MALTA

QORTI KRIMINALI

ONOR. IMHALLEF
LAWRENCE QUINTANO

Seduta ta' l-14 ta' Mejju, 2012

Numru 6/2011

Ir-Repubblika ta' Malta
Vs
Christian Grech

Sentenza dwar l-Eċċezzjonijiet Preliminari.

Il-Qorti,

Rat l-Att tal-Akkuża numru 6 tas-sena 2011 kontra l-akkużat Christian Grech, li bih huwa ġie akkużat talli:

1. Wara li l-Avukat Ġenerali ppremetta fl-Ewwel Kap illi fil-bidu tax-xahar ta' Mejju tas-sena elfejn u sebgħa (2007) il-pulizija rċevew rapporti minn diversi nisa ta' nazzjonalita` barranija li allegaw li kienu qedgħin jinżammu ġewwa dar hawn Malta kontra r-rieda tagħhom u ġew imġiegħla jipprostitwixxu ruħhom. Wara li dawn in-nisa ġew mitkellma mill-pulizija huma indikaw xi persuni li kienu involuti fit-tmexxija ta' din l-operazzjoni illegali u fosthom semmew lil Christian Grech qua l-akkużat f'dawn il-proċeduri.

Illi irriżulta minn investigazzjonijiet aktar akkurati li bejn Lulju tas-sena elfejn u erbgħa (2004) u Mejju tas-sena elfejn u sebgħa (2007), l-akkużat kien għamel trasferimenti ta' flejjes f'ammonti konsiderevoli lil dsatax il-persuna differenti, liema trasferimenti ta' flus seħħew bejn Malta u r-Russja. L-istat ta' fatt tal-akkużat u l-impjieg tiegħu f'ebda mod ma seta' jiġġustifika il-provenjenza ta' dawn l-ammonti ta' flus ammontanti għat-total ta' €31,507.37. Filfatt minn dak li rriżulta waqt l-investigazzjonijiet ma kienx hemm spjegazzjoni valida tal- provenzjenza tal-flejjes in kwistjoni.

Meta ġie mitkellem l-akkużat, hu stqarr *ex admissis* li dawn il-flejjes kienu xjentement ġejjin minn *racket* ta' prostituzzjoni li kienet immexxija minn martu u hu kien għamel dawn it-trasferimenti ta' dawn il-flejjes maħmuġin fuq ismu. B'dan il-mod l-akkużat kien f'posizzjoni xjenti li jikkonverti l-provenjenza ta dawn il-flus minn waħda illeċita għal waħda leġittima filwaqt li jaħbi l-illegalita` tal-istess.

Illi b'għemilu l-imsemmi Christian Grech sar ħati talli fil-bidu ta' Mejju tas-sena elfejn u sebgħa (2007) u fis-snin ta' qabel, b'diversi atti magħmulin fi żminijiet differenti, li jiksru l-istess disposizzjoni tal-liġi, u li ġew magħmula b'riżoluzzjoni waħda, kkometta atti ta' ħasil ta' flus billi:

(i) ikkonverta jew trasferixxa proprjetà meta kien jaf li dik il-proprjetà tkun direttament jew indirettament inkisbet minn, jew mir-rikavat ta', attività kriminali jew minn att jew atti ta' parteċipazzjoni f'attività kriminali, għall-iskop ta' jew skopijiet ta' ħabi jew wiri ta' ħaġa b'oħra ta' l-oriġini tal-proprjetà jew ta' għoti ta' għajnuna lil xi persuna jew persuni involuti jew konċernati f'attività kriminali;

(ii) ħeba jew wera ħaġa b'oħra tal-veri xorta, provenjenza, lok, disposizzjoni, moviment ta' jeddijiet rigward, fi jew fuq proprjetà, meta kien jaf jew jissuspetta li dik il-proprjetà inkisbet direttament jew indirettament minn

attività kriminali jew minn att jew atti ta' parteċipazzjoni f'attività kriminali;

(iii) akkwista proprjetà meta kien jaf li l-istess proprjetà inkisbet jew oriġinat direttament jew indirettament minn attività kriminali jew minn att jew atti ta' parteċipazzjoni f'attività kriminali;

(iv) irritjena mingħajr skuża raġonevoli proprjetà meta kien jaf li l-istess proprjetà inkisbet jew oriġinat direttament jew indirettament minn attività kriminali jew minn att jew atti ta' parteċipazzjoni f'attività kriminali;

(v) għamel tentattiv ta' xi ħwejjeġ jew attivitajiet definiti fis-sub-paragrafi (i), (ii), (iii) u (iv) ta' hawn fuq, u dan fit-tifsir ta' l-artikolu 41 tal-Kodiċi Kriminali;

(vi) aġixxa bħala kompliċi fit-tifsir ta' l-artikolu 42 tal-Kodiċi Kriminali rigward xi waħda mill-ħwejjeġ jew attivitajiet definiti fis-sub-paragrafi (i), (ii), (iii), (iv) u (v) ta' hawn fuq;

Għaldaqstant l-Avukat Ġenerali, fl-isem fuq imsemmi, akkuża lill-imsemmi Christian Grech talli, fil-bidu ta' Mejju tas-sena elfejn u sebgħa (2007) u fis- snin ta' qabel, b'diversi atti magħmulin fi żminijiet differenti, li jiksru l-istess disposizzjoni tal-liġi, u li ġew magħmula b'riżoluzzjoni waħda, sar ħati ta' atti ta' ħasil ta' flus billi:

(i) ikkonverta jew trasferixxa proprjetà meta kien jaf li dik il-proprjetà tkun direttament jew indirettament inkisbet minn, jew mir-rikavat ta', attività kriminali jew minn att jew atti ta' parteċipazzjoni f'attività kriminali, għall-iskop ta' jew skopijiet ta' ħabi jew wiri ta' ħaġa b'oħra ta' l-oriġini tal-proprjetà jew ta' għoti ta' għajnuna lil xi persuna jew persuni involuti jew konċernati f'attività kriminali;

(ii) ħeba jew wera ħaġa b'oħra tal-veri xorta, provenjenza, lok, disposizzjoni, moviment ta' jeddijiet rigward, fi jew fuq proprjetà, meta kien jaf jew jissuspetta li dik il-proprjetà inkisbet direttament jew indirettament minn

attività kriminali jew minn att jew atti ta’ parteċipazzjoni f’attività kriminali;

(iii) akkwista proprjetà meta kien jaf li l-istess proprjetà inkisbet jew oriġinat direttament jew indirettament minn attività kriminali jew minn att jew atti ta’ parteċipazzjoni f’attività kriminali;

(iv) irritjena mingħajr skuża raġonevoli proprjetà meta kien jaf li l-istess proprjetà inkisbet jew oriġinat direttament jew indirettament minn attività kriminali jew minn att jew atti ta’ parteċipazzjoni f’attività kriminali;

(v) għamel tentattiv ta’ xi ħwejjeġ jew attivitajiet definiti fis-sub-paragrafi (i), (ii), (iii) u (iv) ta’ hawn fuq, u dan fit-tifsir ta’ l-artikolu 41 tal-Kodiċi Kriminali;

(vi) aġixxa bħala kompliċi fit-tifsir ta’ l-artikolu 42 tal-Kodiċi Kriminali rigward xi waħda mill-ħwejjeġ jew attivitajiet definiti fis-sub-paragrafi (i), (ii), (iii), (iv) u (v) ta’ hawn fuq;

Talab li jingħamel skond il-liġi kontra l-imsemmi akkużat u illi hu jiġi kkundannat għall-piena ta’ priġunerija għal żmien mhux inqas minn tliet snin iżda mhux iżjed minn tletin sena, jew multa ta’ mhux inqas minn tlieta u għoxrin elf, mitejn u tlieta u disgħin euro u tlieta u sebgħin ċenteżmu (€23,293.73) iżda mhux iżjed minn żewġ miljuni tliet mija u disgħa u għoxrin elf tliet mija u tlieta u sebgħin euro u erbgħin ċenteżmu (€2,329,373.40), jew dik il-multa u priġunerija flimkien skond dak li hemm u jintqal fl-artikoli 2, 3(1), 3(2A)(a)(i), 3(3), 3(5) u 5 tal-Kapitolu 373 tal-Liġijiet ta’ Malta, u skond l-artikoli 18, 23, 23B, 31 u 533 tal-Kodiċi Kriminali, jew għal kull piena oħra li tista’ skond il-liġi tingħata għall-ħtija ta’ l-imsemmi akkużat.

Rat l-atti kollha proċesswali, inklużi l-atti tal-kumpilazzjoni.

Semgħet it-trattazzjoni tal-abbli Prosekutur u tal-abbli Difensur.

Rat in-Nota tal-eċċezzjonijiet tal-akkużat ippreżentata fil-15 ta' April, 2011 fejn eċċepixxa li :

1. Illi huwa jinsab ghaddej proceduri kriminali quddiem l-Onorabbli Qorti tal-Magistrati (Malta) (Kumpilazzjoni Numru: 401/07) b'akkuzi relatati ma' prostituzzjoni u fost id-diversi akkuzi addebitati lilu, huwa jinsab akkuzat ukoll talli fit-tlieta (3) ta' Mejju u fix-xhur precedenti, xjentement ghex ghal kollox jew in parti mill-qliegh tal-prostituzzjoni ta' persuna ta' nazzjonalita barranija;

Illi ghalhekk, jirrizulta illi l-fatti ta' dan ir-reat addebitat lilu permezz ta' l-att ta' akkuza odjerna, u cioe illi l-flejjes illi huwa trasferixxa lejn ir-Russja, kellhom provenjenza allegatament illegali, jinkwadraw ruhhom perfettament fir-reat addebitat lilu permezz tal-proceduri pendenti quddien il-Qorti tal-Magistrati u cioe illi huwa ghex ghal kollox jew in parti mill-qliegh tal-prostituzzjoni;

Illi konsegwentement qed tigi ecepita l-eccezzjoni tan-*nebis in idem*. F'sentenza moghtija mill-Qorti Kostituzjonali, nhar il-hamsa u ghoxrin (25) ta' Mejju, tas-sena elfejn u ghaxra (2010), fl-ismijiet Francis Vella vs Avvukat Generali, il-Qorti fil-konsiderazzjonijiet taghha, spjegat hekk il-principju tan- *nebis in idem*: 'Il-Kostituzzjonali ta' Malta u l-Konvenzjoni Ewropeja jiprojbixxu proceduri kriminali darbtejn fuq l-istess fatt, anke jekk fit-tieni process tinbidel in *nomen iuris* ta' l-akkuza...'

2. Illi l-akkuzi kollha ta' l-uniku Kap t'Akkuza addebitati lil l-akkuzat fl-ewwel Kap t'Akkuza, huma kollha nulli, u dan peress illi l-akkuzat ghadu ma nstabx hati illi huwa kien involut fl-attivita kriminali tal-prostituzzjoni, u ghalhekk m'hemmx prova illi l-provenjenza tal-flus illi huwa trasferixxa barra minn Malta, li allegatament gew mill-qliegh tal-prostituzzjoni, kienet wahda illegali. Filfatt il-proceduri fil-konfronti tieghu ghadhom pendenti u ghalhekk l-akkuzat ghadu nnocenti u ebda Qorti ma tista f'dan l-istadju ma tista taghti decizjoni illi tista taffettwa l-ezitu ta' dawn il-proceduri; konsegwentement ma jistax jigi

allegat illi l-flus li huwa kien trasferixxa kienu gejjin minn *racket* ta' prostituzzjoni li kienet immexija minn martu, kif qed isostni l-Avvukat Generali fl-Att t'Akkuza. Inoltre, martu stess illi tissemma fl-Att t'Akkuza, lanqas biss giet indikata bhala xhud ta' l-Avvukat Generali, u s'issa ebda passi qatt ma ittiehdu fil-konfronti taghha;

3. Illi fil-parti narrativa ta' l-Att t'Akkuza, l-Avvukat Generali testwalment jghid: '*meta gie mitkellem l-akkuzat, hu stqarr ex-admissis li dawn il-flejjes kienu xjentement gejjin minn racket ta' prostituzzjoni li kienet imexxija minn martu u hu kien ghamel dawn it-trasferiment ta' flejjes mahmugin fuq ismu.'* Dawn il-kliem ghandhom jigu kancellati, u dan fid-dawl tal-fatt illi l-imputat irrilaxxa l-istqarrija tieghu qabel l-emendi ricenti ta' frar tas-sena elfejn u ghaxra (2010) meta ma kienx asisstit minn avvukat. Allura d-dritt tieghu ta' smiegh xierqa gie lez. La darba it-tehid ta' din l-isqarrija, tledi d-drittijiet fundamentali ta' l-akkuzat u ghalhekk ebda parti minnha ma ghandha tigi riprodotta f'dan l-istadju. Dan qed jinghad fil-dawl tal-gurisprudenza tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem, u senjatament b'referenza ghall-kaz fl-ismijiet Salduz vs Turkey, Plonka vs Polonja, u Panavotis vs Grecja, fejn il-Qorti Ewropeja kkristalizzat il-principju illi d-dritt sancit illi persuna tkun assista mill-konsulent legali taghha, ghandha tinghata nterpretazzjoni wiesgha, tant li tinkludi d-dritt illi persuna tkun hekk assistita sa mill-bidu tal-proceduri, inkluz waqt il-kors ta' l-investigazzjoni mill-Pulizija. Inoltre, ssir referenza wkoll ghas-sentenzi fl-ismijiet, (konfermati fis-sede t'Appell) Il-Pulizija vs Alvin Privitera (Kawza Numru 20/2009), il-Pulizija vs Esron Pullicino (Kawza Numru: 63/2009) u Il-Pulizija vs Mark Lombardi, fejn il-Qrati taghna kristalizzaw l-istess principju, filwaqt illi sahqu illi l-fatt illi persuna tirilaxxa stqarrija, minghajr ma tinghata l-fakulta illi tikkonsulta ma' avvukat qabel taghmel dan, iledi d-dritt ta' l-istess ghal smiegh xieraq stante li johloq zbilanc bejn id-drittijiet tal-persuna investigata u l-prosekuzzjoni.

4. Illi x-xhud Manuel Darmanin, li xehed nhar il-erbgha u ghoxrin (24) ta' April, tas-sena 2009, (depozizzjoni a Fol 100 tal-process) mhux xhud rilevanti u ghalhekk mhux

amissibli, stante illi ma ezebixxa ebda dokument. Dan qed jinghad peress illi l-iskop ta' dan ix-xhud kien propju li jezebixxi l-VAT Returns ta' l-akkuzat, liema ma kenitx possibli stante illi l-akkuzat kien ghadu kemm irregistra mad-dipartiment tal-VAT u ma kien ghadu dahhal ebda *return.*

5. Illi l-istess jinghad ghax-xhieda ta' Joseph Vigar li ukoll xehed nhar il-erbgha u ghoxrin (24) ta' April, tas-sena 2009, (dipozizzjoni a Fol 102 tal-process). L-iskop tal-prosekuzzjoni, li tingungi lil dan ix-xhud kien unikament biex taghmel il-prova illi l-akkuzat kien allegatament jikri l-fond bl-indirzz 7, 'Hacienda' Triq is-Sirti, San Giljan, sabiex ihaddem in-nisa. Ix-xhieda tieghu hija fl-intier taghha *hearsay evidence* u dan peress illi ibnu huwa s-sid tal-fond inkwistjoni, liema jinsab imsiefer u ghalhekk qatt ma xehed. Inoltre x-xhud Joseph Vigar ma ezebixxa l-ebda skrittura xhieda ta' dan il-kiri ta' dan il-fond, u ghalhekk dan ix-xhud ma jaghmel ebda prova kontra l-akkuzat stante illi huwa irrelevanti, u konsegwentement inamissibli.

6. Illi x-xhieda ta' l-esperti kollha nominati fl-inkjesta u cioe Avv. Dott Joseph Arrigo, Martin Bajada, Robert Cardona, PS 171 Karl Glanville u WPS 148 Denise Camilleri hija inamissibli u dan peress illi ma ssegwiex id-dettami tal-ligi, stante illi l-Qorti Struttorja, fl-ebda hin ma irikkonfermat il-hatra taghhom;

Rat ukoll id-digriet ta' llum 14 ta' Mejju, 2012 dwar kliem li kellu jitnehha mill- att tal-akkuza.

L-Ewwel Eċċezzjoni – Ne bis in idem

Qorti tal-Appell Kriminali

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

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

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

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

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

' In any such case if the agent is tried for any one of the several violations of the law arising out of that fact, be it even the least serious, and a judgement is given, it shall not be lawful to subject the agent to another trial for the more serious violations.
This principle, first expressly affirmed in 'Rex versus Rosaria Portelli' has now become settled law.'

Fil-fatt fit-2 ta' Diċembru, 1939, l-Imħallef Harding fil-każ 'Camilleri versus Cilia'
kien qal li huwa prinċipju stabbilit fil-ġurisprudenza tagħna li meta mill-istess fatt, mibni fuq l-istess intenzjoni, jinkisru żewġ drittijiet jew aktar, m'hemmx pluralita' ta' offiżi iżda offiża waħda bil-vjolazzjoni li jkunu iżgħar jkunu assorbiti fil-vjolazzjoni l-aktar serja. U jekk persuna tkun iġġudikata għal waħda mill-vjolazzjonijiet u jkun meħlus jew jinsab ħati, is-sentenza iżżomm kull prosekuzzjoni ġdida li tista' ssir għal kull vjolazzjoni oħra, ukoll jekk il-vjolazzjoni li jkun tressaq fuqha l-ewwel darba tkun l-anqas waħda serja.

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

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

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

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

(b) Mill-każistika tal-Qorti Kostituzzjonali.

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

(i) Il-Pulizija (Spettur Angelo Caruana) versus Anthony Zammit, John Woods u Ahmed Esawi Mohamed Fakri ta' l-10 ta' Jannar 2005; u

(ii) Il-Pulizija (Spettur Jesmond Borg) versus Kevin Gatt tal-15 t'April, 2008

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

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

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

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

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

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

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

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

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

L-eċċezzjoni ta' nebis in idem għandha tiġi mistħarrġa u deċiża mill-Qorti li quddiemha jinġieb l-akkużat u wara, jekk ikun il-każ, il-Qorti ta' l-Appell Kriminali.

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

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

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

'THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

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

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

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

Omissis

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

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

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

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

Omissis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

U fil-European Court of Justice

Din hija l-Opinjoni ta' Kokott fil-każ ta' Toshiba (C-17/10) 14 ta' Frar 2012.

Il-Qorti għandha tuża l-istess kriterju – ikun xi jkun il-każ quddiemha u mhux tuża kriterja differenti skont il-kontenut. U dejjem għandu jintgħarbel jekk kienx hemm l-istess fatt jew fatti. U hawn hija l-parti l-aktar importanti l-Opinjoni tal-Avukat Ġenerali.

'117. To interpret and apply the *ne bis in idem* principle so differently depending on the area of law concerned is detrimental to the unity of the EU legal order. The crucial importance of the *ne bis in idem* principle as a founding principle of EU law which enjoys the status of a fundamental right means that its content must not be substantially different depending on which area of law is

concerned. (127) For the purposes of determining the scope of the guarantee provided by the *ne bis in idem* principle, as now codified in Article 50 of the Charter of Fundamental Rights, the same criteria should apply in all areas of EU law. This point has rightly been made by the EFTA Surveillance Authority.

118. There is no objective reason why the conditions to which the *ne bis in idem* principle is subject in competition matters should be any different from those applicable to it elsewhere. For, in the same way as, within the context of Article 54 of the CISA, that principle serves to guarantee the free movement of EU citizens in EU territory as a 'single area of freedom, security and justice', (128) so, in the field of competition law, it helps to improve and facilitate the business activities of undertakings in the internal market and, ultimately, to create uniform conditions of competition (a 'level playing field') throughout the EEA.

119. For the purposes of identifying the relevant criteria for defining *idem*, it must be borne in mind that the *ne bis in idem* principle is based largely on a fundamental right enshrined in the ECHR, (129) more specifically, Article 4(1) of Protocol No 7 to the ECHR, although that protocol has not yet been ratified by all the EU Member States. (130) That close proximity to the ECHR is indicated not only by the Explanations on Article 50 of the Charter of Fundamental Rights, which must be duly taken into account by the courts of the European Union and of the Member States, (131) but also by the previous case-law of the Court of Justice concerning the general EU-law principle of *ne bis in idem*. (132)

120. The requirement of homogeneity (133) is therefore applicable. It follows from that requirement that rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR. In other words, Article 4(1) of Protocol No 7 to the ECHR, as interpreted by the European Court of Human Rights (ECtHR), describes the minimum standard that must be guaranteed in the interpretation and application of the *ne bis in idem* principle in EU law.

121. Whereas the case-law of the ECtHR on the meaning of *idem* had lacked uniformity for a long time, the ECtHR held, in a landmark judgment in 2009, that Article 4 of Protocol No 7 to the ECHR prohibits the prosecution or trial of a second offence in so far as it arises from identical facts or facts which are substantially the same. (134) This means that the ECtHR has regard only to whether or not the facts are identical and expressly not to the legal classification of the offence. (135) Moreover, in so doing, it is itself guided primarily by the case-law of the Court of Justice on the area of freedom, security and justice. (136) In addition, the form of words used by the ECtHR to define the meaning of identical facts is very similar to that employed by the Court of Justice. There is nothing to indicate that the ECtHR might be inclined to the view that the scope of the guarantee provided by the *ne bis in idem* principle is less extensive specifically in the area of competition law. (137) On the contrary, while the judgment of the Court of Justice in *Aalborg Portland*, which establishes the criterion of unity of the legal interest protected, is cited by the ECtHR, it does not rely on it as a basis for its interpretation of the *ne bis in idem* principle. (138)

122. It follows that, for the purposes of interpreting and applying *idem* in the context of the prohibition against prosecution and punishment for the same cause of action under EU law also, account should henceforth be taken only of the identity of the facts (which necessarily includes the unity of the offender).'

Ikkonsidrat

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

mogħtija hawn fuq jidher li l-Qrati sabu ‘l-istess fatt’ meta l-azzjonijiet kollha kellhom tassew x’jaqsmu mal-istess fatt.

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

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

Issa fil-każ ta’ llum, l-akkużat għaddej proċeduri fuq akkużi oħra fi proċeduri differenti - huma x’inhuma – iżda mhux ta’ money laundering jew ħasil tal-flus. Il-fatt li wieħed ikun għaddej proċeduri fuq l-underlying criminal act ma jfissirx li ma jistax jiffaċċja proċeduri oħrajn fuq il-ħasil tal-flus. Wieħed jista’ jisraq u jkun akkużat b’serq. Iżda jekk f’xi żmien – ukoll qabel ma jkunu ntemmu l-proċeduri ta’ serq – huwa jittrasferixxi dak li seraq (per eżempju, billi jpoġġi s-somma ġo bank) m’hemm xejn x’iżomm lill-awtoritajiet li jieħdu proċeduri kontrih minħabba ħasil ta’ flus.

Ir-reat ta’ serq mhux ir-reat ta’ ħasil ta’ flus u l-fatt tas-serqa mhux il-fatt tal-money laundering.

Għalhekk m’għandekx l-istess fatti. Anzi l-istess Kap 373 jipprovdi hekk:

‘Persuna tista’ tinstab ħatja separatament kemm ta’ delitt ta’ money laundering taħt dan l-Att, kif ukoll ta’ l-attività kriminali sottostanti li minnha inkisbet il-proprjetà jew ir-rikavat li fir-rigward tiegħu ikun qed jiġi akkużat ta’ money laundering.’

Id-difiża tissottometti li hemm ‘overlapping’ bejn qligħ li ġej mill-prostituzzjoni (li jkun parti mir-reat) u l-money laundering. Iżda bir-rispett kollu dan mhux legalment korrett. Fil-Money Laundering, wieħed ikun akkużat li kkonverta jew ittrasferixxa propjeta’ li kien jaf li ġejja mir-rikavat ta’ attivita’ kriminali jew li ħeba jew wera ħaġa

b'oħra tal-vera xorta, provenjenza, lok dispożizzjonita' proprjeta' li jkun jaf li ġejja direttament jew indirettament minn attivita' kriminali. U l-liġi tipprospetta tliet sitwazzjonijiet oħra ta' kif jista' jsir il-ħasil tal-flus. Mela jekk wieħed għandu traffikar ta' persuni jew qed jgħix minn fuq il-prostituzzjoni mhux ekwivalenti għal li jaqbad dak il-qligħ u jittrasferih jew jaħbih jew jagħtih lil ħadd ieħor biex iżommhulu. Is-sustanza tat-tieni reat hija għal kollox differenti mis-sustanza tal-ewwel reat. **Isegwi li m'hemm ebda overlapping bejn ir-reat li bih huwa akkużat l-akkużat innifsu fi proċeduri oħrajn u r-reat tal-money laundering. Il-fatti huma għal kollox differenti u la l-fatti huma differenti għal kollox m'hemmx każ ta' 'ne bis in idem'.** Il-Qorti tfakkar li s-sorsi tal-Kap 373 huma d-diversi Direttivi tal-Unjoni Ewropea li s'iss ħarġu tlieta u oħra għandha toħroġ f'April ta' din is-sena, il-Konvenzjoni Dwar il-Ħasil tal-Flus tal-Kunsill tal-Ewropa, u l-Konvenzjoni dwar id-drogi Psikotropiċi tal-Ġnus Magħquda ta' Vienna 1988.

Għaldaqstant il-Qorti qed tiċħad l-ewwel eċċezzjoni.

It-Tieni Eċċezzjoni – Nullita' tal-akkużi.

Fil-qosor, l-akkużat jgħid li huwa qatt ma nstab ħati tar-reat ta' prostituzzjoni. Dawn il-proċeduri għadhom pendenti. Allura ma jistax jingħad li huwa ttrasferixxa flus li kienu ġejjin minn racket ta' prostituzzjoni.

Bir-rispett kollha l-Qorti am qed tara ebda nullita' fl-Att tal-akkuża. Li jrid isir matul il-proċeduri tal-akkuża tal-Money Laundering huwa li jkunu ippruvati - kemm quddiem ġurija u kemm quddiem ġudikant- u l-provi jridu jsiru **'l hemm minn kull dubju raġonevol**i

(a) Li l-akkużat wettaq ir-reat li għandu x'jaqsam mal-underlying criminal activity u
(b) Li l-akkużat għamel waħda jew aktar mill-azzjonijiet prospettati taħt id-definizzjoni ta' money laundering kif jidhru fil-Kap 373 u li kien **jaf** li l-proprjeta' (bid-definizzjoni

ampja tagħha kif tidher fil-Kap 373) kienet ġejja minn attivita' kriminali.

Isegwi li ma hemm nullita' fil-Kap tal-akkuża.

Għalhekk il-Qorti qed tiċħad it-tieni eċċezzjoni.

It-tielet Eċċezzjoni - L-Istqarrija tal-Akkużat.

L-akkużat talab li jitneħħew ċerti kliem li jidhru fl-Att tal-Akkuża.

Il-pożizzjoni legali dwar l-istqarrijiet, ir-referenzi għalihom, u l-esibizzjoni tagħhom bħala prova huma bħal issa regolari bil-Kap 9 u bil-każistika tal-Qorti Kostituzzjonali. Sa meta qed tinkiteb din is-sentenza, il-parti tal-Kap 9 dwar l-istqarrija jew il-konfessjoni għadha ma nbidlitx. Għalhekk m'hemm xejn irregolari dwar il-kliem li jidher fl-Att tal-Akkuża.

Madankollu, wara li ngħataw għadd ta' deċiżjonijiet mill-Qorti Kostituzzjonali dwar dan il-punt, il-Qorti tirreserva li tagħti dawk id-direzzjonijiet lill-ġurija (jekk il-każ jinstema' bil-ġurati) li jidhirlha xierqa fid-dawl tal-każistika li saret referenza għaliha.

Dak li ngħad dwar il-kliem fl-Att tal-Akkuża jgħodd ukoll għat-talba dwar l-isfilz, Jiġifieri li Qorti mhix ser tordna l-isfilz tal-istqarrija.

Għalhekk il-Qorti qed tiċħad it-tielet eċċezzjoni tal-akkużat.

Ir-raba' eċċezzjoni – ix-xhieda ta' Manuel Darmanin.

L-akkużat jissometti li peress li dan ix-xhud ma ssottometta ebda document tal-VAT returns, allura dan ix-xhud mhux ammissibbli għax mhux rilevanti.

Il-Qrati tagħna dejjem għamlu distinzjoni bejn dak li hu ammissibbli u dak li huwa relevanti. Fil-Liġi m'hemm xejn

li jżomm li l-Prosekuzzjoni tipproduċi dan ix-xhud. Imbagħad, ikun għall-Qorti biex waqt il-ġuri tgħid jekk ix-xhud hux relevanti jew le. Iżda l-Qorti ma tistax f'dan l-istadju tiddikjara x-xhud hux relevanti jew le.

Għaldaqstant il-Qorti qed tiċħad din ir-raba' eċċezzjoni.

Il-ħames eċċezzjoni - Ix-xhieda ta' Joseph Vigar.

L-akkużat jirrepeti l-istess argument li għamel taħt ir-raba' eċċezzjoni – la dan ix-xhud huwa rrelevanti allura huwa inammissibbli. Il-Qorti tirreferi għal dak li diġa' qalet dwar dan l-argument meta kienet qed tiddeċiedi r-raba' eċċezzjoni.

Dwar ir-rule tal-hearsay evidence, l-artikolu 598 tal-Kap 12 kif applikkabbli għal Kap 9, iħalli f'idejn il-Qorti tammettix tali prova jekk din ikollha effett sustanzjali fuq il-każ. Li din ir-regola mhix assoluta, intwera fil-każ 'Al –Khawaja versus UK', każ deċiż mill-Grand Chamber tal-Qorti Ewropea dwar id-Drittijiet tal-Bniedem fil-15 ta' Diċembru 2011.

Għaldaqstant il-Qorti qed tiċħad il-ħames eċċezzjoni.

Is-Sitt eċċezzjoni. – Nuqqas ta' konferma tal-esperti.

L-ewwelnett, skont il-Prosekuzzjoni, dawn kienu ikkonfermati mill-Qorti li qed tisma' l-każ dwar l-underlying criminal act.

Iżda wkoll jekk dan ma sarx, ġaladarba Qorti tkun ippermettiet lill-esperti jiddeponu u jippreżentaw ir-rapporti tagħhom jew kopji tar-rapport oriġinali tagħhom, il-Qorti tkun qed tikkonferma l-esperti taċitament. Jekk tali konferma ma tkunx imniżżla f'xi verbal tas-seduti ma jfissirx li allura l-esperti ma kinux ikkonfermati jew li x-xiehda tagħhom għandha tkun sfilzata. Fil-Kap 9 m'hemm

imkien imniżżel li n-nuqqas ta’ tali verbal iġib xi nullita’ jew xi inammissibilita’.

Għalhekk il-Qorti qed tiċħad is-sitt eċċezzjoni.

< Sentenza Finali >

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