MALTA

QORTI TA' L-APPELL KRIMINALI

ONOR. IMHALLEF
DAVID SCICLUNA

Seduta tad-9 ta' Frar, 2011

Appell Kriminali Numru. 356/2010

Il-Pulizija

v.

Ludvic Bugeja

Il-Qorti,

Rat l-imputazzjonijiet migjuba mill-Pulizija Ezekuttiva kontra l-imsemmi Ludvic Bugeja talli f'dawn il-Gżejjer fl-14 t'April 2002 u xahar qabel, ġewwa l-Belt Valletta u fi bandi oħra f'Malta f'ħinijiet differenti:

(a) kellu fil-pussess tieghu d-droga kokaina specifikata fl-Ewwel Skeda tal-Ordinanza dwar il-Medicini Perikolużi Kap 101 tal-Liġijiet ta' Malta meta ma kienx fil-pussess ta' awtorizzazzjoni għall-importazzjoni jew għall-esportazzjoni maħruġ mit-Tabib Principali tal-Gvern skond id-disposizzjonijiet tar-4 u s-6 Taqsima tal-Ordinanza u meta

ma kienx bil-licenzja jew xort'oħra awtorizzat li jimmanifattura, jew li jforni d-droga msemmija u meta ma kienx b'xi mod iehor bil-licenzja mill-President ta' Malta li jkollu d-droga msemmija fil-pussess tiegħu u naqas milli jipprova li d-droga msemmija giet fornuta lilu għall-użu tiegħu skond ir-ricetta kif provdut fir-regolamenti msemmija u dan bi ksur tar-Regolament 9 tar-regoli tal-1939 dwar il-Kontroll Intern tad-drogi perikoluzi (GN 292/39) kif sussegwentement emendati u bi ksur ta' l-Ordinanza dwar il-Medicini Perikoluzi Kap 101 tal-Ligijiet ta' Malta, liema droga nstabet f'tali cirkostanzi li juru li ma kinitx ghall-uzu personali tieghu;

(b) fl-istess data, hin, lok u cirkostanzi kellu fil-pussess tieghu medicina ristretta u psikotropika (ecstasy u dalmaine) meta ma kienx awtorizzat kif imiss bi ksur tar-Regolament 3(1) ta' l-Avviz Legali 22 tal-1985 kif sussegwentement emendat u 40A u 120A u t-Tielet Skeda tal-Ordinanza dwar il-Professjoni Medika u l-Professjonijiet li ghandhom x'jaqsmu maghha, Kap 31 tal-Ligijiet ta' Malta u l-Artikolu 16 tal-Att V tal-1985 kif emendat, liema droga nstabet f'tali cirkostanzi li juru li ma kinitx ghall-uzu personali tieghu.

Il-Qorti ntalbet ukoll sabiex minbarra li tapplika l-piena skond il-ligi tordna lill-imsemmi Ludvic Bugeja jhallas l-ispejjez li ghandhom x'jaqsmu mal-hatra ta' l-esperti skond l-artikolu 533 tal-Kap 9 tal-Ligijiet ta' Malta;

Rat is-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali tat-28 ta' Lulju 2010 li permezz taghha dik il-Qorti wara li rat ir-regolament 9 tal-GN 292/1939, it-Taqsimiet 4 u 6, l-artikoli 22(1)(a), 22(2)(b)(i) tal-Kap 101, ir-regolamenti 3(1) u 5(1) tal-Avviż Legali 22 tas-sena 1985, l-artikoli 40, 120A(1)(a), 120A(2)(b)(i)(ii) tal-Kap 31, sabet lill-imsemmi Ludvic Bugeja ħati taż-żewġ imputazzjonijiet dedotti kontra tiegħu u kkundannatu għall-piena ta' priġunerija ta' tmintax-il xahar u għall-ħlas ta' multa ta' €2300 li tista' titħallas b'rati ta' €100 kull erba' ġimgħat bl-ewwel pagament iseħħ mhux aktar tard minn erba' ġimgħat mid-data tas-sentenza appellata u fin-nuqqas ta' ħlas ta' xi pagament, il-bilanċ

ikun dovut f’daqqa. Jekk xi parti minn din il-multa ma titħallasx, din għandha tinbidel f’jum priġunerija għal kull 11.65 Ewros li ma jitħallsux. Ai fini tal-artikolu 533 tal-Kap 9, il-Qorti ma ordnatx il-ħlas tal-ispejjeż tal-esperti għaliex dawn tqabbdu matul inkjesta li saret qabel is-16 ta’ Jannar 2006. Jekk id-droga gahdha ma gietx distrutta wara l-ordni li kienet moghtija fis-sentenza **Il-Pulizija v. Maryanne Zerafa**, din ghandha tinqered taht is-sorveljanza tar-Registratur;

Rat ir-rikors ta’ l-appell ta’ Ludvic Bugeja pprezentat fit-30 ta’ Lulju 2010 li permezz tieghu talab li din il-Qorti thassar u tirrevoka s-sentenza moghtija fil-konfront tieghu u tilliberah minn kull imputazzjoni u htija, u fin-nuqqas tipprovdi ghal piena aktar mita u idonea fic-cirkostanzi;

Rat l-atti kollha tal-kawza;

Semghet it-trattazzjoni;

Ikkunsidrat:

L-aggravji ta’ l-appellanti huma fil-qosor is-segwenti: (1) li l-ewwel Qorti ghamlet apprezzament hazin tal-provi, u l-kaz tal-prosekuzzjoni jistrieh fuq ix-xiehda ta’ Mary Anne Zerafa li mhijiex xhud attendibbli; (2) li l-piena hi fi kwalunkwe kaz eccessiva u l-piena tal-komplici u ta’ l-awtur hi l-istess.

Evidentement permezz ta’ l-ewwel aggravju l-appellant qed jitlob li din il-Qorti taghmel apprezzament mill-gdid tal-provi. Issa, kif kostantement ritenut, huwa principju ormaj stabilit fil-gurisprudenza ta’ din il-Qorti (kemm fil-kaz ta’ appelli minn sentenzi tal-Qorti tal-Magistrati kif ukoll fil-kaz ta’ appelli minn verdetti u sentenzi tal-Qorti Kriminali) li din il-Qorti ma tiddisturbax l-apprezzament dwar il-provi maghmul mill-ewwel Qorti jekk tasal ghall-konkluzjoni li dik il-Qorti setghet ragjonevolment u legalment tasal ghall-konkluzjoni li waslet ghaliha. Fi kliem iehor, din il-Qorti ma tirrimpjazzax id-diskrezzjoni fl-apprezzament tal-provi ezercitata mill-ewwel Qorti izda taghmel apprezzament approfondit tal-istess biex tara jekk dik l-ewwel Qorti kinitx

ragjonevoli fil-konkluzjoni taghha. Jekk izda din il-Qorti tasal ghall-konkluzjoni li l-ewwel Qorti fuq il-provi li kellha quddiemha, ma setghetx ragjonevolment tasal ghall-konkluzjoni li waslet ghaliha, allura din tkun raguni valida, jekk mhux addirittura mpellenti, sabiex din il-Qorti tiddisturba dik id-diskrezzjoni u konkluzjoni[1].

Dan il-kaz huwa msejjes fuq ix-xiehda ta' certa Maryanne Zerafa. L-appellant jattakka l-kredibilita` taghha. Jghid l-ewwelnett illi, kif xehed il-*clinical psychologist*, Maryanne Zerafa *"can easily be led"*. Skond l-appellant, din l-asserzjoni "tincidi fuq il-kredibilita` ta' l-istess xhud." Inoltre l-appellant jghid illi din ix-xhud biddlet il-verzjoni taghha bosta drabi, tant li fl-ahhar xiehda taghha tghid li l-appellant biss kien responsabbli ghad-droga. Ghalhekk, isostni l-appellant, it-testimonjanza ta' Maryanne Zerafa ghandha titqies *"unsafe"*. L-appellant izid jghid li l-verzjoni moghtija minn Maryanne Zerafa m'ghandhiex mis-sewwa, u cioe` li l-appellant flimkien ma' ohrajn kellhom access liberu ghall-appartament taghha, u li kienu jabbuzaw minn tali kordjalita` billi jzommu d-droga hemm; kellha kull interess li tixhed f'dan is-sens biex tiskolpa lilha nnifisha.

Issa, l-ewwel Qorti kellha l-vantagg li tara u tisma' x-xhieda u ghalhekk kellha kull possibilita` li taghmel il-valutazzjoni opportuna tal-kredibilita` tax-xhieda skond il-linji ndikati fl-artikolu 637 tal-Kap. 9 tal-Ligijiet ta' Malta. L-ewwel Qorti difatti kkonkludiet li setghet toqghod fuq ix-xiehda ta' Maryanne Zerafa. Hija fil-fatt qalet hekk fis-sentenza appellata:

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[1] Ara, fost ohrajn, l-Appelli Kriminali Superjuri: **Ir-Repubblika ta' Malta v. Domenic Briffa**, 16 ta' Ottubru 2003; **Ir-Repubblika ta' Malta 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**; **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. 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.

"… il-*clinical psychologist* kien xehed li l-ahjar kompetenza tax-xhud Maryanne Zerafa kienet f'dik li hi *short term memory*" (ara s-sentenza tat-30 ta' Novembru 2004 pagna 3).

"Il-fatt li x-xhud kien *'easily be led'* ma jfissirx li ma tistax tixhed kif suppost. U jekk hi b'sahhitha fix-*short term memory*, dan huwa *asset* ghaliex ix-xhud Maryanne Zerafa ghamlet stqarrija quddiem il-Pulizija fil-15 ta' April 2002 fis-14.30 jigifieri anqas minn 24 siegha wara li sar ir-*raid* tal-Pulizija. Hija wkoll ikkonfermat l-istqarrija quddiem il-Magistrat tal-Ghassa Dr. Antonio Mizzi fid-9 ta' Ottubru 2002 [*recte:* 16 ta' April 2002]. Barra minn dan, dak li qalet kien car – ukoll fuq il-pedana tax-xhieda – u ma kienx hemm xi grajja komplikata.

"Ghalhekk il-Qorti mhix tilqa' s-sottomissjoni tad-difiza dwar ix-xhud Maryanne Zerafa u qed tiddeciedi li tista' toqghod fuq dan ix-xhud li l-Qorti rat tixhed quddiemha."

Ftit hemm x'jista' jizdied ma' dan li qalet l-ewwel Qorti. Evidentement, il-fatt li Maryanne Zerafa hija persuna li *she could easily be led*, kien il-fattur determinanti li wassal biex haddiehor japprofitta ruhu minnha u juza l-appartament taghha bhala post ghad-depozitu jew habi ta' sustanzi lleciti u affarijiet ohra li haddiehor ma riedx li jinstabu fil-pussess tieghu. Jigifieri l-fatt stess li *she could easily be led* ixejjen is-sottomissjoni ta' l-appellant li l-verzjoni li tat Maryanne Zerafa ma kinitx verzjoni verosimili.

Kwantu ghas-sottomissjoni li Maryanne Zerafa biddlet il-verzjoni taghha diversi drabi, din il-Qorti ezaminat l-istqarrija li ghamlet lill-Pulizija fil-15 ta' April 2002, ix-xiehda li tat quddiem il-Magistrat Inkwirenti fis-16 ta' April 2002 u x-xiehda li tat quddiem l-ewwel Qorti fit-30 ta' April 2007 u fis-16 ta' Novembru 2009. Minn hawn jirrizulta li hija kkonfermat bil-gurament darbtejn l-istqarrija li ghamlet lill-Pulizija. Skond il-verzjoni unika rizultanti minn dik l-istqarrija, Maryanne Zerafa qalet li d-droga li nstabet fl-

appartament taghha kienet ta' Monique Borg u Ludvic Bugeja u li kif kienet niezla t-tarag iltaqghet ma' Katia Chisari li f'idha kellha d-droga u qaltilha li kienet ser tpoggiha gewwa l-appartament taghha (ta' Zerafa) ghax il-Pulizija kienu arrestaw lil Raymond Borg maghruf bhala l-Borza.

Imbaghad in kontro-ezami giet mistoqsija kif kienet taf li d-droga kienet ta' Monique Borg u Ludvic Bugeja, u t-twegiba taghha kienet: "Ghax Ludvic gieli tela' ghalihom hux. Ma nafx ta' min huma ezatt." Qalet ukoll li gieli kienet fl-appartament meta Ludvic Bugeja tela' ghalihom filwaqt illi t-tnejn l-ohra qatt ma telghu – naturalment meta kienet fl-appartament. Giet mistoqsija wkoll kif kienet taf illi Katia Chisari kellha d-droga f'idejha u ratx x'kellha f'idejha. Maryanne Zerafa wiegbet fin-negattiv, cioe` li ma ratx x'kellha Chisari f'idejha, u qalet li kellha d-droga ghax "indunajt meta kien hemm il-Borza arrestat, telghu biex jerfghu l-affarijiet."

Fil-fehma ta' din il-Qorti, dak li wiegbet Maryanne Zerafa in kontro-ezami ftit ibiddel mill-verzjoni originali taghha. Baqghet tikkonferma li kien l-appellant li "gieli tela' ghalihom", cioe` ghad-droga. Inoltre kkonfermat li hija kienet tat cavetta wahda biss ta' l-appartament lil Monique Borg u nonostante li c-cavetta kienet fdatha lil Monique Borg, kien hemm okkazjonijiet fejn kien jitla' Ludvic Bugeja fl-appartament taghha. Fl-istqarrija taghha, u dan ma giex kontradett, qalet li dakinhar li Katia Chisari telghet bid-droga ma kinitx l-ewwel darba li kienu tellghu d-droga ghandha u din il-bicca xoghol kienet ilha sejra xi xahar, "kemm ilni li tajtha c-cavetta". Kwantu ghall-okkazjoni meta tghid li Katia Chisari tellghet id-droga, mill-istqarrija ta' Maryanne Zerafa jirrizulta li Katia Chisari stess indikatilha x'kellha f'idejha.

L-ewwel Qorti fis-sentenza taghha wkoll irreferiet ghal dak li qalet Maryanne Zerafa dwar l-appellant fis-sens li l-appellant "kien qed itella' u jnizzel id-droga regolarment hu waqt li kien qed joqghod ma' Monique Borg li kellha access ghall-appartament ta' Maryanne Zerafa ghax kellha c-cavetta. Huwa sahansitra <u>kien ghamel ftehim ma'</u>

Maryanne Zerafa sabiex id-droga tinzamm fl-appartament ta' din tal-ahhar biex il-Pulizija ma jsibu xejn ghaliex il-Pulizija lanqas biss kienu jafu biha" (sottolinear ta' din il-Qorti). Dan kollu ma jinsab b'ebda mod kontradett.

Ghalhekk l-ewwel Qorti setghet ragjonevolment u legalment tikkonkludi li l-appellant kien hati taz-zewg imputazzjonijiet dedotti kontra tieghu bhala awtur. Jekk Maryanne Zerafa nstabet hatja ta' pussess kontra l-ligi ta' l-istess droga, ma jfissirx li l-appellant ma setax jinstab hati hu ukoll ta' pussess ta' l-istess droga. Maryanne Zerafa kellha l-pussess tad-droga waqt li din kienet fl-appartament taghha filwaqt illi l-appellant kellu tali pussess kemm barra mill-imsemmi appartament kif ukoll gewwa l-istess appartament in vista ta' l-access li kellu ghall-appartament kif spjegat Maryanne Zerafa. Huwa ghal kollox irrilevanti li haddiehor instab hati bhala komplici.

Konsegwentement l-ewwel aggravju huwa michud.

It-tieni aggravju jirrigwarda l-piena li l-appellant iqis eccessiva. Jghid li filwaqt li l-piena tal-komplici u dik ta' l-awtur hija l-istess, f'dan il-kaz min instab hati bhala komplici nghata piena ferm izghar. Jirreferi ghall-fatt li l-appellant ghandu fedina penali nadifa filwaqt illi Monique Borg hija recidiva u kisret il-provvedimenti ta' ordni ta' probation, u ghalhekk hemm sproporzjonalita` bejn il-pieni.

L-ewwelnett l-appellant mhuwiex korrett meta jghid li Monique Borg kienet recidiva u kisret ordni ta' *probation*. Dak li giet akkuzata li kisret kien ordni ta' *conditional discharge*, u min jikkommetti reat waqt perijodu ta' *probation* jew perijodu ta' *conditional discharge* ma jitqiesx recidiv. Dwar id-disparita` ta' sentenzi l-Qrati Inglizi kellhom okkazjoni jittrattaw sitwazzjonijiet simili u minn dik il-gurisprudenza wiehed jista' jislet certi linji ta' gwida. F'*Blackstones Criminal Practice*, 2001 (para. D22.47 a fol. 1650) jinghad:

“A marked difference in the sentences given to joint offenders is sometimes used as a ground of appeal by the offender receiving the heavier sentence. The approach of the Court of Appeal to such appeals has not been entirely consistent. The dominant line of authority is represented by *Stroud* (1977) 65 Cr App R 150. In his judgment in that case, Scarman LJ stated that disparity can never in itself be a sufficient ground of appeal - the question for the Court of Appeal is simply whether the sentence received by the appellant was wrong in principle or manifestly excessive. If it was not, the appeal should be dismissed, even though a co-offender was, in the Court of Appeal’s view, treated with undue leniency. To reduce the heavier sentence would simply result in two rather than one, over-lenient penalties. As his lordship put it, ‘The appellant’s proposition is that where you have one wrong sentence and one right sentence, this court should produce two wrong sentences. That is a submission which this court cannot accept. Other similar decisions include *Brown* [1975] Crim LR 177, *Hair* [1978] Crim LR 698 and *Weekes* (1980) 74 Cr App R 161…. However, despite the above line of authority, cases continue to occur in which the Court of Appeal seems to regard disparity as at least a factor in whether or not to allow an appeal (see, for example, *Wood* (1983) 5 Cr App R (S) 381). The true position may be that, if the appealed sentence was clearly in the right band, disparity with a co-offender’s sentence will be disregarded and any appeal dismissed, but where a sentence was, on any view, somewhat severe, the fact that a co-offender was more leniently dealt with may tip the scales and result in a reduction.

Most cases of disparity arise out of co-offenders being sentenced by different judges on different occasions. Where, however, co-offenders are dealt with together by the same judge, the court may be more willing to allow an appeal on the basis of disparity. The question then is whether the offender sentenced more heavily has been left with ‘an

understandable and burning sense of grievance' (*Dickinson* [1977] Crim LR 303). If he has, the Court of Appeal will at least consider reducing his sentence. Even so, the prime question remains one of whether the appealed sentence was in itself too severe. Thus, in *Nooy* (1982) 4 Cr App R (S) 308, appeals against terms of 18 months and nine months imposed on N and S at the same time as their almost equally culpable co-offenders received three months were dismissed. Lawton LJ said:

There is authority for saying that if a disparity of sentence is such that appellants have a grievance, that is a factor to be taken into account. Undoubtedly, it is a factor to be taken into account, but the important factor for the court to consider is whether the sentences which were in fact passed were the right sentences."

Archbold, f'*Criminal Pleading, Evidence and Practice*, 2001 (para. 5-174, p. 571) jikkummenta hekk:

"Where an offender has received a sentence which is not open to criticism when considered in isolation, but which is significantly more severe than has been imposed on his accomplice, and there is no reason for the differentiation, the Court of Appeal may reduce the sentence, but only if the disparity is serious. The current formulation of the test has been stated in the form of the question: 'would right-thinking members of the public, with full knowledge of the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice?' (per Lawton L.J. in *R. v. Fawcett*, 5 Cr. App.R.(S) 158 C.A.). The court will not make comparisons with sentences passed in the Crown Courts in cases unconnected with that of the appellant (see *R. v. Large*, 3 Cr.App.R.(S) 80, C.A.). There is some authority for the view that disparity will be entertained as a ground of appeal only in relation to sentences passed on different offenders on the same occasion: see *R.v. Stroud*, 65 Cr. App.R. 150,

C.A. It appears to have been ignored in more recent decisions, such as *R. v. Wood,* 5 Cr.App.R.(S) 381. C.A., *Fawcett*, ante, and *Broadbridge*, ante. The present position seems to be that the court will entertain submissions based on disparity of sentence between offenders involved in the same case, irrespective of whether they were sentenced on the same occasion or by the same judge, so long as the test stated in *Fawcett* is satisfied."

Katia Chisari nstabet hatja bhala komplici izda hi kellha biss sittax-il sena meta sehh il-kaz u ghalhekk hija tibbenefika minn tnaqqis fil-piena skond l-artikolu 37 tal-Kap. 9 tal-Ligijiet ta' Malta. Fil-kaz ta' Monique Borg, il-piena nflitta hi taht il-*minimum* stabbilit mil-ligi, izda stante li l-Avukat Generali ma appellax mis-sentenza moghtija fil-konfront taghha, ma jista' jkun hemm ebda revizjoni 'l fuq tal-piena. Inoltre m'hemm l-ebda dubju li l-ewwel Qorti qieset ukoll il-grad rispettiv ta' reita` rizultanti ta' l-imputati. Meta mbaghad wiehed iqis l-ammont ta' droga nvoluta, din il-Qorti ma tara l-ebda raguni biex tiddisturba l-*quantum* tal-piena nflitta mill-ewwel Qorti fir-rigward ta' l-appellant.

Ghal dawn il-motivi:

Tiddeciedi billi tichad l-appell u tikkonferma s-sentenza appellata fl-intier, b'dan li l-perijodu ghall-hlas tal-multa jibda jiddekorri millum.

< Sentenza Finali >

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