MALTA

QORTI CIVILI
PRIM' AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
LINO FARRUGIA SACCO

Seduta tal-15 ta' Novembru, 2010

Rikors Numru. 18/2007

Mario Camilleri u Pierre Camilleri
vs
L-Avukat Generali

Il-Qorti,

A. RIKORS:
Rat ir-rikors tar-rikorrenti li bih esponew:

Illi huma jinsabu akkuzati quddiem il-Qorti Kriminali b'Att ta' Akkuza 9/2006, fejn, fl-istadju tal-eccezzjonijiet preliminari, huma qajmu zewg eccezzjonijiet ta' natura kostituzzjonali, u l-Qorti Kriminali, flok irriferiet il-kwistjoni li kienet imqajma quddiemha, ghazlet li tordna lir-rikorrenti li jiddeducu l-pretensjoni taghhom b'rikors.

Illi l-eccezzjonijiet kienu testwalment dawn li gejjin:-

A. “Illi L-artikolu 3(3) tal-Kap 373 jimponi fuq l-akkuzati t-tnejn *onus probandi* li ma jhallix dak il-*fair balance* fil-guri li hu rikjest mill-Art 6(2) tal-Konvenzjoni Ewropea u l-artikolu 39 tal-Kostituzzjoni, u dan specjalment ghall-fatt li r-rikorrenti jridu jippruvaw il-provenjenza ta’ kontijiet bankarji ta’ persuna ohra u li ghalihom m’ghandhomx access jew informazzjoni. Dan mhux il-kaz li xi hadd irid jipprova fatt, b’inverzjoni tal-piz tal-prova, ghaliex il-fatti jkunu f’idejh. Ghalhekk qed titqajjem din il-kwistjoni ta’ natura kostituzzjonali li tattakka l-istess artiklu 3(3) tal-Kap 373.”

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B. “Illi l-artikolu 22 (1C)(b) jimponi fuq l-akkuzati t-tnejn *onus probandi* li ma jhallix dak il-*fair balance* fil-guri li hu rikjest mill-Art 6(2) tal-Konvenzjoni Ewropea u l-artikolu 39 tal-Kostituzzjoni, u dan specjalment ghall-fatt li r-rikorrenti jridu jippruvaw il-provenzjenza ta’ kontijiet bankarji ta’ persuna ohra u li ghalihom m’ghandhomx access jew informazzjoni. Dan mhux il-kaz li xi hadd irid jipprova fatt, b’inverzjoni tal-piz tal-prova, ghaliex il-fatti jkunu f’idejh. Ghalhekk qed titqajjem din il-kwistjoni ta’ natura kostituzzjonali li tattakka l-istess artiklu.”

Illi kif jidher mill-premess l-ilment tar-rikorrenti huwa fis-sustanza li waqt li hu legittimu ghal-legislatur li jbiddel l-oneru tal-prova minn fuq l-akkuza ghal fuq il-persuna akkuzat, tali tibdil skond il-Kostituzzjoni ghandu jkun limitat ghal fatt wiehed, li b’ligi specjali jrid jghaddi ghal fuq l-akkuzat, u skond il-Konvenzjoni Ewropea, tali *shifting* tal-*burden of proof* ma jridx igib li jkun hemm il-prezunzjoni tal-htija sakemm wiehed ma jippruvax l-innocenza tieghu.

Illi dwar il-fatti partikolari f’dan il-kaz, imbghad hemm fattispecji li aktar jaghmlu piz irragjonevoli u kontra l-ligi. Fil-process hemm akkuzati tlieta min-nies. Hadd minnhom ma jista’ jissejjah bhala xhud favur jew kontra akkuzat iehor. F’dan il-kaz, l-akkuzati rikorrenti, skond il-fatti tal-process, qed ikunu obbligati li jispjegaw il-flus li kellha l-banek it-tielet akkuzata. Huwa risaput li hadd m’ghandu access ghal flus haddiehor fil-banek, u certament l-unika persuna li tista’ taghti spjegazzjoni hija l-akkuzata l-ohra li mhix producibbli bhala xhud.

Illi fuq kollox kif inhuma miktuba z-zewg ligijiet, huwa prattikament f'kull kaz impossibbli li wiehed jipprova l-fatti li jezonerawh mir-responsabbilta`. Dan imur kontra l-artikoli precitati tal-Kostituzzjoni u l-Konvenzjoni, u saret riferenza ghas-sentenza tal-Qorti Kostituzzjonali ta' Malta tal-1 ta' April 2005 **The Republic of Malta v Robert Gregory Eyre u Susan Jayne Molyneux**, fejn fuq l-istess tip ta' ilment gie akkolt b'riferenza ghall-artikolu 26(2) tal-Kap 101. Saret riferenza wkoll ghal **Salabiaku vs France** tal-Qorti Ewropea ghad-Drittijiet tal-Bniedem.

L-artikolu 22 (1C) (b) li ghalih jaghmel riferenza *mutatis mutandis* l-Artiklu 3(3) tal-Kap 373 irid necessarjament jinqara mal-Artiklu 22(1C) (a) li flimkien jghidu hekk:
(1C) (a) Persuna tkun ukoll hatja ta' reat kontra din l-Ordinanza jekk tuza, tittrasferixxi l-pussess ta', tibghat lil xi persuna jew post, takkwista, tircievi, izzomm, tittrasporta, tittrasmetti, taltera, tiddisponi minn jew b'xi mod iehor tinnegozja, bi kwalunkwe mod jew bi kwalunkwe mezz, xi flus, proprjeta` (kemm jekk mobbli jew immobbli) jew xi rikavat minn dawk il-flus jew dik il-proprjeta` bil-hsieb li tahbi jew tikkonverti dawk il-flus jew dik il-proprjeta` jew dak ir-rikavat u tkun taf jew ikollha suspett li dawk il-flus jew proprjeta` kollha jew parti minnhom, jew dak ir-rikavat kollu jew parti minnu, ikunu gew miksuba jew ricevuti, direttament jew indirettament, bhala rizultat ta' –
(i) l-ghemil ta' reat imsemmi fis-subartikolu (1) jew fil-paragrafu (a) tas-subartikolu (1D) jew fis-subartikolu (1E); jew
(ii) xi att ta' kommissjoni jew ommissjoni f'xi post barra minn dawn il-Gzejjer li jekk isir f'dawn il-Gzejjer ikun jikkostitwixxi reat taht is-subartikolu (1) jew il-paragrafu (a) tas-subartikolu (1D).
(b) Fi procedimenti ghal reat taht il-paragrafu (a) ta' dan is-subartikolu, meta l-prosekuzzjoni ggib prova li l-imputat jew akkuzat **ma jkun ta ebda spjegazzjoni ragonevoli** li turi li dawk il-flus, proprjeta` jew rikavat ma kienux flus, proprjeta` jew rikavat kif deskritti fl-imsemmi paragrafu, **l-oneru li jipprova l-provenjenza lecita** ta' dawk il-flus, proprjeta` jew rikavat tkun tinkombi fuq il-persuna imputata jew akkuzata. (ir-rizalt tar-rikorrenti).

Mill-parti rizaltata jidher car li fl-ewwel lok qed jigi impost l-obbligu li jaghti spjegazzjoni lill-prosekuzzjoni u dan barra l-Qorti u qabel jitressaq, u dan jikser id-dritt tas-silenzju, it-tieni anke jekk jaghzel li jitkellem, l-ispjegazzjoni trid tidher ragjonevoli ghall-prosekuzzjoni. Il-prosekuzzjoni tassumi wkoll bhala pruvat li l-flus ecc. huma ta' provenjenza illecita. Imbaghad tistenna spjegazzjoni minghand is-suspettat, imbaghad tara hix ragjonevoli jew le, jew fi kliem iehor l-ispjegazzjoni tissodisfax, u jekk tghid mhix sodisfacenti, allura l-akkuzat irid jipprova l-provenjenza lecita huwa. Il-kumulu tal-kundizzjonijiet huwa tali li jgib fix-xejn il-prezunzjoni tal-innocenza.

Imbaghad f'dan il-kaz, hemm ukoll l-element l-iehor li kull akkuzat irid jipprova wkoll x'kellu kull akkuzat iehor, minghajr ma jista' jtellghu xhud.

Ghaldaqstant ir-rikorrenti talbu li din il-Qorti joghgobha (a) tiddikjara li l-Artiklu 3(3) tal-Kap 373 u l-Artikolu 22(1C)(b) tal-Kap 101 jivvjolaw il-Kostituzzjoni fl-Artikolu 39 u l-Konvenzjoni Ewropea fl-Artikolu 6, u dan f'diversi aspetti tal-istess zewg artikoli; (b) taghti rimedju effettiv biex tigi sanata l-istess vjolazzjoni fil-konfront tar-rikorrenti.

B. RISPOSTA:

Rat ir-risposta ta' l-Avukat Generali li biha espona:

Illi r-rikorrenti qed jallegaw primarjament li c-caqliqa (*shift*) fl-oneru tal-prova ikkawzat mill-operat ta' l-artikolu 3(3) tal-Kap 373 meta mehud in assocjazzjoni mal-artikolu 22(1C) tal-Kap 101 jilledi d-drittijiet fundamentali taghhom kif sanciti bl-Artikolu 6(2) tal-Konvenzjoni Ewropea u l-Artikolu 39 tal-Kostituzzjoni ta' Malta.

Illi l-intimat jidhirlu fl-ewwel lok illi fil-kaz odjern ma hemmx kwistjoni ta' '*shift*' fl-oneru tal-provi billi l-artikolu 22(1C)(b) m'hu bl-ebda mod intiz sabiex jattribwixxi htija lill-imputat jew akkuzat. Attwalment, dan l-artikolu huwa intiz biss sabiex jistabbilixxi jekk il-flus, proprjeta` jew rikavat in kwistjoni (flus etc.) ikunux "gew miksuba jew ricevuti, direttament jew indirettament" bhala rizultat ta' l-ghemil ta'

reat imsemmi fis-subartikolu (1D) u (1E). Pjuttost, ghalhekk, hemm sitwazzjoni ta' '*sharing*' ta' l-oneru tal-prova. Dan ghaliex il-veru piz li jholl u jorbot jinsab xorta wahda mitfugh fuq il-prosekuzzjoni, li ghandha l-oneru li – wara li jigi stabblilit il-fatt jekk il-flus, proprjeta` jew rikavat fuq imsemmija mhumiex gejjin mir-reati fuq imsemmija – tipprova li

1) il-persuna li ghandha nstabu l-flus, proprjeta` jew rikavat kienet fil-fatt qed "tuza, tittrasferixxi l-pussess ta', tibghat jew tikkonsenja lil xi persuna jew post, takkwista, tircievi, izzomm, tittrasporta, tittrasmetti, toltera, tiddisponi minn jew b'xi mod iehor tinnegozja, bi kwalunkwe mod jew bi kwalunkwe mezz" tali flus, proprjeta` jew rikavat;

2) li dan tkun ghamlitu "bil-hsieb li tahbi jew tikkonverti dawk il-flus jew dik il-proprjeta` jew dak ir-rikavat";

3) li l-istess persuna "tkun taf jew ikollha suspett li dawk il-flus jew proprjeta` kollha jew parti minnhom, jew dak ir-rikavat kollu jew parti minnu jkunu gew miksuba jew ricevuti direttament jew indirettament bhala rizultat ta' "xi wiehed mir-reati imsemmija fis-sub-paragrafi 22(1E) u 22(1D).

Illi inoltre, is-sitwazzjoni li tinholoq ghar-rigward ta' oneru tal-provi bl-operat ta' l-artikoli fuq imsemmija m'hi xejn anomala u sahansitra sitwazzjoni fejn l-oneru tal-provi huwa kompletament rovexxjat hija anke prevista mill-gurisprudenza dwar id-drittijiet fundamentali. Filwaqt li huwa minnu li b'mod generali hija l-prosekuzzjoni li trid tipprova dak li qed tallega, jezistu reati fejn, aktarx minhabba fil-gravita` tar-reat involut u d-diffikulta` biex wiehed jipprova li reat ta' dan it-tip attwalment sehh, il-legizlatur jaqleb l-oneru tal-prova. Infatti, dwar **Salabiaku vs France** li accennaw ghaliha r-rikorrenti, Harris et jghidu li:
"Article 6(2) does not prohibit presumptions of fact or of law that may operate against the accused. However, it does require that states confine such presumptions 'within

reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence".

Gie sottomess li l-kaz lamentat jaqa' proprju fil-paramentri hawn delinejati ta' '*reasonable limits*'.

Inoltre, fil-kaz ta' **Salabiaku vs France** il-Qorti Ewropeja iddecidiet li ma kienx hemm ksur ta' l-artikolu 6(2) stante li l-applikant seta' taht il-ligi Franciza juza d-difiza ta' '*force majeure*' u ghalhekk jipprova quddiem il-Qorti li kien impossibbli ghalih li jkun jaf bil-kontenut tal-bagoll li fih kienu instabu l-oggetti projbiti. Tali possibilita` pero` mhix ristretta ghal-ligi Franciza. Anki taht il-ligi Maltija, kieku r-rikorrenti odjerni rnexxielhom jippruvaw lill-Qorti li kien impossibbli ghalihom li jkunu jafu bl-oggetti li nstabu fil-pussess taghhom, allura ma kienux ikunu tenuti aktar li jaghtu l-'ispjegazzjoni ragjonevoli' in konnessjoni ma' tali pussess.

Illi fil-fatt fil-kaz ta' **Salabiaku** l-applikant ma kienx sehhlu jipprova tali impossibilita` ta' konoxxenza ta' l-oggetti projbiti quddiem il-Qorti Kriminali ta' pajjizu. Ghalhekk, il-Qorti Ewropeja iddecidiet li l-*Customs Code* ma gietx applikata mill-qrati b'mod li jmur kontra l-artikolu 6(2) u ghaldaqstant ma sabet ebda ksur ta' tali artikolu min-naha ta' l-Istat Franciz.

Illi ta' min jghid li din id-difiza ta' "*force majeure*" mhix l-unika wahda li l-ezistenza taghha tipprevjeni stat ta' ksur ta' l-artikolu 6(2); kwalunkwe prezunjoni li tista' tigi respinta sservi sabiex tipprevjeni tali ksur. Infatti, Harris et jghidu li l-Qorti Ewropeja kienet iddecidiet f'okkazzjonijiet ohrajn illi:
"rebuttable presumptions that an accused was living knowingly off the earnings of a prostitute who was proved to be living with him or under his control and that a company director was guilty of an offence committed by the company were not inconsistent with article 6(2)".

Rigward is-sentenza **Republic of Malta vs Eyre u Molyneaux**, il-provvediment li nstab li kien jilledi l-Artikolu

6 tal-Konvenzjoni kien specifikament l-art 26(2) li jipprovdi li:
“Meta r-reat li bih il-persuna tkun akkuzata ikun dak ta’ pussess ta’, jew bejgh jew traffikar ta’, medicini kontra d-disposizzjonijiet ta’ din l-Ordinanza l-akkuzat ma jkunx jista’ jiddefendi ruhu kontra dik l-akkuza billi jipprova li huwa haseb li kellu fil-pussess tieghu, jew li kien qed ibigh jew jittraffika, xi haga li ma kienetx il-medicina msemmija fl-akkuza jekk il-pussess ta’, jew il-bejgh jew traffikar ta’, dik il-haga ohra kien ikun, fic-cirkostanzi, bi ksur ta’ xi disposizzjoni ta’ din l-Ordinanza jew ta’ xi ligi ohra.”

L-intimat dehrlu li l-artikolu 26(2) m’huwiex rilevanti ghall-kaz in ezami stante li hawnhekk si tratta ta’ “pussess flus, proprjeta` jew rikavat” u ghaldaqstant l-investigazzjoni ta’ tali pussess m’hijiex milquta bl-operat ta’ l-artikolu 26(2).

Ghaldaqstant u ghal ragunijiet ohrajn li, okkorrendo, jirriserva li jesponihom fi stadju ulterjuri, l-intimat issottometta li din il-Qorti ghandha tichad ir-rikors odjern bl-ispejjez kontra r-rikorrenti.

Rat l-atti kollha tal-kawza.

Semghet lix-xhieda bil-gurament.

Semghet l-abili difensuri.

Ikkunsidrat

C. PROVI:
Fis-16 ta’ Jannar 2008 gew prezentati tliet kopji legali mir-rikorrenti u cioe` wahda ta’ l-att ta’ l-akkuza, l-ohra ta’ l-i*statements* ta’ l-akkuzati u l-ohra tax-xhieda ta’ l-Ispettur Vassallo, investigatur fil-kaz li saret fil-kumpilazzjoni.

Xehed l-Ispettur Paul Vassallo li kien il-prosekutur investigattiv fil-kaz. Qal li jiftakar li kienu nstabu xi flus u kienu gew iffrizati ghall-ewwel a bazi ta’ investigazzjoni mahruga mill-Qorti Kriminali a bazi ta’ l-ordni tal-Magistrat meta dawn tressqu fil-Qorti. Ir-raguni ta’ dan hija l-possibbli konfiska sakemm kikun hemm decizjoni fil-

kawza Kriminali. Il-flus meta hu kien qed jinvestiga kienu qeghdin ghand omm Mario Camilleri ghand Maria Stella Camilleri li iddepozitathom il-bank. Qal li kienu talabu lis-sinjura biex tispjega l-flus, meta ma tatx spjegazzjoni ippruvaw jiehdu spjegazzjoni minghand Mario Camilleri jew minghand Pierre. Kienu daru fuq Pierre Camilleri u Mario Camilleri meta l-omm ma tatx spjegazzjoni minhabba li kien hemm fatturi ohrajn. Ikkonferma li kellu xi jghid anke quddiem il-Magistrat. Zied li meta bhal dan il-kaz kien hemm *links* ohrajn, ma' reati ohrajn li wiehed ghandu raguni bizzejjed biex jissuspetta li l-flus gejjin min xi kriminalita` allura iva huma ghandhom il-jedd li jimxu fuqhom dawn l-affarijiet.

D. KUNSIDERAZZJONIJIET:

Il-Kapitolu 373 tal-Ligijiet ta' Malta huwa dwar il-*money laundering*, u fih barra d-diversi poteri li ghandu l-Avukat Generali, hemm inkluz l-Artikolu 3(3) li jghid testwalment hekk:

"Fi proceduri dwar reat ta' *money laundering* taht l-Att, id-disposizzjonijiet ta' l-Artikolu 22(1C)(b) tal-Ordinanza dwar Medicini Perikoluzi, ghandhom ikunu *mutatis mutandis* japplikaw."

L-Artikolu 22(1C)(b) tal-Kap 101 jghid hekk:

"(b) Fi procedimenti ghal reat taht il-paragrafu (a) ta' dan is-subartikolu, meta l-prosekuzzjoni ggib prova li l-imputat jew akkuzat ma jkun ta ebda spjegazzjoni ragonevoli li turi li dawk il-flus, proprjetà jew rikavat ma kienux flus, proprjetà jew rikavat kif deskritti fl-imsemmi paragrafu, l-oneru li jipprova l-provenjenza lecita ta' dawk il-flus, proprjetà jew rikavat tkun tinkombi fuq il-persuna imputata jew akkuzata."

U l-artikolu 22 (1C)(a) tal-Kap 101 jghid hekk:

"(1C) (a)Persuna tkun ukoll hatja ta' reat kontra din l-Ordinanza jekk tuza, tittrasferixxi l-pussess ta', tibghat jew tikkonsenja lil xi persuna jew post, takkwista, tircievi , izzomm, tittrasporta, tittrasmetti, toltera, tiddisponi minn jew b'xi mod iehor tinnegozja, bi kwalunkwe mod jew bi kwalunkwe mezz, xi flus, proprjetà (kemm jekk mobbli jew immobbli) jew xi rikavat minn dawk il-flus jew minn dik il-

proprjetà bil-hsieb li tahbi jew tikkonverti dawk il-flus jew dik il-proprjetà jew dak ir-rikavat u tkun taf jew ikollha suspett li dawk il-flus jew proprjetà kollha jew parti minnhom, jew dak ir-rikavat kollu jew parti minnu, ikunu gew miksuba jew ricevuti, direttament jew indirettament, bhala rizultat ta' -
(i) l-ghemil ta' reat imsemmi fis-subartikolu (1) jew fil-paragrafu (a) tas-subartikolu (1D) jew fissubartikolu (1E); jew
(ii) xi att ta' kommissjoni jew ommissjoni f'xi post barra minn dawn il-Gzejjer li jekk isir f'dawn il-Gzejjer ikun jikkostitwixxi reat taht is-subartikolu (1) jew il-paragrafu (a) tas-subartikolu (1D)."

Ir-rikorrent isostni li:
"Skond l-Artikolu 22(1C)(a) il-Prosekuzzjoni trid tipprova reat sottostanti u x-xjenza jew ghall-inqas is-suspett fil-persuna li tindahal biex tirreclika dawk il-flus, li tali flus gejjin minn reat. Fil-kaz tal-Kap 101 hija mid-droga, fil-kaz tal-Kap 373 minn kwalunkwe reat iehor. Imma l-piz tal-prova skond dak l-Artikolu jibqa' fuq il-Prosekuzzjoni."

Issa fil-Kap. 373 l-artikolu 2(2)(a) ma hux mehtieg li l-Prosekuzzjoni tipprova tali reat. Infatti l-imsemmi artikolu jipprovdi illi:
"Persuna tista' tinsab hatja tad-delitt ta' *money laundering* taht dan l-Att, anke fin-nuqqas ta' sentenza ta' qorti li tistabbilixxi htija fir-rigward ta' l-attività kriminali sottostanti, liema attività kriminali tista' tigi stabbilita minn prova cirkostanzjali jew prova ohra, minghajr il-htiega li l-prosekuzzjoni tipprova li kien hemm sentenza ta' kundanna ghall-offiza sottostanti."

Il-Prosekuzzjoni ghandha l-obbligu li tipprova l-ezistenza ta' xi reat - "*any criminal offence*" *ai termini* tat-Tieni Skeda ta' l-Att kontra *Money Laundering*, u dan fuq bazi ta' "prova cirkostanzjali jew prova ohra". Fil-kaz in dizamina dan ir-reat hu precizament dak ta' traffikar ta' droga u kongura.

Dan iwassal ghal li l-Prosekuzzjoni ma kellha ebda htiega li ggib sentenza ta' htija fil-konfront tar-rikorrenti in

konnessjoni mat-traffikar tad-droga jew kongura ghal dan l-iskop.

Kif isemmi l-intimat fin-nota tieghu:
“Il-prosekuzzjoni gabet provi in abbondanza dwar l-agir kriminuz – traffikar ta’ droga u kongura ghall-istes skop - billi esebiet recordings u xehdu investigatturi f’kazijiet li kienu involuti fihom Mario u Pierre Camilleri (ara atti tal-kumpilazzjoni) biex b’hekk issodisfatt l-oneru impost bl-artikolu 2(2)(a) tal-Kap.373.

Ghalhekk, ma hemmx kwistjoni ta’ sejbien arbitrarju ta’ htija li tintakka l-prezunzjoni ta’ l-innocenza f’reati bhalma huma dawk tat-traffikar tad-droga.”

Interessanti wkoll hu l-fatt li l-Kap 319 fit-Tieni Skeda annessa mieghu li tinkludi d-Dikjarazzjonijiet u r-Rizervi tal-Gvern Malti, illi meta accetta li jirratifika l-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem l-istess Gvern impona riserva fis-sens illi:
“*The Government of Malta declares that it interprets paragraph 2 of Article 6 of the Convention in the sense that it does not preclude any particular law from imposing upon any person charged under such law the burden of proving particular facts*.”

L-istess kwalifika tinsab fil-paragrafu 5 ta’ l-artikolu 39 tal-Kostituzzjoni li jghid hekk:
“(5) Kull min jigi akkuzat b’reat kriminali ghandu jigi meqjus li jkun innocenti sakemm jigi pruvat jew ikun wiegeb li huwa hati:
Izda ebda haga li hemm fi jew maghmula skond l-awtorità ta’ xi ligi ma titqies li tkun inkonsistenti ma’ jew bi ksur ta’ dan is-subartikolu safejn dik il-ligi timponi fuq xi persuna akkuzata kif intqal qabel il-piz tal-prova ta’ fatti partikolari.”

Issa jidher li quddiem il-Qorti tal-Magistrati ma ngabet ebda prova li twassal ghal li dawn il-flus gew minn xi attivita` lecita taht kull forma, inkluz affarijiet bhal wirt, rebh ta’ lottu. L-artikolu 6.2 jezigi li l-Prosekuzzjoni ggorr l-oneru li tkun hi li finalment trid tikkonvinci lill-Qorti jekk sehhx reat u jekk il-persuna akkuzata kenitx hatja ta’ tali

reat. Zgur li dan ma jwassalx ghall-fatt li l-imputat ikun qieghed jigi meqjus hati *ab initio*. Dejjem jibqa' l-obbligu tal-prosekuzzjoni li tipprova fatti konnessi mar-reat ta' *money laundering*. Il-Prosekuzzjoni trid dejjem tipprova ghas-sodisfazzjon tal-qorti aspetti ohra bhal ma huma kondotta refrattarja ta' l-imputat jew li kien konness f'cirku ta' traffikar tad-droga. Jinkombi dejjem fuq il-Prosekuzzjoni li tipprova li s-sitwazzjoni finanzjarja tar-rikorrenti ma kienetx kompatibbli ma' l-ammont ta' flejjes li kellhom fil-pussess taghhhom. Huwa biss wara li jsir l-ezami mill-gudikant dwar ir-ragjonevolezza *o meno* tal-provenjenza tal-flus li in segwitu tkun tista' topera din il-prezunzjoni. Hawnhekk ta' min jqis fattur ferm importanti. Hija Qorti li suppost dejjem ghandha l-indipendenza ta' l-agir taghha li trid tiddecidi. Mhux qed nitkellmu dwar xi hadd mill-Ezekuttiv. Ghalhekk huwa necessarju biex tinstab htija li jkun hemm iz-zewg fatturi. Ghandu jkun hemm **agir suspettuz** segwit bi **tranzazzjonijiet ta' flus f'ammonti li setghu jitqiesu eccessivi**. U dan irid jigi **konstatat mill-Qorti**. Fil-kaz in ezami omm ta' imputat u nanna ta' l-iehor kienet iddepozitat Lm20,000 go kont fil-bank in segwitu ta' bejgh ta' karozza Mercedes E-Class, izda x-xhieda tax-xerrej ma ikkonfermatx dan. Dan wassal biex baqa' s-suspett li l-movimenti ta' flus li gew effettwati mir-rikorrent Pierre Camilleri u nanntu s-Sinjura Camilleri setghu kienu konnessi mar-reat tat-traffikar tad-droga. Kien irrizulta li r-rikorrenti Mario Camilleri, anke minn gewwa l-Habs, kien qed jaghti struzzjonijiet lil ibnu Pierre, ir-rikorrenti l-iehor, ghall-finanzjament ta' xiri ta' droga provenjenti minn Sqallija.

Dwar l-aspett tar-ragonevolezza jew le tal-prezunzjoni jispetta lill-gudikant u mhux lill-Prosekuzzjoni kuntrarjament ghal dak sostnut mir-rikorrenti. Ta' min isemmi li meta nstabu l-flus wiehed mill-imputati kien il-habs ghal numru ta' snin u l-akkuzat l-iehor kien fi stat finanzjarju li wkoll ma jiggustifikax il-flejjes misjuba. Dan iwassal li mill-provi cirkostanzjali, il-Prosekuzzjoni irnexxilha tipprova ghas-soddisfazzjon tal-Qorti li dawn il-flejjes gejjin minn xi reat, f'dan il-kaz dak ta' traffikar ta' droga.

Fil-kaz in ezami il-prosekuzzjoni trid:
tistabbilixxi n-ness bejn ir-rikorrenti u xi reat sottostanti kommess minnhom,
li l-origini tal-propjeta` u flejjes ma kellhom ebda sors lecitu jew spjegabbli.
Altrimenti ma jistghux jinstabu hatja.

Skond Jacobs [*The European Convention on Human Rights*] il-presunzjoni tal-innocenza u t-tqeghid tal-oneru tal-prova fuq il-prosekuzzjoni m'humiex l-istess haga. Ukoll gieli l-oneru tal-prova jaqa' fuq l-akkuzat:
“What the principle of presumption of innocence requires here is just that the Court should not be predisposed to find the accused guilty and second that it should at all times give the accused the benefit of the doubt 'in dubio pro reo'.”

Il-fatt li l-oneru tal-prova jigi trasferit fuq l-imputat ma jwassalx ghal ksur tal-artikolu 6(2) tal-Konvenzjoni Ewropeja [simili ghall-artikolu 39(5) tal-Kostituzzjoni Maltija]
Basta li l-presunzjoni tkun “*rebuttable and is not in itself unreasonable*”.

Ara wkoll J. Fawcett -*The application of the European Convention on Human Rights* (page 180):
“*Here it may be remarked that the presumption of innocence does not imply where lies the main burden of proof at the trial of the charge, that is to say upon the prosecution to prove the guilt of the accused beyond a reasonable doubt;”*

Fis-sentenza **A.G. vs Malta** Appl. *16641/90* il-Kummissjoni qalet:
“The Commission recalls that presumptions of fact or of law operate in every legal system and that while the Convention does not prohibit such presumptions in principle, Article 6 para. 2 (Art. 6-2) requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.....

The Commission notes that in the present case the legislation provides that a director of a company is presumed guilty of an offence committed by the company unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence. The applicant was therefore provided under the legislation with the possibility of exculpating himself. The Commission does not consider that the conditions, which required the applicant to prove that he had no actual knowledge of the offence and also was not negligent in his duties as an officer of a company, were self-contradictory or imposed an irrebuttable presumption. The Commission further finds that the Maltese courts enjoyed a genuine freedom of assessment in this area and that there is no indication that Article 13 of the 1975 Act was applied to the applicant in a manner incompatible with the presumption of innocence."

Mis-sentenza fl-ismijiet **David Marinelli vs Avukat Generali u Kummissarju tal-Pulizija** deciza mill-Onorabbli Qorti Kostituzzjonali fid-29 ta' Mejju 2009 jemergi li:
"la darba l-akkuzat, kemm *di diritto* kif ukoll *de facto*, inghata l-opportunita` jiskolpa ruhu, ma jistax jinghad li kien hemm ksur tal-artikoli invokati mir-rikorrent."

Fl-appell gie asserit li meta jitpogga l-piz fuq l-imputat dan ma jmurx kontra l- Art. 6, para. 2. Izda dawn ghanhom ikunu cirkoskritti ghal-limiti ragjonevoli u certament dawn ma jistghux inehhu d-dritt tal-qorti li tevalwa fatti u htija.

Fis-sentenza **The Republic of Malta vs Gregory Robert Eyre and Susan Jayne Molyneaux** il-Qorti ta' l-Appell bdiet billi enuncjat il-principju generali li
"… the Strasbourg case-law has in general admitted the possibility of reverse onus provisions and presumptions, subject, however, to certain overriding considerations."

Intqal ukoll:
"*there may be circumstances where it is only fair that the onus of proving certain facts, especially facts which lie*

within the particular knowledge of the accused, should rest on the accused himself:
we have already seen the proviso to subsection (5) of Section 39 of the Constitution, and how this has been transposed, by way of a declaration, to the interpretation of Article 6(2) of the Convention under the European Convention Act...

(i) it is for the prosecution to prove the guilt of the accused beyond reasonable doubt;
(ii) if the accused is called upon, either by law or by the need to rebut the evidence adduced against him by the prosecution, to prove or disprove certain facts, he need only prove or disprove that fact or those facts on a balance of probabilities;
(iii) if the accused proves on a balance of probabilities a fact that he has been called upon to prove, and if that fact is decisive as to the question of guilt, then he is entitled to be acquitted;
(iv) to determine whether the prosecution has proved a fact beyond reasonable doubt or whether the accused has proved a fact on a balance of probabilities, account must be taken of all the evidence and of all the circumstances of the case;
(v) before the accused can be found guilty, whoever has to judge must be satisfied beyond reasonable doubt, after weighing all the evidence, of the existence of both the material and the formal element of the offence...

Article 6(2) of the Convention does not in principle prohibit presumptions of fact or of law and "reverse onus provisions".

"The ultimate question is: would the exception prevent a fair trial? If it would, it must either be read down if this is possible; otherwise it should be declared incompatible."

Fis-sentenza fl-ismijiet **Andrew Ellul Sullivan *et* vs Il-Kummissarju tal-Pulizija u l-Avukat Generali**, deciza mill-Prim'Awla (Sede Kostituzzjonali) fit-8 ta' Lulju 2004 inghad:

"…"Illi kif imfisser f'sentenzi ewlenin moghtija mill-Qorti Ewropeja, il-prezunzjoni tal-innocenza tfisser li l-piz tal-prova jaqa' generalment fuq il-prosekuzzjoni. Madanakollu, dan ma jfissirx li f'kull kaz il-piz tal-prova jrid ikun biss fuq il-prosekuzzjoni. L-artikoli imsemmija m'humiex kontra li xi ligi tistipula ghal prezunzjonijiet ta' fatt jew ta' dritt li jahdmu kontra l-persuna mixlija. Izda huwa mistenni li l-Istat jillimita tali prezunzjonijiet b'mod ragonevoli li jiehu qies tas-siwi ta' dak li l-kaz jinvolvi u tal-jeddijiet tad-difiza xierqa."

Din il-Qorti kif presjeduta trid pero` taghmilha cara li l-qlib ta' l-oneru tal-prova hija l-eccezzjoni u mhux ir-regola. Dan hu limitat ghall-kazijiet biss fejn huwa logiku li sta ghall-imputat li jaghmel il-provi hu minhabba li l-prosekuzzjoni ma jista' qatt ikollha dawk il-provi. Hekk per ezempju l-kaz ta' min jghix ma' prostituta li ghandu jipprova hu li ma kiex jghix minn fuq il-qligh taghha – haga li l-prosekuzzjoni rari tista' tipprova [ara **R.P. vs United Kingdom (1972)** Appl. 5124/72]. L-istess japplika ghal kaz ta' karozza li tinqabad *overspeeding* [ara **Tora Tolmos vs Spain** Appl. 23816/94].

Izda din ir-regola ma tista' qatt tigi wzata ghal xi kaz fejn il-prosekuzzjoni tallega xi haga bla bazi u wara tipprova twaddab l-oneru tal-prova fuq l-imputat.

Fil-kaz **Salabiaku** il-Qorti qalet:
"Article 6 para. 2 (art. 6-2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence...
Even though the "person in possession" is "deemed liable for the offence" this does not mean that he is left entirely without a means of defence."

F'**Butler vs UK** Appl. 41661/98, l-applikant ilmenta li taht l-artikolu 6.2 tal-Konvenzjoni:
"*the seizure, detention and forfeiture proceedings under sections 42 and 43 of the Drug Trafficking Act 1994*

infringed his right to be presumed innocent since he was compelled to bear the burden of proving beyond reasonable doubt (the criminal standard) that the money at issue was unconnected with drug trafficking, whereas the authorities were only required to prove on a balance of probabilities (the civil standard) that the money taken from him directly or indirectly represented any person's proceeds of drug trafficking or was intended by any person for use in drug trafficking."

Izda l-Qorti sostniet li :
"… in criminal proceedings against an accused it is not incompatible with the requirements of a fair trial to shift the burden of proof to the defence (see as regards inferences drawn from an accused's silence, **Condron v. the United Kingdom***, (no. 35718/97, § 56, ECHR 2000-IX); nor is the fairness of a trial vitiated on account of the prosecution's reliance on presumptions of fact or law which operate to the detriment of the accused, provided such presumptions are confined within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (see the* **Salabiaku v. France** *judgment of 7 October 1988, Series A, no. 141-A, p. 16, § 28 in fine; the* **Pham Hoang v. France** *judgment of 25 September 1992, Series A no. 243, p. 21, § 33).*

Il-Qorti kompliet tosserva li:
"At no stage was the applicant faced with irrebuttable presumptions of fact or law. It was open to the applicant to adduce documentary and oral evidence in order to satisfy the domestic courts of the legitimacy of the purpose of his visit to Spain, the reasons for taking such a substantial amount of money out of the country in the back of a car as well the source of the money. The Court is satisfied that the domestic courts weighed the evidence before them, assessed it carefully and based the forfeiture order on that evidence. The domestic courts refrained from any automatic reliance on presumptions created in the relevant provisions of the 1994 Act and did not apply them in a manner incompatible with the requirements of a fair hearing. The domestic courts did not accept the

applicant's explanations. It is not for the Court to gainsay that conclusion."

Fin-nota taghhom ir-rikorrenti irreferew ghas-sentenza tal-Qorti ta' l-Appell Kriminali ta' l-Ingilterra, tal-21 ta' Lulju, 2006, **Regina vs Amer Ramzan.** Ikomplu jghidu:
"Hemm referenza wkoll ghal sentenza importanti tal-House of Lords, Montila, fejn jinghad illi hija l-Prosekuzzjoni li trid tipprova fil-kazijiet kollha li l-flus kienu ta' provenjenza llecita. Din is-sentenza kienet li kkjarifikat darba ghal dejjem il-posizzjoni Ngliza. Is-sentenza nghatat mill-*House of Lords* fil-25 ta' Novembru, 2004.
Fiha jinghad hekk:
38. Common to all three international instruments was the proposal that those third parties whose actions were to be criminalised were people who knew that the property which they were dealing with was the proceeds of drug trafficking or criminal conduct. Reasonable suspicion is not mentioned in any of them. It was of course open to the Legislature to find its own solutions to the problem in the domestic system. There is no doubt that the effectiveness of the measures that were being introduced was assisted by enabling prosecutions to be brought where there was no evidence of actual knowledge but reasonable grounds to suspect could be established. But to broaden the scope of the third party offences still further so as to bring cases within their reach where the Crown could not prove that the property that was being dealt with was the proceeds of drug trafficking or criminal conduct would have been a significant departure from what had been asked for by the international instruments. One would have expected some indication of this to be given to Parliament, and there was none.

39. Two other points were mentioned in argument, but they carry little weight. First, there is the concession in R v El-Kurd [2001] Crim L R 234, in which the Crown accepted that it had to establish that the money had come from drug trafficking or other criminal conduct. That was a case where the defendants had been charged with four conspiracies, each of which was indicted as a conspiracy to commit offences under the 1994 Act on the

one hand and under the 1988 Act on the other. As Latham LJ pointed out in para 26, the wording of each alternative depended upon whether the property was the proceeds of drug trafficking or criminal conduct. Secondly, there is the way the 2002 Act has dealt with the problem of money laundering.

40. All that need be said on the first point is that the concession, if that was what it was, could not have been held against the Crown if the interpretation for which it is now contending was the right one. There is some authority for the view that official statements by a government department which is responsible for administering an Act may be taken into account as persuasive authority as to what the Act means: Bennion, p 597. But the concession that was made in that case fell well short of being an official statement of that kind.

41. As for the second, Parliament is of course free to restructure the offences that it creates in any way it likes. The language that it has chosen to use in the 2002 Act is different from that in the enactments which are in issue in this case. There is no room for any ambiguity. The property that is being dealt with in each case must be shown to have been criminal property. But it would be surprising if the intention was to reduce the scope of these offences. The problem of money laundering has not gone away. The fact that these offences have been designed on the assumption that proof that the property being dealt with was in fact criminal property fits into the pattern which was set by the international instruments and which the wording of the subsections themselves, when properly construed in their context, indicates."

Ghal dan l-intimat irrisponda hekk:
"Fis-sentenza **Regina vs Amer Ramzan** ikkwotata mir-rikorrent, hemm referenza ghall-kaz ta' **Regina vs Saik**, fejn il-Qorti irreferiet ghal kazijiet fejn ikun jinhtieg li jigi ippruvat '*knowledge or reasonable grounds for suspicion*" min-naha ta' l-imputat, illi *"the money represents the proceeds of the relevant type of crime*". Kif tajjeb qalet il-Qorti f'dak il-kaz, "*the House of Lords has held that on*

proper interpretation, the sections which refer to reasonable grounds for suspicion import the necessity that actual suspicion by the Defendant must be proved."

L-esponent jidhirlu li cirkostanzi bhal dawn, taht il-ligi taghna, jistghu jitqiesu li jaqghu taht l-artikolu 21(C) (a) tal-Kap. 101 izda mhux taht il-paragrafu (b) ta' l-istess. Ghalhekk il-kaz **Saik** ma jistax jitqies li japplika ghall-kaz prezenti....

Fil-kaz Montila, il-Qorti skond l-esponent kienet qed tikkonsidra sitwazzjoni fejn persuna kienet qed tigi akkuzata b'*money laundering*. F'kas ta' akkuza simili, naturalment, mhux bizzejjed li tigi ippruvata l-*mens rea* biss...."

Hawnhekk suspett li l-flus in kwistjoni kienu jikostitwixxu rikavat ta' reat partikolari minghajr ma b'xi mod tigi stabbilita l-attwali provenjenza ta' tali flus, ir-reat naturalment ma jissussistix. Ukoll il-fatt wahdu li l-Qorti tikkonkludi li l-proprjeta` tar-rikorrenti tikkostitwixxi r-rikavat ta' xi reat mhux bizzejjed biex ir-rikorrenti jinstabu hatja.

Ir-rikorrenti jissoffermaw fuq il-kliem "spjegazzjoni ragonevoli'. Dan naturalment jimplika li l-imputati kellhom jaghtu mhux biss spjegazzjoni, imma dik l-ispjegazzjoni tkun ragonevoli. Fil-fehma taghhom din tmur kontra kull principju tad-dritt tas-silenzju. Jekk persuna taghzel li ma tirrispondi ghall-ebda mistoqsija tal-pulizija fil-fatt hija ma tkunx qieghda taghti l-ebda spjegazzjoni, ragjonevoli jew le. Il-Qorti pero` ma tistax taqbel ma' dan. Huwa logiku li l-ispjegazzjoni bil-fors trid tkun ragjonevoli. Dan ma jfissirx li trid toghgob lill-Prosekuzzjoni izda trid tkun tali li f'mohh min qieghed jiggudika hemm certu ragjonevolezza ghalkemm mhux necessarjament certezza. Tali ragonevolezza *o meno* ma jistax jiddependi mill-kriterji jew mid-decizjoni, anke soggettiva ta' min qieghed jinterroga, jew ta' l-Avukat Generali, izda tal-gudikant.

Interessanti b'mod specjali hija dik il-parti tan-nota ta' l-intimat li titkellem fuq Prezunzjonijiet simili f'ligijiet esteri li l-Qorti sejra tirriproduci:
"*L-**International Narcotics Control Strategy Report** tal-Bureau for International Narcotics and Law Enforcement Affairs* redatt f'Marzu ta' l-2006 ghad-Dipartiment ta' l-Istat Amerikan jirrimarka hekk dwar l-istati segwenti:

Liechtenstein

Liechtenstein has in place legislation to seize, freeze, and share forfeited assets with cooperating countries. The Special Law on Mutual Assistance in International Criminal Matters gives priority to international agreements. Money laundering is an extraditable offense, and legal assistance is granted on the basis of dual criminality (i.e., the offense must be a criminal offense in both jurisdictions). Article 235A provides for the sharing of confiscated assets, and this has been used in practice. Liechtenstein has not adopted the EU-driven policy of reversing the burden of proof (i.e., making it necessary for the defendant to prove that he had acquired assets legally instead of the state's having to prove he had acquired them illegally).

Olanda

In 1994, the Government of the Netherlands (GON) criminalized money laundering related to all crimes. In December 2001, legislation was enacted making facilitating, encouraging, or engaging in money laundering a separate criminal offense, easing the public prosecutor's burden of proof regarding the criminal origins of proceeds. Under the law, the public prosecutor needs only to prove that the proceeds "apparently" originated from a crime; self-laundering is also covered. In two cases in 2004 and 2005, the Dutch Supreme Court confirmed the wide application of the money laundering offenses by stating that the public prosecutor does not need to prove the exact origin of laundered proceeds and that the general criminal origin as well as the knowledge of the perpetrator may be deducted from objective circumstances..

Portugall

Act 5/2002 shifted the burden of proof in cases of criminal asset forfeiture from the government to the defendant; an individual must prove that his assets were not obtained as a result of his illegal activities. The law defines criminal assets as those owned by an individual at the time of indictment and thereafter. The law also presumes that assets transferred by an individual to a third party within the previous five years still belong to the individual in question, unless proven otherwise. GOP law enforcement agencies seized a total of 2.4 million euros in cash and accounts in 2003 and 5.1 million euros in 2004 in association with drug and money laundering investigations. Portugal has comprehensive legal procedures that enable it to cooperate with foreign jurisdictions and share seized assets.

Renju Unit

The Proceeds of Crime Act 2002 has enhanced the efficiency of the forfeiture process and increased the recovered amount of illegally obtained assets. The Act consolidates existing laws on forfeiture and money laundering into a single piece of legislation, and, perhaps most importantly, creates a civil asset forfeiture system for the proceeds of unlawful conduct. It also creates the Assets Recovery Agency (ARA), to enhance financial investigators' power to request information from any bank about whether it holds an account for a particular person. The Act provides for confiscation orders and for restraint orders to prohibit dealing with property. It also allows for the recovery of property that is, or represents, property obtained through unlawful conduct, or that is intended to be used in unlawful conduct. Furthermore, the Act shifts the burden of proof to the holder of the assets to prove that the assets were acquired through lawful means. In the absence of such proof, assets may be forfeited, even without a criminal conviction. The Act gives standing to overseas requests and orders concerning property believed to be the proceeds of criminal conduct. The Act

also provides the ARA with a national standard for training investigators, and gives greater powers of seizure at a lower standard of proof."

Ir-rikorrenti jaghlqu billi jistqarru:
"Applikati dawn il-problemi ghall-kaz in ezami, Mario Camilleri qieghed jigi mitlub jirrispondi ghall-karozzi u proprjeta' ohra li ghandu Pierre Camilleri, u ghall-proprjeta` u flus il-bank li kellha ommu akkuzata f'dan il-kaz. Huwa m'ghandu l-ebda access jew mezz kif jista' jiggustifika kontijiet u depoziti li ghamel haddiehor ghaliex hemm is-sigriet bankarju li johrog mill-Ligi. Huwa effettivament qieghed jigi mghajjat jirrispondi ghal depoziti li definittivament ma kienx prezenti meta saru. Irid jispjega kif gew dawk il-flus ghand ommu. Bl-istess mod ghal ghand it-tifel.

Fil-kaz ta' Pierre Camilleri johrog car illi dak li kellu hu, irid jipprova li gabu legittimament. Ma kienx qieghed jigi akkuzat hlief bil-parentela ma' Mario Camilleri li kontra tieghu kien hemm sentenza dwar id-drogi. Imma b'daqshekk ma tistax issir investigazzjoni fuq il-patrimonju tieghu taht il-Kapitolu 373 tal-Ligijiet ta' Malta bil-presunzjoni kontra l-innocenza u bl-obbligu li jikser kull dritt ta' silenzju kif prevvist fl-Artikolu 3(3) tal-Kapitolu 373 tal-Ligijiet ta' Malta...."

Izda kif ripetutament qalet il-Qorti fil-kors ta' din is-sentenza dan l-aspett irid jigi studjat mhux mill-**Prosekuzzjoni izda mill-gudikant**. Jibqa' l-obbligu ta' l-imputat li l-ispjegazzjoni tkun ragonevoli.

E. KONKLUZJONIJIET:

Ghal dawn il-motivi peress li tqis il-presunzjoni hija "*rebuttable and is not in itself unreasonable*, u billi thoss li d-drittijiet tad-difiza gew mizmuma, u li fil-kaz in ezami x-*shifting* tal-*burden of proof* huwa wiehed legali u jhalli l-*fair balance* rikjest ghall-iskopijiet ta' guri, il-Qorti tilqa' l-eccezzjonijiet ta' l-intimat.

Minhabba n-natura tal-kaz spejjez bla taxxa.

< Sentenza Finali >

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