollu li ngab a konoxxenza taghhom tul il-guri, wara ezami u kontro-ezami tax-xhieda, wara access mizmum fuq il-post, wara li kellhom l-opportunita` iqisu "l-imgieba, il-kondotta u l-karattru" tax-xhieda, u "tal-fatt jekk ix-xiehda ghandhiex mis-sewwa jew hix konsistenti, u ta' fattizzi ohra tax-xiehda" kif ukoll "jekk ix-xiehda hix imsahha minn xiehda ohra, u tac-cirkostanzi kollha tal-kaz" (artikolu 637 tal-Kap. 9), wara li semghu s-sottomissjonijiet tal-prosekuzzjoni u tad-difiza, u wara li gew ben indirizzati mill-Imhallef li ppresjeda l-guri, ikkonkludew li l-appellant huwa hati skond l-Att ta' Akkuza kif dedott kontra tieghu.

(ii) M'hemm l-ebda dubju illi l-eroina li uzat N.B. fit-2 ta' Novembru 2001 injettatha hi stess gewwa l-post fejn kien jirrisjedi l-appellant. L-appellant ukoll uza mill-istess eroina li kienu xtraw ftit tal-hin qabel, billi injetta lilu nnifsu separatament u qabel ma uzat N.B.. Skond N.B., kienet hi li talbet lill-appellant biex imorru jixtru l-eroina ghax ma kinitx taf minn fejn setghet tixtri. Taghtu Lm20 ghax hu ma

---

v. Godfrey Lopez u **r-Repubblika ta' Malta v. Eleno sive Lino Bezzina** 24 ta' April 2003, **Ir-Repubblika ta' Malta v. Lawrence Asciak sive Axiak** 23 ta' Jannar 2003, **Ir-Repubblika ta' Malta v. Mustafa Ali Larbed**, 5 ta' Lulju 2002; **Ir-Repubblika ta' Malta v. Thomas sive Tommy Baldacchino**, 7 ta' Marzu 2000, **Ir-Repubblika ta' Malta v. Ivan Gatt**, 1 ta' Dicembru 1994; u **Ir-Repubblika ta' Malta v. George Azzopardi**, 14 ta' Frar 1989; u l-Appelli Kriminali Inferjuri: **Il-Pulizija v. Andrew George Stone**, 12 ta' Mejju 2004, **Il-Pulizija v. Anthony Bartolo**, 6 ta' Mejju 2004; **Il-Pulizija v. Maurice Saliba**, 30 ta' April 2004; **Il-Pulizija v. Saviour Cutajar**, 30 ta' Marzu 2004; **Il-Pulizija v. Seifeddine Mohamed Marshan et**, 21 ta' Ottubru 1996; **Il-Pulizija v. Raymond Psaila et**, 12 ta' Mejju 1994; **Il-Pulizija v. Simon Paris**, 15 ta' Lulju 1996; **Il-Pulizija v. Carmel sive Chalmer Pace**, 31 ta' Mejju 1991; **Il-Pulizija v. Anthony Zammit**, 31 ta' Mejju 1991.

kellux flus, waqfu hdejn St. Luke's u gie lura b'zewg pakketti. Marru r-residenza ta' l-appellant fejn sajjarha hu stess. N.B. tghid illi wara li hadet l-eroina ma tiftakar xejn.[11] Mir-residenza ta' l-appellant hija spiccat mixhuta gewwa l-parkegg tar-Razzett l-Abjad.

(iii) Meta l-appellant xehed l-ewwel darba fit-2 ta' Novembru 2001 quddiem Dr. Stefano Filletti li kien gie nominat mill-Magistrat Inkwirenti sabiex jirrelata dwar il-kaz, l-appellant qal illi l-eroina haduha hdejn il-fabbriki ta' San Gwann izda l-ghada rega' xehed u qal li fil-fatt kienu haduha fil-kcina tad-dar tieghu. Jghid ukoll fix-xiehda tieghu tat-3 ta' Novembru 2001 li kif N.B. hadet l-eroina talbitu jwassalha. Imbaghad jghid: "X'hin tlajna hi waqghet gharkubbtejha hdejn il-karozza."

(iv) L-appellant jammetti li kien hu li hadha f'parkegg. Fix-xiehda tieghu tat-2 ta' Novembru 2001 l-appellant jghid illi x'hin waqghet gharkubbtejha, huwa ghabbiha fil-karozza fis-seat tal-passiggier u hadha fejn il-"Vibes". Jghid: "Dak il-hin kien hemm in-nies tax-xoghol. Go mohhi ghidt li kieku raha xi hadd kien jirrapportaha. Jien ridt inhalliha x'imkien fejn jarawha n-nies. Inzilt mill-"Vibes", qbizt wiehed taz-'Zarb Coaches', faccata hemm *car park* miftuha. Jien hallejt lil N.B. sserrah ma' hajt mibni – mhux tas-sejjiegh – ezatt kif tidhol mill-*car park* fuq il-lemin. Hallejtha f'post fejn setghu jarawha mit-triq. In-nies telghin 'il fuq setghu jarawha." Mill-provi rrizulta illi N.B. ma nstabitx fejn jghid l-appellant li halliha izda aktar 'il gewwa. Difatti mir-relazzjoni tal-perit arkitett l-A.I.C. Richard Aquilina tirrizulta din il-konstatazzjoni: "Il-post fejn kienet instabet N.B. qieghed 'il gewwa sew mit-triq minn fejn hi ma setghetx tidher minhabba l-hajt ta' mat-triq. Kien hemm ukoll sigar baxxi tal-lewz li jkomplu jostru dan il-post." Barra minn hekk, meta Dr. Mario Scerri kien qieghed jigi mistoqsi mid-difiza jekk fil-perijodu li N.B. ghamlet fil-parkegg setghetx "irrigejnjat il-koxjenza taghha, is-sahha taghha u regghet cediet", huwa kkonkluda li dik "mhux in-normalita`".

[11] Traskrizzjoni tax-xiehda li tat N.B. waqt il-guri, pagna 49.

(v) L-appellant jghid illi qabel ma halliha fil-parkegg, huwa xarrbilha wiccha u pprova jqajjimha (fl-istqarrija tieghu jghid li caqalqilha wiccha bil-mod). Imbaghad mar icempel ghall-ambulanza minn *telephone booth* hdejn il-M.U.S.E.U.M. San Gwann. Fix-xiehda tieghu tat-2 ta' Novembru 2001 l-appellant jghid illi cempel fuq in-numru fejn ikun hemm salib. "Jien ghidtilhom li kien hemm mara mitlufa minn sensiha fejn il-'Vibes'. Qaltli 'stenna ftit' u jiena qtajt. Ftit minuti wara rajt ambulanza tiela'." Qamet diskussjoni dwar jekk l-appellant kienx ghamel din it-telefonata jew le. Effettivament, anke jekk stess ghamel din it-telefonata, huwa ma tax indikazzjoni korretta dwar fejn kienet tinsab N.B.. N.B. ma kinitx "fejn il-'Vibes'" izda gol-parkegg tar-Razzett l-Abjad aktar 'l isfel mill-"Vibes" f'posizzjoni fejn ma setghetx tidher mit-triq. U jekk l-appellant verament ra ambulanza ghaddejja, kif seta' jikkonkludi li din kienet harget per konsegwenza tat-telefonata tieghu? L-appellant jipprova jaghti x'jifhem li t-telefonata tal-11.50 a.m. li skond id-dokument a fol. 261 tal-process saret minn xi hadd "Pauline", kienet fil-fatt it-telefonata tieghu. Izda dak li jinsa l-appellant hu li l-ambulanza ma hargitx mill-Isptar izda mill-Mosta Health Centre u ghalhekk zgur ma kinitx se tghaddi minn San Gwann biex tasal hdejn il-"Vibes". Difatti din l-ambulanza ma rintraccatx lil N.B.. U kien biss meta certu Alfred Camilleri, sid l-ghelieqi li jintuzaw bhala parkegg tar-Razzett l-Abjad, dahal fil-parkegg li nstabet N.B. – bil-qalziet imnizzel sa nofs kuxxtejha, imdawra bid-dubbien anke go halqha. Fil-fatt cempel ghall-ambulanza fit-3.55 p.m. Dr. Michael Spiteri li akkompanja l-ambulanza xehed li N.B. kienet "sekondi 'l boghod mill-mewt".

(vi) Mela, hawn ghandna sitwazzjoni ta' zewg zghazagh li hadu l-eroina flimkien u li b'rizultat ta' hekk N.B. bdiet minnufih issofri s-sintomi ta' *overdose*. L-appellant hass li kellu jipprova jghinha tigi f'taghha billi jxarrbilha wiccha u jcaqalqilha wiccha. Hass anke li kellu jcempel ghall-ambulanza – ghalkemm jekk verament cempel, huwa ta informazzjoni skorretta. Fl-istqarrija tieghu jghid illi beda jissuspetta li "kienet seta' sejra tmut, jien fil-fatt cempilt lill-ambulanza. Din smack mhux gugu." Nonostante cio`, minflok ma l-appellant baqa' sejjer l-Isptar b'N.B., mar

telaqha fil-parkegg imsemmi. Jigifieri huwa hass li kellu *a duty to care* (u fil-fatt kellu tali *duty to care* ghax kien hu li dahhalha fir-residenza tieghu) izda l-preokkupazzjoni tieghu kienet li ma jispiccax il-habs. L-appellant kien ilu zmien mhux hazin jabbuza mid-droga u kien certament konxju wkoll mill-fatt li *overdose* tista` twassal facilment ghall-mewt. Hu stess jghid fl-istqarrija tieghu illi kien hemm kaz fejn assista bniedem li kien "waqa' OD" billi tefaghlu s-silg mal-parti tieghu u beda jipprova jmexxieh u wara cempel ghall-ambulanza. Inoltre fl-istess stqarrija jghid li meta gie arrestat – fil-fatt gie arrestat xi hin bejn il-11.30 a.m. u 11.45 a.m. – ma qal xejn dwar it-tfajla ghax beza' li jmur il-habs "li kieku mietet jew xi haga". Kien biss ghall-habta tat-8.30 p.m./9.00 p.m. meta rinfaccat mill-Ispettur Josric Mifsud bl-informazzjoni li N.B. kienet stejqret u kellmet lill-Pulizija, li l-appellant ammetta. Ghalhekk l-appellant kien *reckless* dwar il-konsegwenzi ta' l-agir tieghu, ossia dwar l-ommissjoni voluta tieghu li jassigura li N.B. tinghata l-ghajnuna medika li kienet tehtieg. Kien hu biss li seta' jaghmel dan, cioe` jara li tircievi ghajnuna medika. Izda minflok, iddecieda li jiffacja r-riskju rejali li dik l-ommissjoni tieghu setghet twassal ghall-mewt ta' N.B., u dan ghall-motiv li ried jevita l-habs. Cioe` hu ra l-mewt bhala konsegwenza probabbli ta' l-att jew ommissjoni tieghu, u ghalkemm ma riedx il-mewt xorta wahda ried u wettaq dak l-att jew dik l-ommissjoni. Sahansitra jammetti fl-istqarrija tieghu li ma marx jiccekkja jekk l-ambulanza marritx tigbor lil N.B..

(vii) Ghalhekk, fic-cirkostanzi rizultanti mill-provi u fid-dawl ta' dak li ntqal aktar qabel, din il-Qorti hi tal-fehma li l-gurati setghu legalment u ragjonevolment jikkonkludu li l-appellant kellu u kien ukoll assuma *a duty of care*, u n-nuqqas tieghu li jaghmel dak li kien indikat fic-cirkostanzi kien iwassal ghas-sejbien ta' htija skond l-att ta' akkuza.

22. L-ahhar aggravju ta' l-appellant jirrigwarda l-piena, li hu jqis eccessiva. Jghid li l-esperjenza trawmatika li ghaddiet minnha N.B. kienet wahda illi pprokurat fuqha nnifisha u setghet ugwalment gabet il-mewt taghha minghajr ebda intervent attiv jew passiv tieghu. Jghid li rrizulta li din N.B. kellha esperjenza ta' *overdose* qabel il-

kaz in ezami u anke kaz iehor wara. Ghalhekk, isostni l-appellant, ir-responsabbilta` tieghu f'dan il-kaz inholqot b'kumbinazzjoni u, konsegwentement, il-kontributorjeta` tal-vittma ghall-akkadut trid tigi ben riflessa fil-piena. Skond l-appellant, il-piena nflitta fuqu ma tirriflettix dan, ghalkemm taqa' fil-parametri tal-piena mitluba fl-Att ta' Akkuza. Jghid li m'hemmx proporzjon bejn dak li wettaq hu u l-piena nflitta. Lanqas ma jidher li nghata piz sufficjenti ghall-fatt illi meta sehh il-kaz kien mahkum sew mit-tossikodipendenza u li sahansitra waqt il-mumenti determinanti ta' dan il-kaz huwa kien intossikat. Finalment, jissottometti l-appellant, fil-kaz odjern, fejn huwa qatt ma ried jew xtaq li jgib il-mewt ta' N.B. izda adopera agir inkonsult meta rinfaccjat b'sitwazzjoni allarmanti u taht l-effett tal-paniku, certament il-piena l-aktar gusta u ekwa kellha tkun wahda ferm aktar moderata.

23. Bhalma jaccetta l-appellant, il-piena nflitta taqa' fil-parametri ta' dik mitluba fl-Att ta' Akkuza. Issa, il-principju regolatur in materja ta' piena huwa li din il-Qorti mhux normali li tiddisturba d-diskrezzjoni ta' l-ewwel Qorti fl-ghoti tal-piena sakemm din ma tkunx tohrog barra mil-limiti stipulati fil-ligi u ma jkun hemm xejn x'jindika li kellha tkun inqas minn dik li tkun fil-fatt inghatat. Fil-fehma ta' din il-Qorti l-ewwel Qorti qieset dak kollu li seta' jigi kkunsidrat meta giet biex tiddetermina l-piena. Imbaghad m'hemm l-ebda prova illi l-appellant kien intossikat b'tali mod li jista' jibbenefika minn xi difiza taht l-artikolu 34 tal-Kap. 9. Inoltre, bhalma jintqal f'**Blackstone's Criminal Practice 2004**:

"The phrase 'wrong in principle or manifestly excessive' has traditionally been accepted as encapsulating the Court of Appeal's general approach. It conveys the idea that the Court of Appeal will not interfere merely because the Crown Court sentence is above that which their lordships as individuals would have imposed. The appellant must be able to show that the way he was dealt with was outside the broad range of penalties or other dispositions appropriate to the case. Thus in *Nuttall*

(1908) 1 Cr App R 180, Channell J said, 'This court will…be reluctant to interfere with sentences which do not seem to it to be wrong in principle, *though they may appear heavy to individual judges*' (emphasis added). Similarly, in *Gumbs* (1926) 19 Cr App R 74, Lord Hewart CJ stated: *'…that this court never interferes with the discretion of the court below merely on the ground that this court might have passed a somewhat different sentence; for this court to revise a sentence there must be some error in principle."* Both Channell J in *Nuttall* and Lord Hewart CJ in *Gumbs* use the phrase 'wrong in principle'. In more recent cases too numerous to mention, the Court of Appeal has used (either additionally or alternatively to 'wrong in principle') words to the effect that the sentence was 'excessive' or 'manifestly excessive'. This does not, however, cast any doubt on Channell J's dictum that a sentence will not be reduced merely because it was on the severe side – an appeal will succeed only if the sentence was excessive in the sense of being outside the appropriate range for the offence and offender in question, as opposed to being merely more than the Court of Appeal itself would have passed." [12]

Konsegwentement din il-Qorti ma tarax li huwa l-kaz li hija tiddisturba d-diskrezzjoni ta' l-ewwel Qorti kif ezercitata f'dak li huwa l-quantum tal-piena erogata.

24. Ghal dawn il-motivi tiddeciedi billi tichad l-appell u tikkonferma s-sentenza appellata fl-intier, b'dan illi l-perijodu ghall-hlas ta' l-ispejjez tal-perizji jibda jiddekorri millum.

< Sentenza Finali >

[12] Para. D23.45, pagna 1695.

----------TMIEM----------