MALTA

QORTI TA' L-APPELL KRIMINALI

ONOR. IMHALLEF -- AGENT PRESIDENT
DAVID SCICLUNA

ONOR. IMHALLEF
ABIGAIL LOFARO

ONOR. IMHALLEF
JOSEPH ZAMMIT MC KEON

Seduta tat-12 ta' Dicembru, 2013

Numru 6/2011

Att ta’ Akkuża
Nru. 6/2011

Ir-Repubblika ta’ Malta

v.

Christian Grech

Il-Qorti:

1. Din hija sentenza dwar appell minn sentenza tal-Qorti Kriminali mogħtija minn dik il-Qorti fl-14 ta' Mejju 2012 dwar eccezzjonijiet preliminari ta' l-akkużat.

2. Christian Grech kien akkużat, permezz ta' Att ta' Akkuża ppreżentat mill-Avukat Ġenerali fl-24 ta' Marzu 2011 (nru 6/2011) li, 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 proprjeta` meta kien jaf li dik il-proprjeta` tkun direttament jew indirettament inkisbet minn, jew mir-rikavat ta', attivita` kriminali jew minn att jew atti ta' parteċipazzjoni f'attivita` kriminali, għall-iskop ta' jew skopijiet ta' ħabi jew wiri ta' ħaġa b'oħra ta' l-oriġini tal-proprjeta` jew ta' għoti ta' għajnuna lil xi persuna jew persuni involuti jew konċernati f'attivita` kriminali;

(ii) ħeba jew wera ħaġa b'oħra tal-veri xorta, provenjenza, lok, disposizzjoni, moviment ta' jeddijiet rigward, fi jew fuq proprjeta`, meta kien jaf jew jissuspetta li dik il-proprjeta` inkisbet direttament jew indirettament minn attivita` kriminali jew minn att jew atti ta' parteċipazzjoni f'attivita` kriminali;

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

(iv) irritjena mingħajr skuża raġonevoli proprjeta` meta kien jaf li l-istess proprjeta` inkisbet jew oriġinat direttament jew indirettament minn attivita` kriminali jew minn att jew atti ta' parteċipazzjoni f'attivita` 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.

3. Permezz tar-rikors ta' appell tiegħu l-akkużat talab li din il-Qorti tirriforma s-sentenza appellata billi tirrevokaha f'dik il-parti fejn ma laqgħetx l-ewwel eċċezzjoni u minflok tilqa' din l-eċċezzjoni mingħajr riservi, u tikkonferma s-sentenza fil-bqija.

4. Permezz ta' nota ta' l-eċċezzjonijiet ippreżentata fil-15 ta' April 2011 l-akkużat appellant eċċepixxa permezz ta' l-ewwel eċċezzjoni tiegħu:

"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 quddiem il-Qorti tal-Magistrati u cioe` illi huwa ghex ghal kollox jew in parti mill-qliegh tal-prostituzzjoni;

"Illi konsegwentement qed tigi eccepita l-eccezzjoni tan-*ne bis 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 Avukat Generali, il-Qorti fil-konsiderazzjonijiet taghha, spjegat hekk il-principju tan-*ne bis in idem*: 'Il-Kostituzzjoni 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..."

5. Fis-sentenza taghha dwar din l-ewwel eċċezzjoni, l-ewwel Qorti qalet hekk:

"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 jivvjola aktar minn provvediment wieħed tal-Liġi

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

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

"Dwar dan il-Professur Mamo fin-Noti tiegħu dwar 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 adjucation ought to be final….'

<u>"(b) Mill-każistika tal-Qorti Kostituzzjonali.</u>

"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.[1]

“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` provviżorja 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’.

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

[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’ *ne bis 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.

“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-prinċipju 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)

“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-liċenzja 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 kienu 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. Polten 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 (Strasenverkehrsordnung).

“On 18 March 1997 the St. Polten Regional Court (Landesgericht) convicted the applicant under Article 81 § 2 of the Criminal Code (Strafgesetzbuch) of causing death by negligence lafter 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 ideal 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 jista 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-attivita` kriminali sottostanti li minnha inkisbet il-proprjeta` jew ir-rikavat li fir-rigward tiegħu ikun qed jiġi akkużat ta' *money-laundering*.'

"Id-difiża tissottometti li hemm 'overlapping' bejn qliegħ 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

dispożizzjoni ta' 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 ħaddieħor 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'issa 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."

6. L-aggravju ta' l-appellant hu li l-Ewwel Qorti ma fehmitx l-argument sollevat minnu permezz ta' l-ewwel eċċezzjoni. Huwa jgħid:

"Fil-fatt, li qed jingħad mill-appellant huwa totalment differenti, u cioe` illi l-fatti, l-elementi kostituttivi ta' dawn ir-reati, addebitat lilu permezz ta' din l-att ta' akkuża, u cioe` illi l-flejjes illi huwa trasferixxa lejn ir-Russja għal skop ta' lukru jew benefiċċju għalih, jinkwadraw ruħhom perfettament fir-reat addebitat lilu permezz tal-proċedura pendenti quddiem il-Qorti tal-Maġistrati, u cioe` illi huwa kkonverta l-flus mill-qliegħ tal-prostituzzjoni, għal skop ta' lukru, u dan billi għex għal kollox jew in parti mill-qliegħ tal-prostituzzjoni.

"Fis-sustanza li wieħed jgħix mir-rikavat tal-prostituzzjoni, u cioe` illi jdawwar bi profitt/benefiċċju għalih ir-rikavat mill-prostituzzjoni, tant illi jgħix minn fuq l-istess, huwa element identiku għal dak tar-reat tal-*money-laundering* u

cioe` li wieħed idawwar a benefiċċju tiegħu, flejjes bi provenjenza allegatament illegali illi għalihom ma hemm l-ebda spjegazzjoni plawsibbli jew loġika.

“Dan ifisser illi l-elementi kostitutivi taż-żewġ reati in diżamina huma għal kollox identiċi, u b’hekk japplika l-prinċipju tan-*ne bis in idem*.

“Fis-sentenza minn referenza kostituzzjonali (li għadha *sub judice*) fl-ismijiet **Il-Pulizija vs Nicolai Christian Magrin**, deċiża mill-Qorti Ċivili (Sede Kostituzzjonali) fis-26 ta’ Marzu 2009, il-Qorti spjegat x’jikkostitwixxi l-istess fatt fil-prinċipju tan-*ne bis in idem*:

“‘Illi, madankollu, jidher li, f’dawn l-aħħar żminijiet, il-Qorti Ewropeja tad-Drittijiet tal-Bniedem fasslet kriterju maħsub biex jagħti ‘tifsira armoniżżata’ tal-kunċett tal-‘istess reat’. B’deċiżjoni meħuda mill-Grand Chamber, dik il-Qorti qalet li hija *‘takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second ‘offence’ in so far as it arises from identical facts or facts which are substantially the same.... The Court’s inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings.’*

“Bħala eżempju, ta’ fejn għandu japplika l-prinċipju tan-*ne bis in idem*, wieħed jista’ jieħu r-reat ta’ serq aggravat bil-mezz permezz ta’ sgass. Ċertament illi persuna, u dan minħabba l-prinċipju bażilari tan-*ne bis in idem*, ma jistax l-ewwel jiġi akkużat bis-serq aggravat bil-mezz, imbagħad fi proċeduri separati akkużat bir-reat tal-ħsara volontarja.

“L-istess jista’ jingħad għar-reati kontemplati fil-Kap. 373 u senjatament l-artikoli 2(1)(i) u 2(1)(ii). Jekk persuna jiġi akkużat bir-reat kontemplat fl-artikolu 2(1)(i), ma jistax wara, fi proċeduri separati, jiġi akkużat ai termini ta’ l-artikolu 2(1)(ii).

“Jiġi umilment sottomess illi dan mhux xi prinċipju ġenerali illi japplika għar-reati kollha. Bħala eżempju jista’ jintuża dak ta’ traffikar ta’ droga u *money-laundering*. Filwaqt illi l-element kostitutiv tar-reat ta’ traffikar ta’ droga jikkonsisti fil-fatt illi sustanza illegali, kontrollata bil-liġi, tgħaddi minn persuna għal oħra, mingħajr il-bżonn ta’ kwalunkwe korrispettiv, fir-reat ta’ *money-laundering* l-elementi kostitutivi tar-reat huma totalment differenti peress illi l-element bażiku huwa l-profitt. Għalhekk ċertament f’dan il-każ il-prinċipju tan-*ne bis in idem* ċertament ma japplikax.”

7. Din il-Qorti tgħid fl-ewwel lok illi ma taqbilx ma’ dak li qal l-appellant fir-rikors ta’ appell tiegħu li l-Ewwel Qorti ma fehmitx l-argument sollevat minnu bl-ewwel eċċezzjoni. Waqt sottomissjonijiet orali fil-fatt id-difensur il-ġdid ta’ l-appellant aċċetta li huwa hekk, u li dak li għamlet l-Ewwel Qorti kien li tat interpretazzjoni differenti minn dik li kien qiegħed jagħti l-appellant.

8. L-ilment ta’ l-appellant effettivament hu li qiegħed jiġi proċessat darbtejn għall-istess fatti. Skond id-difensur ta’ l-appellant, meta persuna qed tagħmel qliegħ mir-rikavat mill-prostituzzjoni ta’ persuna oħra, “huwa ovvju li kif ħa tipprova tiġġenera xi ħaġa oħra minn dan ir-rikavat u tipprova tikkonverti dan ir-rikavat, ħa tkun qed tgħix prattikament b’mod konkret minn dak il-qliegħ u allura tikkonverti l-istess rikavat.” Jgħid illi persuna tista’ tgħix minn fuq il-qliegħ b’elf mod differenti, “hawn min kull ma jaqla’ jġemmgħu, hawn min kull ma jaqla’ jonfqu, imma dawk huma forom differenti ta’ kif tgħix minn fuq il-qliegħ tiegħek.” Għalhekk isostni illi hawn si tratta ta’ fatt uniku u identiku għaż-żewġ reati.

9. Issa, l-artikolu 527 tal-Kap. 9 tal-Ligijiet ta’ Malta jipprovdi: **“Wara sentenza li f’kawza tillibera imputat jew akkuzat, dan ma jistax ghall-istess fatt ikun suggett ghal kawza ohra.”** F’dan il-każ l-appellant għandu żewġ proċedimenti kriminali mixjin kontra tiegħu, li l-ebda wieħed ma hu deċiż. F’wieħed minnhom qiegħed jiġi akkużat, *inter alia*, b’għixien minn fuq il-qliegħ tal-prostituzzjoni, u fil-proċediment odjern b’ħasil ta’ flus ġejjin mill-prostituzzjoni ta’ nisa li kienu qegħdin jinżammu

ġewwa dar kontra r-rieda tagħhom għal dan l-iskop. L-appellant iqis li hawn għandna l-istess fatt li jagħti lok għall-ksur ta' provvedimenti differenti tal-liġi. Mill-gurisprudenza tagħna, pero`, jirriżulta li l-Qrati sabu "l-istess fatt" meta l-azzjonijiet kollha kellhom tassew x'jaqsmu ma' l-istess fatt. Hekk, fil-każ **Rex v. Rosaria Portelli** (23 ta' Frar 1904, Vol. XIX.iv.1) l-imputata kienet waddbet *dish* tal-fuħħar lejn Riccarda Borg. Id-*dish* tal-fuħħar laqat lil Riccarda Borg f'wiċċha li rriżulta f'offiża ħafifa. Iżda framment laqat għajn John Borg li kien għaddej għall-affari tiegħu. Dan spiċċa jsofri offiża ta' natura gravi.

10. Il-Professur Mamo fin-Noti dwar il-Proċedura Kriminali jgħid hekk:

"But it must be strongly emphasised that for the plea to succeed the fresh proceedings must be placed on the very same fact. (Criminal Appeal: 'Il-Pulizija vs Piscopo' 21 ta' Marzu 1953). The mere circumstance that an act is done more or less at the same time (nello stesso contesto) as another act does not necessarily mean that they constitute one and the same fact, if the two are materially distinguishable as separate events (v. Cr.App. 'Pol vs Saliba 28/2/1953 and Pol vs Cassar 9/1/1954; cf also Cr.App Police vs Attard' 17/6/1950)."[2]

11. Fil-każ odjern, u partikolarment qabel ma nstemgħu l-provi fil-ġuri, diffiċilment wieħed jista' jitkellem dwar "l-istess fatt". Difatti l-uffiċjal prosekutur indikat waqt sottomissjonijiet orali, u dan jirriżulta wkoll mill-parti narrativa ta' l-Att ta' Akkuża, illi fil-proċedimenti l-oħra l-appellant jinsab akkużat ukoll bi traffikar ta' persuni għall-iskop ta' prostituzzjoni. Għalkemm jidher illi fiż-żewġ proċedimenti si tratta ta' rikavat allegatament ġej mill-prostituzzjoni, jistgħu jeżistu fatti li huma **"materially distinguishable as separate events"**, aktar u aktar meta wieħed jikkunsidra kif inhu definit ir-reat ta' *money-laundering* fil-Kap. 373 tal-Liġijiet ta' Malta. U allura kellha

[2] Professur Anthony Mamo: **Notes on Criminal Procedure**, pagna 45.

raġun l-Ewwel Qorti tikkonkludi kif ikkonkludiet. Fi kwalunkwe każ ma jistax ma jiġix ikkunsidrat ukoll l-artikolu 2(2)(b) tal-Kap. 373 tal-Liġijiet ta' Malta li jipprovdi:

"Persuna tista' tinstab ħatja separatament kemm ta' delitt ta' *money-laundering* taħt dan l-Att, kif ukoll ta' l-attivita` kriminali sottostanti li minnha inkisbet il-proprjeta` jew ir-rikavat li fir-rigward tiegħu ikun qed jiġi akkużat ta' *money-laundering*."

12. Għal dawn il-motivi tiddeċiedi billi tiċħad l-appell u tordna li l-atti jigu minnufih rimessi lill-Qorti Kriminali sabiex dik il-Qorti tipproċedi ulterjorment fil-konfront ta' l-imsemmi Christian Grech.

< Sentenza Finali >

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