MALTA

QORTI CIVILI

PRIM' AWLA

(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF

JOSEPH ZAMMIT MC KEON

Seduta tad-29 ta' April, 2014

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(I.D. 632650M)

kontra

Avukat Generali

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors prezentat fil-21 ta` Lulju 2011 li jaqra hekk –

Illi r-rikorrent tressaq b`arrest quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti Istruttorja fit-3 ta` Novembru 2008 u gie akkuzat talli f`dawn il-gzejjer fix-xahar ta` Gunju 2008 u fix-xhur u snin ta` qabel, b`diversi atti maghmulin fi zminijiet differenti li jiksru l-istess disposizzjoni tal-ligi u li gew maghmula b`rizoluzzjoni wahda* ***(i)*** *b`mezzi kontra l-ligi, jew billi ghamel uzu ta` ismijiet foloz, jew ta` kwalifiki foloz, jew billi nqeda b`qerq iehor, ingann jew billi wera haga b`ohra sabiex igieghel titwemmen l-ezistenza ta` intraprizi foloz, jew ta` hila, setgha fuq haddiehor, jew ta` krediti immaginarji jew sabiex iqanqal tama jew biza` ta` xi grajja kimerika, ghamel qligh li jeccedi €2,329.37 a dannu ta` Rita Borg mill-Kappara, ***(ii)*** *dawwar bi profit ghalih jew ghal persuna ohra, minn haga ta` haddiehor li kienet giet fdata jew ikkunsinnata lilu taht titolu illi jgib mieghu l-obbligu tar-radd tal-haga jew li jsir uzu minnha specifikat, u cioe` ha u zamm ammont ta` flus li jeccedi €2,329.37 a dannu tal-imsemmija Rita Borg,* ***(iii)*** *xjentement ghamel uzu minn att awtentiku u pubbliku, jew skrittura kummercjali jew ta` bank privat falza ; huwa kien akkuzat ukoll* ***(iv)*** *li kien recidiv fit-termini tal-Artikoli 49 et seq tal-Kodici Kriminali. Din l-ahhar akkuza pero` giet irtirata mill-Avukat Generali billi ma gietx inkluza fin-Nota ta` Rinviju ghall-gudizzju tieghu tat-13 ta` Frar 2009 (fol. 129 tal-process fil-proceduri kriminali).*

Illi b`Sentenza moghtija mill-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali fit-18 ta` Jannar 2010, filwaqt illi r-rikorrent ma nstabx hati tal-ewwel imputazzjoni in kwantu tirreferi ghar-reat ta` truffa kontemplat fl-Artikolu 308 tal-Kapitolu 9 tal-Ligijiet ta` Malta u gie lliberat minnha, huwa nstab hati tal-ewwel imputazzjoni in kwantu tirreferi ghar-reat minuri ta` frodi nnominata kontemplat fl-Artikolu 309 tal-Kapitolu 9 kif ukoll insab hati tat-tieni

u t-tielet imputazzjonijiet migjuba kontra tieghu u taghhom gie kkundannat sittax (16)-il xahar prigunerija – liema sentenza giet ikkonfermata anke mill-Qorti tal-Appell Kriminali fis-sentenza taghha tat-12 ta` Awissu 2010.

Illi fil-fatt ir-rikorrent ghadu kemm skonta l-piena karcerarja li ghaliha gie kkundannat skond is-sentenzi fuq imsemmija.

Illi jirrizulta mill-atti tal-process illi l-Qorti inferjuri kienet hatret espert kaligrafu sabiex tigi ezaminata l-awtenticita` ta` numru ta` firem li dehru fuq diversi cekkijiet li r-rikorrent kien gie akkuzat fil-proceduri fuq imsemmija li kien iffalsifika.

Illi jirrizulta wkoll mill-atti processwali illi kienu saru diversi talbiet kemm mir-rikorrent personalment kif ukoll tramite l-avukat difensur tieghu quddiem il-Qorti inferjuri sabiex ir-rapport peritali redatt mill-espert kaligrafu fuq imsemmi mqabbad mill-Qorti jigi analizzat minn persuna indipendenti nominata ghal dan l-iskop mid-difiza.

Illi ghall-ewwel il-Qorti inferjuri wriet id-disposizzjoni taghha illi x-xhud tinstema`, u fil-fatt harrket lil PL Juliana Scerri Ferrante sabiex dan tixhed bhala prova ghad-difiza.

Illi fil-fatt jirrizulta wkoll illi permezz ta` digriet moghti fis-seduta tat-18 ta` Novembru 2009, il-Qorti kienet ordnat il-hrug ta` Mandat ta` Akkumpanjament kif ukoll infliggiet multa ta` €100 ghad-disprezz lejn l-awtorita` taghha peress illi din ix-xhud ma dehritx ghall-fuq imsemmija seduta kif stabbilita mill-Qorti, liema Mandat u risultanti multa ghad-disprezz tal-Qorti kienu gew sussegwentement revokati in parti (kwantu ghall-Mandat) permezz ta`

digriet moghti kameralment fis-26 ta` Novembru 2009 u in parti (kwantu ghall-multa) permezz ta` digriet moghti fis-seduta tat-3 ta` Dicembru 2009 stante illi l-imsemmija xhud spjegat ic-cirkostanzi ghaliex ma dehritx ghas-sodisfazzjon tal-Qorti.

Illi meta fis-seduta segwenti tat-3 ta` Dicembru 2009 ix-xhud dehret quddiem il-Qorti u l-Qorti talbet in-natura tax-xhieda illi kellha taghti u l-Qorti fehmet li l-iskop tal-prova kienet ta` natura teknika sabiex id-difiza jkollha l-opportunita` li tirrevedi l-konkluzjonijiet peritali tal-espert kaligrafu mahtur mill-istess Qorti, irrizulta li l-Qorti ma kinitx izjed disposta li taghti l-opportunita` lid-difiza li tipprezenta dik ix-xhud stante li l-Qorti kienet diga` ddecidiet sua sponte li tistrieh fuq il-konkluzjonijiet rizultanti mir-rapport tal-perit tekniku li fir-rigward taghhom ma kinitx inghatat l-opportunita` li jigu kontradetti mid-difiza u dana anke minkejja l-fatt illi lanqas il-prosekuzzjoni stess ma kienet opponiet ruhha espressament ghal tali talba.

Illi ghalhekk gie kkreat dubju ragjonevoli fil-mohh tal-akkuzat illi d-dritt fondamentali tieghu sancit kemm mill-Kostituzzjoni ta` Malta kif ukoll mill-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem liema Konvenzjoni llum tifforma parti mil-ligijiet ta` Malta permezz tal-Att Dwar il-Konvenzjoni Ewropea (Kapitolu 319 tal-Ligijiet ta` Malta) inkiser, billi ma nghatax smigh xieraq fi proceduri ta` natura gravi fejn il-liberta` stess tal-akkuzat kienet in kwistjoni u fejn il-limitu tan-natura tal-prova ghandha tkun lil hinn mill-bilanc ta` probabilitajiet rikjest fil-kamp civili u li fil-fatt ghandu jilhaq il-livell ta` "beyond reasonable doubt", liema dubju baqa` tul il-mori kollha tal-process u anke llum illi ghadu kemm skonta l-piena sancita mill-process guridiku.

Illi r-rikorrent ghalhekk ghad ghandu kull interess sabiex dak li gie michud lilu u cioe` d-dritt ta` smigh xieraq, bil-garanziji kollha tal-"fair trial" partikolarment fil-kamp penali, ma jigux michudin lilu anke jekk fil-pratticita` tal-kaz diga` skonta l-piena karcerarja lilu nflitta fl-interezza taghha.

Illi din il-fehma tar-rikorrent tissahhah izjed meta dan ser jipprova jerga` jistabbilixxi ruhu fis-socjeta` civili minhabba li l-Qorti fir-ratio taghha ghamlitha cara illi l-kredibilita` tal-akkuzat fid-difiza tieghu ma kienet tiswa` ghalxejn u dan partikolarment minhabba r-rizultat tal-perizja teknika li kienet stabbiliet kaz ta` qerq li jmur lil hinn minn semplici malamministrazzjoni jew anke nuqqas ta` amministrazzjoni kif rikjest minn bonus paterfamilias. L-unika prova oggettiva li manifestament ma kinitx tiddependi minn evalwazzjoni ta` kredibilita` kienet il-perizja teknika li r-rikorrent, dak iz-zmien l-akkuzat, gie michud milli jaghmel kwalunkwe prova ghad-difiza tieghu sabiex jattakka l-konkluzjonijiet ta` natura teknika u dan ta` perit illi certament ma kellu ebda kwalifiki ahjar, jew izjed tas-sengha, fil-qasam tal-perizja kaligrafika mix-xhud mitlub mid-difiza, u dan kif jigi ppruvat waqt il-mori tal-kawza.

Illi ghalhekk jirrizulta manifestament illi d-decizjoni tal-Qorti inferjuri li tichad it-talba tad-difiza ghall-produzzjoni ta` xhud daqstant fondamentali sabiex id-difiza tigi kondotta b`mod kompetenti ghall-ahjar interess sew tal-akkuzat kif ukoll tal-gustizzja, u dan minghajr ma nghatat ebda raguni li setghet spjegat decizjoni tant pregudizzjevoli ghall-kondotta tad-difiza f`materja li tinvolvi l-liberta` tal-persuna u b`hekk il-Qorti pregudikat serjament l-`equality of arms` li f`kull waqt ghandu jezisti waqt is-smigh tax-xhieda u l-gbir tal-provi partikolarment fil-kamp penali.

L-ghagla ingustifikata tal-Qorti tohrog ukoll mill-fatt illi mac-cahda ghall-produzzjoni tax-xhud saret dikjarazzjoni mill-istess Qorti, fl-istess seduta tat-3 ta` Dicembru 2009 meta l-istess rikorrent lanqas ma kien assistit mill-avukat difensur tieghu, li l-provi kollha tad-difiza inghalqu u sahansitra anke pprocediet ghat-trattazzjoni.

Illi sfortunatament il-Qorti baqghet tinsisti fuq il-pozizzjoni taghha minkejja r-rikors illi kien gie pprezentat mir-rikorrent fis-7 ta` Dicembru 2009, fejn l-attenzjoni tal-Qorti kienet giet espressament attirata wkoll ghall-fatt illi fil-fehma tad-difiza l-produzzjoni ta` dan ix-xhud kien indispensabbli sabiex l-

akkuzat ikollu smigh xieraq. Difatti, fis-seduta sussegwenti tal-11 ta` Jannar 2010, meta ghal darb`ohra l-akkuzat kien sprovvist mill-avukat difensur tieghu, il-Qorti wara li semghet lir-rikorrent jispjega l-iskop tax-xhud cahdet it-talba u ddiferixxiet il-kawza ghas-sentenza ghat-18 ta` Jannar 2010, f`liema seduta s-sentenza giet fil-fatt pronunzjata.

Illi wkoll, minkejja l-fatt illi fir-Rikors tal-Appell tieghu pprezentat fis-26 ta` Jannar 2010, l-esponent specifikament elenka din ic-cahda mill-produzzjoni tax-xhud bhala wiehed mill-aggravji tieghu, il-Qorti tal-Appell Kriminali lanqas biss ma ttrattat l-istess aggravju fis-Sentenza taghha tat-12 ta` Awwissu 2010.

Illi ghalhekk ir-rikorrent kien ezawrixxa kull rimedju miftuh lilu sabiex jinghata l-opportunita` jibbilancja s-smigh tal-process bl-ezami tar-rapport kalligrafiku minn espert tal-fiducja tieghu li seta` jezamina kemm il-konkluzjonijiet kif ukoll il-metodologija adottati mill-perit imqabbad mill-Qorti.

Illi fejn l-operat tal-Qorti fil-kaz de quo ghandu jkun distin minn sitwazzjoni ohra, u cioe` fejn ghall-grazzja tal-argument kellha tkun il-Qorti stess illi sabet ruhha ffaccjata b`rapport peritali pprezentat mid-difiza u l-Qorti kellha thoss il-htiega li tappunta perit tekniku sabiex jivverifika ghall-istess Qorti xi aspetti tar-rapport jew sahansitra l-konkluzjonijiet ex parte fl-enterezza taghhom.

Illi fil-kaz ipotetiku fuq imsemmi, il-prassi kostanti nostrana anke fil-kamp penali setghet twassal li l-Qorti tkun sodisfatta mir-rizultanzi tal-perit imqabbad minnha u ghalhekk tillimita konsiderevolment kwalunkwe talba ghal xi ezami ulterjuri tar-rapporti u dan ghall-ahjar ekonomija tal-gudizzju.

Illi fil-fatt dak li sehh fil-kaz tar-rikorrent kien ezatt l-oppost u cioe` li d-difiza ma nghatatx anqas opportunita` wahda li tezamina r-rapport peritali li kien tant pregudizjevoli ghall-kredibilta` tal-akkuzat kif ukoll ghall-`equality of arms` tal-process shih.

Ghaldaqstant ir-rikorrent umilment jitlob illi din il-Qorti joghgobha tiddikjara u tiddeciedi li bis-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali moghtija fit-18 ta` Jannar 2010 kif ukoll bis-sentenza sussegwenti moghtija mill-Qorti tal-Appell Kriminali fit-12 ta` Awwissu 2010 gie miksur id-dritt tieghu ta` smigh xieraq protett bl-artikoli 39 tal-Kostituzzjoni ta` Malta u 6 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet Umani u Libertajiet Fundamentali u konsegwentement taghti r-rimedji u taghmel dawk l-ordnijiet, tohrog dawk l-atti u taghti dawk id-direttivi li tqis xieraq sabiex twettaq, jew tassigura t-twettiq tad-disposizzjoni tal-imsemmija artikoli 10 tal-Kostituzzjoni ta` Malta u 6 tal-Konvenzjoni Ewropea ghall-protezzjoni tad-Drittijiet Umani u Libertajiet Fundamentali.

Bl-ispejjez.

Rat ir-risposta pprezentata fis-26 ta` Awissu 2011 li taqra hekk –

1. Illi in linea preliminari, it-talbiet kif dedotti fir-rikors promotur ghandhom jigu michuda u din l-Onorabbli Qorti m`ghandhiex tkompli tisma` din il-lanjanza li jidher li r-rikorrent ma esawrixxiex ir-rimedji ordinarji li f`dan il-kaz, kien jikkonsisti f`appell mid-decizjoni tal-Qorti tal-Magistrati bhala Qorti ta` Gudikatura Kriminali datata 18 ta` Jannar 2010, huwa llimita ruhu sempliciment sabiex isemmi dan il-fatt dwar ix-xhud ex parte Dr Scerri Ferrante fil-korp tal-appell, pero` fl-ebda mument m`ghamel aggravju specifiku meta ntavola r-rikors tal-appell tieghu.

2. Illi subordinatament u minghajr pregudizzju ghas-suespost, l-esponent intimat jopponi t-talbiet avvanzati fir-rikors promotur u jirrileva li c-cirkostanzi dedotti fl-istess rikors ma jipprezentaw l-ebda ksur tad-drittijiet fundamentali tal-bniedem fil-konfront tar-rikorrent billi l-pretensjonijiet tieghu huma ghal kollox infondati fil-fatt u fid-dritt, stante li jirrizulta car li fil-konfront tar-rikorrent ma kien hemm l-ebda procedura mhix gustifikata fil-proceduri kriminali in ezami u fil-fatt jidher mill-istess process li kemm il-Qorti tal-Magistrati bhala Qorti ta` Gudikatura Kriminali, kif ukoll il-Qorti tal-Appell Kriminali zvolgew il-kompitu rispettiv taghhom in ottemperanza mal-provvedimenti tal-Kap. 9. Inoltre, jirrizulta car li fic-cirkostanzi odjerni, il-Qorti tal-Magistrati bhala Qorti ta` Gudikatura Kriminali kienet legalment gustifikata li tahtar espert fil-materja tal-kalligrafija ai termini tal-Artikolu 650 tal-Kap. 9. Inoltre, peress li kemm ir-relazzjoni kif ukoll il-konkluzjonijiet oggettivi tal-Espert Martin Bajada ***li kien indipendenti mill-partijiet****, kienu a sodisfazzjon tal-istess Qorti, l-akkuzat m`ghandux dritt li jiddetta lill-Qorti li tahtar Espert ex parte maghzul mill-akkuzat stess, kif qed jippretendi r-rikorrent fir-rikors in risposta. Illi mir-rikors odjern jidher li r-rikorrent qed jassumi erronjament li x-xhud Dottoressa Scerri Ferrante kienet xhud maghzula mill-Prosekuzzjoni, li certament mhux il-kaz in kwistjoni. Ghaldaqstant, ma kien hemm ebda ksur tad-drittijiet tar-rikorrent a tenur tal-Artikolu 39 tal-Kostituzzjoni ta` Malta u/jew l-Artikolu 6 tal-Konvenzjoni Ewropea da parte tal-esponenti.*

3. Illi huwa pacifiku li l-fatturi li principalment ghandhom jittiehdu in konsiderazzjoni sabiex jigi determinat jekk kienx hemm smigh xieraq huma l-komplessita` tal-kaz, l-agir tal-partijiet fil-kawza u l-agir tal-awtorita` jew awtoritajiet gudizzjarji. F`dan il-kaz, l-agir tad-Difiza jidher li kien irragonevoli ghall-ahhar stante li fl-istadju opportun (i) la talab ir-rikuza tal-espert imqabbad mill-Qorti koncernata kif kellu dritt li jaghmel jekk deherlu li l-espert inkarigat mill-Qorti seta` jigi rikuzat a bazi ta` wahda mill-kundizzjonijiet stipulati fl-Artikolu 734 tal-Kap. 12 u (ii) la oggezzjona ghall-espert inkarigat stante li fl-opinjoni tieghu ma kienx idoneju sabiex jirrelata fuq il-materja in kwistjoni ai termini tal-Artikolu 629 tal-Kap. 9 u (iii) wisq inqas ma rnexxielu jixhet xi dubju fuq il-kredibilita` tal-espert inkarigat mill-Qorti jew ixejjen b`xi mod il-konkluzjonijiet tal-istess ibbazati fuq ic-cirkostanzi tal-kaz permezz ta` kontro-ezamijiet, fejn l-akkuzat seta` facilment jikkontrolla l-operat tal-espert mahtur mill-Qorti, imma sempliciment insista li jressaq lid-Dottoressa Guiliana Scerri Ferrante bhala xhud/esperta ex parte. Illi huwa fatt risaput li fil-kamp

Kriminali, l-esperti jinhatru mill-Qorti kompetenti u jekk l-akkuzat ma jxejjinx il-kredibilita` u/jew il-konkluzjoni tal-istess Espert inkarigat mir-relazzjoni a sodisfazzjon tal-istess Qorti, il-Qorti koncernata m`ghandhiex ghalfejn tahtar espert iehor, specjalment espert maghzul mill-akkuzat stess li f`dak l-istadju ma kinitx edotta mill-fatti u bil-ghan uniku li taghti opinjoni soggettiva. Illi fil-procedura Kriminali espert ex parte mhux ammissibbli.

4. Illi l-esponent jirribatti li d-dritt ta` smigh xieraq tal-akkuzat ghandu jigi salvagwardjat fl-ambitu tal-ligi procedurali kriminali u dan bl-ebda mod ma jista` jigi nterpretat, kif qed jippretendi r-rikorrent, li l-akkuzat ghandu xi drittijiet awtomatici li jressaq kwalunkwe xhud fi proceduri Kriminali anke jekk dak ix-xhud ikun irrelevanti jew b`opinjoni soggettiva bhal fil-kaz in kwistjoni u mhux ibbazata fuq il-fatti. Illi l-esponent jenfasizza l-fatt li wara kollox il-Qorti mhix marbuta mal-konkluzjonijiet tal-espert u dan kif stipulat ai termini tal-Artikolu 656 tal-Kap. 9 li jistipula li :

"Min ghandu jiddeciedi mhux marbut li joqghod ghall-fehma tal-periti kontra l-perswazjoni tieghu."

Illi l-esponent jirrileva li r-rikorrent kellu juza l-mezzi li taghtih il-ligi sabiex se mai jiskossja l-konkluzjonijiet tal-espert inkarigat mill-Qorti u jekk ma kienx konvint mill-istess konkluzjonijiet ***ghal ragunijiet serji*** *li kellhom jigu sostanzjati u mhux semplicimeent ghax ma qabilx maghhom, huwa kellu jattira l-attenzjoni tal-Qorti qabel ma l-Qorti tal-Magistrati bhala Qorti ta` Gudikatura Kriminali ghaddiet ghas-sentenza u sussegwentement huwa seta` jitlob li jitqabbad espert indipendenti iehor mill-Qorti. Pero` r-rikorrent fl-ebda mument ma gab a konjizzjoni tal-Qorti koncernata ragunijiet serji ta` dubju fir-rigward tar-relazzjoni tal-espert inkarigat u lanqas ma talab lill-Qorti sabiex tinkariga Espert iehor indipendenti mill-partijiet.*

5. Inoltre, jirrizulta car kemm mill-andament tal-proceduri Kriminali nvoluti u mill-fatt li l-espert inkarigat mill-Qorti ma kienx xhud tal-Prosekuzzjoni izda kien espert indipendenti mill-partijiet mahtur mill-Qorti, kif ukoll mid-decizjonijiet tal-Qorti tal-Magistrati bhala Qorti ta` Gudikatura

Kriminali u tal-Onorabbli Qorti tal-Appell Kriminali rispettivament, li l-proceduri kriminali in ezami tmexxew fil-parametri tal-provvedimenti tal-Kap. 9 u ghalhekk l-argumenti tar-rikorrent li gie lez id-dritt tieghu ghal smigh xieraq jew li ma kienx hemm equality of arms jew "... li d-difiza ma nghatatx anqas opportunita` wahda li tezamina r-rapport peritali..." fil-proceduri in kwistjoni certament ma jregux.

6. Salv eccezzjonijiet ulterjuri.

Ghaldaqstant, l-esponent jitlob bir-rispett lil din l-Onorabbli Qorti joghgobha tichad it-talbiet kollha kif dedotti fir-rikors promotur stante li ma kien hemm l-ebda ksur tad-drittijiet fundamentali tar-rikorrent ai termini tal-Artikolu 39 tal-Kostituzzjoni u/jew tal-Artikolu 6 tal-Konvenzjoni Ewropea bl-ispejjez kontra l-istess rikorrent.

Semghet lir-rikorrent jikkonferma bil-gurament tieghu l-kontenut tar-rikors promotorju.

Rat id-digriet taghha moghti fl-udjenza tas-16 ta` Settembru 2011 fejn awtorizzat lir-rikorrent sabiex jipprezenta kopja legali tal-atti tal-kawza fl-ismijiet *Il-Pulizija vs Edgar Bonnici Cachia* li kienet deciza finalment mill-Qorti tal-Appell Kriminali fit-12 ta` Awissu 2010.

Rat l-atti tal-kawza fuq riferita fl-ismijiet *Il-Pulizija vs Edgar Bonnici Cachia* li pprezenta r-rikorrent b`nota tat-13 ta` Ottubru 2011.

Rat il-verbal tal-udjenza tat-22 ta` Novembru 2011.

Rat in-nota b`dokument li r-rikorrent ipprezenta fis-6 ta` Dicembru 2011.

Rat in-nota li l-Avukat Generali pprezenta fis-26 ta` Dicembru 2011.

Semghet ix-xiehda tal-Ispettur tal-Pulizija Angelo Gafa`.

Rat in-nota ta` osservazzjonijiet li r-rikorrent ipprezenta fid-19 ta` April 2012.

Rat in-nota responsiva li l-Avukat Generali pprezenta fid-9 ta` Lulju 2012.

Semghet lid-difensuri tal-partijiet jaghmlu s-sottomissjonijiet tal-ahhar bil-fomm fl-udjenza tal-5 ta` Novembru 2012.

Rat id-digriet taghha moghti fl-istess udjenza fejn halliet il-kawza ghas-sentenza.

Rat l-atti l-ohra tal-kawza.

Ikkunsidrat :

II. <u>Fatti</u>

Il-Qorti taghmel riferenza ghall-atti tal-kawza fl-ismijiet *Il-Pulizija vs Edgar Bonnici Cachia* li kienet deciza finalment mill-Qorti tal-Appell Kriminali fit-12 ta` Awissu 2010.

Skond dawn l-atti jirrizultaw dawn il-fatti :-

1) Fis-seduta tal-1 ta` Dicembru 2008 quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti Struttorja (fol 101 u 102), il-Prosekuzzjoni talbet in-nomina ta` espert kalligrafu biex janalizza l-genwinita` o meno tal-firma tal-account holder li tidher fuq numru ta` cheques. Il-Qorti laqghet t-talba u hatret lil Martin Bajada bhala espert ghal dak l-iskop.

2) Fis-seduta tat-12 ta` Jannar 2009 (fol 126), l-espert Martin Bajada pprezenta r-relazzjoni tieghu quddiem il-Qorti u kkonferma l-kontenut taghha bil-gurament. Fl-istess seduta sar il-kontroezami ta` Martin Bajada mid-difensur tal-imputat (ara fol 128 u fol 129) u jidher illi kien konkluz ukoll. Fl-

istess seduta, il-Prosekuzzjoni ddikjarat li ma kellhiex aktar provi. Kif appena r-relazzjoni kienet mahlufa, kienet prontament inserita fl-atti tal-kawza.

3) Fit-13 ta` Frar 2009, l-Avukat Generali hareg l-Artikoli, u fis-seduta tas-16 ta` Frar 2009, inqraw l-Artikoli. L-imputat assistit mill-avukat tieghu iddikjara li ma kellux oggezzjoni li l-kaz jigi trattat bil-procedura sommarja.

4) Fis-seduta tat-30 ta` Marzu 2009, l-imputat debitament assistit iddikjara li se jixhed pero` x-xiehda tieghu ma nstemghetx billi fil-bini tal-Qorti kien hemm theddida ta` bomba.

5) Fis-seduta tal-25 ta` Mejju 2009, l-imputat rega` ma setax jixhed billi rega` kien hemm theddida ta` bomba fil-bini tal-Qorti.

6) Fis-seduta tas-6 ta` Lulju 2009, xehed l-imputat u sar il-kontroezami tieghu. L-imputat kien mghejjun minn avukat differenti minn dak li kien qieghed jassistieh sa dakinhar.

7) Fis-seduta tat-18 ta` Settembru 2009, xehdu erba` persuni li tressqu bhala xhieda mill-akkuzat.

8) Fis-seduta tas-26 ta` Ottubru 2009 (fol 197) xehdu erba` persuni ohra. Fl-istess udjenza, id-difiza ddikjarat illi kien fadlilha xhud wiehed u cioe` l-PL Giuliana Scerri Ferrante.

9) Fis-seduta tat-18 ta` Novembru 2009, l-PL Scerri Ferrante ssejhet biex tixhed izda ma dehritx.

10) Il-verbal tal-udjenza tat-3 ta` Dicembru 2009 ighid hekk :-

Meta ssejjhet il-kawza deher l-ufficjal prosekutur l-Ispettur Angelo Gafa` u l-imputat.

Deher ukoll Dr Stephen Tonna Lowell ghall-parte civile.

L-imputat iddikjara li ghas-seduta tal-lum mhux qieghed jesigi l-assistenza ta` l-avukat tieghu.

Il-Qorti tirrileva li ghal habta ta` 11.45 a.m. dehret Dr Giuliana Scerri Ferrante li nfurmat lil Qorti li hija kellha appuntament l-isptar u ma setghatx toqghod il-Qorti wara nofsinhar.

Hija wkoll infurmat lil Qorti li dwar il-fatti tal-kaz ma taf xejn, pero` gie avvicinata mill-imputat biex hija tezemina l-atti u taghmel rapport dwar il-firem mertu ta` dawn il-proceduri.

L-imputat fil-fatt kkonferma lill-Qorti li dan kien l-involviment ta` Dr Giuliana Scerri Ferrante u li ma taf xejn dwar il-fatti tal-kaz in ezami.

Il-Qorti fic-cirkostanzi ma tarax li Dr Giuliana Scerri Ferrante tixhed f`dawn il-proceduri u in vista tal-fatt li diga` gie nominat espert kaligrafu mill-Qorti u li diga` pprezenta r-rapport tieghu u anke gie kontroezaminat mill-

konsulent ta` l-imputat, tiddikjara li l-provi tad-difiza maghluqa u tipprocedi bit-trattazzjoni.

Saret trattazzjoni minn Dr Stephen Tonna Lowell u l-Ispettur Angelo Gafa`

…

Il-Qorti qieghed tiddifferixxi l-kawza ghas-sentenza ghall-11 ta` Jannar 2010 fid-9.00 a.m. b`dan li l-imputat ghandu zmien sat-18 ta` Dicembru 2009 biex jaghmel nota ta` sottomissjonijiet tieghu jekk jixtieq.

Il-Qorti tordna li dan il-verbal jigi kkomunikat lil Dr Chris Cardona.

11) Fis-7 ta` Dicembru 2009, l-imputat ipprezenta rikors (fol 257) fejn talab lill-Qorti sabiex tissospendi l-prolazzjoni tas-sentenza u tawtorizzah biex iressaq bhala xhud lil Dr Giuliana Scerri Ferrante billi skond l-imputat dik kienet xhud indispensabbli sabiex ikollu smigh xieraq.

12) Permezz ta` digriet taghha tad-9 ta` Dicembru 2009 (fol 260) il-Qorti tat lill-imputat gimgha zmien min-notifika tad-digriet lil Dr Chris Cardona biex jindika x`hinu l-iskop tax-xiehda ta` Dr Scerri Ferrante u dan in vista ta` dak verbalizzat fl-udjenza tat-3 ta` Dicembru 2009.

13) L-imputat baqa` ma ndikax l-oggett tal-prova kif kien dirett jaghmel.

14) Fit-22 ta` Dicembru 2009, l-imputat ipprezenta nota ta` sottomissjonijiet.

15) Il-verbal tal-udjenza tal-11 ta` Jannar 2010 jaqra hekk :-

Meta ssejjhet il-kawza deher l-ufficjal prosekutur l-Ispettur Angelo Gafa` u l-imputat.

Il-Qorti ordnat li jissejjah Dr Chris Cardona pero` l-imputat informa lil Qorti li hu mhux ser jinsisti ghall-presenza ta` Dr Chris Cardona ghas-seduta tal-lum.

Il-Qorti xorta ordnat biex jissejjah Dr Chris Cardona u li gie msejjah diversi drabi izda ma deherx.

Il-Qorti irrilevat li mill-atti ma jirrizultax li d-digriet taghha tad-9 ta` Dicembru 2009 gie notifikat lil Dr Chris Cardona.

Il-Qorti pero` nforma lil Qorti li Dr Chris Cardona bilfors gie notifikat minhabba li qrahulu.

L-imputat mistoqsi mill-Qorti ddikjara li huwa xtaq lil Dr Giuliana Scerri Ferrante bhala espert biex tezamina l-atti u taghti l-opinjoni taghha dwar il-firem mertu ta` dawn il-proceduri.

Il-Qorti wara li rat il-verbal tat-3 ta` Dicembru 2009 u l-atti relevanti tichad it-talba dedotta fir-rikors tas-7 ta` Dicembru 2009.

Il-Qorti qeghda tiddeferixxi l-kawza ghat-18 ta` Jannar 2010 fil-11.30 a.m.

16) Il-kawza kienet deciza fit-18 ta` Jannar 2010. Kienu prezenti l-ufficjal prosekutur u l-imputat assistit minn Dr Chris Cardona. Wara l-qari tas-sentenza, l-imputat talab is-sospensjoni tal-esekuzzjoni tas-sentenza ghall-fini ta` appell. L-imputat ipprezenta r-rikors tal-appell fis-26 ta` Jannar 2010.

17) L-appell kien trattat fis-26 ta` Frar 2010 u deciz mill-Qorti tal-Appell Kriminali fit-12 ta` Awissu 2010. Il-Qorti cahdet l-appell u kkonfermat is-sentenza appellata.

Ikkunsidrat :

III. Sottomissjonijiet bil-miktub

Il-partijiet skambjaw noti ta` osservazzjonijiet.

Ir-rikorrent jissottometti illi fi process penali, il-principju tal-*fair trial* jinkorpora l-*equality of arms* bejn il-prosekuzzjoni u d-difiza. Dan ighodd ukoll meta gudikant ikun tal-fehma li ghandu jinnomina perit tekniku.

Ir-rikorrent jaghmel referenza ghal awtur Philip Leach li fil-ktieb tieghu "*Taking a case to the European Court of Human Rights*", jirreferi ghal kawza tal-Qorti ta` Strasbourg fl-ismijiet "**De Haes and Gijsels vs Belgium**" (Nru.

19983/92) u jikkummenta dwar – *"the opportunity for parties to civil and criminal proceedings, to have knowledge of and be able to comment on all evidence adduced or observation files."* L-awtur jghid ukoll illi – *"The principle may also apply to the failure to admit evidence or to hear or allow the cross-examination of witnesses. In relation to criminal proceedings it is therefore likely to overlap with other constituent rights in Article 6(3)."*

Ir-rikorrent jissottometti li hija partikolarment rilevanti ghall-kaz tal-lum id-decizjoni tal-Qorti ta` Strasbourg fil-kawza "**Mantovelli vs France**" li kienet deciza fis-17 ta` Frar 1997.

B`referenza ghall-kaz tal-lum, ir-rikorrent jghid illi kien hemm vjolazzjoni tal-*equality of arms* meta huwa hass il-bzonn li r-rapport tal-perit kalligrafu jigi ezaminat minn espert *ex parte* u dan sabiex il-Qorti tkun f`posizzjoni ahjar biex tasal ghall-konkluzjoni u verdett aktar gust. Ir-rikorrent ikompli li huwa ma kienx talab ghal perizja perizjuri izda talab li jitpogga f`posizzjoni li jaghmel il-kontro-ezami necessarju ghad-difiza tieghu bhallikieku hu u l-Avukat tieghu kienu edotti mit-teknika u proceduri skond ix-xjenza kalligrafika li fil-fatt ma kienux. Ghalhekk id-dritt fundamentali tad-difiza gie lez meta l-Qorti arbitrarjament u minghajr ebda raguni valida ddecidiet illi mhux biss tichad li r-rapport kalligrafu jkun ezaminat minn espert *ex parte* tad-difiza, izda ddikjarat il-provi tad-difiza maghluqa, meta dan ma kienx il-kaz. Il-konsegwenzi ta` dan kienu fatali ghall-imputat ghaliex mhux biss ma setax ikompli bid-difiza tieghu izda lanqas biss seta` jaghmel kontroezami effettiv u effikaci.

Ir-rikorrent jaghmel referenza ghad-decizjoni tal-Qorti ta` Strasbourg fil-kawza "**Saidi vs France**" (Nru 14647/89). Ir-rikorrent ma kienx qieghed jitlob illi din l-Qorti terga` tqis il-provi li kienu saru quddiem l-Ewwel Qorti. L-akkuzat kellu jinghata mhux biss access ghar-rapport izda li, taht l-awtorita tal-Qorti, jinghata l-opportunita` li l-ezami tal-perit tekniku isir minn persuna li jkun jista` jfiehem lill-akkuzat dak li fih ir-rapport sabiex b`hekk l-imputat jkun jista` jifhem l-impatt li r-rizultanzi ta` dak ir-rapport jista` jkollhom fuq il-presunzjoni tal-innocenza tieghu.

Ir-rikorrent jirreferi ghal *Theory and Practice of the Euopean Convention on Human Rights* tal-awturi van Dijk & van Hoof fejn jinghad illi – *"If there did not exist an adequate and proper opportunity for the accused to question the witness, his conviction cannot solely or mainly be based on the testimony of the latter."*

Il-prova tar-rapport peritali kienet l-unika prova oggettiva. Kienet prova centrali ghall-impjant akkuzatorju kontra r-rikorrent. Ghalhekk dak li kien qed jitlob ir-rikorrent huwa li l-Qorti tevalwa l-importanza ghalih in kwantu akkuzat li jkollu espert *ex parte* li jfehmu l-implikazzjoni tar-rapport peritali kif ukoll sabiex jimposta l-kontroezami tal-istess rapport.

Min-naha tieghu, **l-intimat** jissottometti li r-rikorrent ma kienx esawrixxa r-rimedji ordinarji tieghu ghaliex huwa seta` jressaq il-lanjanza li qieghed jaghmel fil-procediment tal-lum meta ressaq l-appell tieghu mis-sentenza tal-Ewwel Qorti. Kull ma ghamel r-rikorrent kien illi fl-appell semplicement accenna ghall-kwistjoni tax-xhud *ex parte*, bla ma ressaq aggravju specifiku.

L-intimat isostni illi mill-atti jirrizulta li l-principji li ghalihom rrefera r-rikorrent kienu osservati, u ma kien hemm l-ebda zbilanc ghad-detriment tad-difiza, ghaliex kemm il-Prosekuzzjoni kif ukoll id-Difiza kellhom kull opportunita` li jipprezentaw il-kaz taghhom bil-mezzi kollha pprovuti mill-ligi. Kieku l-akkuzat kellu jiddetta lill-Qorti li tammetti xhud *ex parte*, li se jkollu opinjoni soggettiva, a kuntrarju tal-espert imqabbad mill-Qorti, certament jinghata lok ghal abbuz li l-Kodici Kriminali ma jippermettix. Inoltre jekk r-rikorrent dehrlu li r-rapport redatt mill-espert kalligrafu kellu xi nuqqasijiet, huwa seta` talab lill-Qorti sabiex tappunta espert iehor independenti sabiex jirrelata fuq il-materja in kwistjoni. Fil-fatt mill-atti procedurali ma jirrizultax li r-rikorrent qatt ghamel din it-talba.

Il-fatturi li ghandhom jittiehdu in konsiderazzjoni sabiex jigi stabbilit jekk kienx hemm smiegh xieraq jew le huma l-komplessita tal-kaz, l-agir tal-partijiet u l-agir tal-awtoritajiet gudizzjarji. Fil-kaz tal-lum l-agir tad-Difiza jidher li ma kienx ragjonevoli ghaliex : i) la talab ir-rikuza tal-espert kalligrafu kif kellu kull dritt li jaghmel ; ii) la oggezzjona ghall-espert nominat ; u iii) ma irnexxilux jixhet dubju fuq il-kredibilita` tal-espert jew ixejjen il-konkluzjonijiet tal-espert permezz ta` kontroezami. Kull ma ghamel ir-rikorrent huwa li baqa` jinsisti li jressaq lid-Dott. Giuliana Scerri Ferrante bhal espert *ex parte*. Fil-procedura kriminali espert *ex parte* mhuwiex ammissibli u lanqas perizja perizjuri ma hija kontemplata fil-Kodici Kriminali.

Skond l-intimat, mhuwiex sostenibbli l-argument tar-rikorrent li huwa ma kellux access ghar-rapport u/jew li ma nghatax l-opportunita` li r-rapport jigi ezaminat minn persuna li jista jifhem il-kontenut tar-rapport, ghaliex kellu kull opportunita` li jaghmel hekk. Minbarra dan, ma jirrizultax li l-htija tar-rikorrent irrizultat mir-rapport peritali biss. Kien hemm fatti ohra li kkorroboraw l-konkluzjonijiet tal-espert tekniku, bhax-xiehda tal-vittma li xehdet b`mod dettaljat dwar liema *cheques* hija kienet awtorizzat, iffirmat o meno, apparti x-xiehda tal-ufficjali tal-banek.

Ikkunsidrat :

IV. **<u>Sottomissjonijiet tal-ahhar</u>**

Fl-udjenza tal-5 ta` Novembru 2012, il-Qorti semghet l-ahhar sottomissjonijiet bil-fomm mid-difensuri tal-partijiet.

Ir-rikorrent issottometta illi espert imqabbad mill-qorti mhuwiex xi prova unika lil hinn mir-regoli tal-evidenza. Huwa xhud bhal kull xhud iehor, u l-konkluzzjonijiet tieghu jaqghu taht l-iskrutinju tal-Qorti. Ir-rikorrent isostni li l-iskrutinju tal-qorti ghandu jkun aktar attent u akkurat b`rispett ghall-jedd ta` smigh xieraq. Espert imqabbad mill-qorti ghandu axxendent ta` kredibilita` ghaz-zewg ragunijiet : fl-ewwel lok, ghandu d-dehra ta` indipendenza, u t-tieninett ghandu dehra ta` espert. L-ezami ta` l-perizja m`ghandux ikun biss ezami tekniku legali izda ghandu jkun ezami fil-perizja, jigifieri ghandu jkun hemm dritt ghan-naha tad-difiza li tpoggi in kwistjoni l-perizja tal-perit. Ghalhekk huwa f`dan il-kuntest li r-rikorrent kien talab sabiex il-Qorti tippermetti lil persuna ta` fiducja tieghu, allura *ex parte*, li jkollha vizjoni tal-process, sabiex b`hekk id-difiza jkollha l-opportunita` li tattakka l-kompetenza tal-espert. Il-vjolazzjoni hemm qeghda, meta l-Qorti ddecidiet li ma kellha tisma` xejn izjed ghaliex kellha r-rapport peritali u kwindi cahdet it-talba tad-difiza. L-principju tal-*equality of arms* jimplika illi fejn hemm prova li tipprezenta pregudizzju ghad-difiza, u ghalhekk ghall-presunzjoni tal-innocenza, l-imputat ghandu jkollu l-jedd li jezamina r-rapport b`vizjoni mhux biss ta` avukat, izda b`vizjoni ta` xi hadd li huwa espert. Mhux dan biss, ikompli r-rikorrent, izda l-Qorti ghalqet ukoll il-provi tad-Difiza, minkejja l-protesti tempestivi tad-Difiza. Kuntrarjament ghal dak eccepiet mill-intimat, ir-rikorrent isostni li huwa kien fil-fatt esawrixxa r-rimedji ordinarji tieghu ghaliex fost l-aggravji tieghu tal-appell, ir-rikorrent inkluda l-kwistjoni tal-perit kalligrafu.

Min-naha tieghu, **l-intimat** wiegeb billi sostna li r-rikorrent kien assolutament passiv fil-proceduri quddiem il-Qorti tal-Magistrati u dan huwa hekk ghaliex kellu l-fakulta` kemm li jirrikuza l-espert, kemm li joggezzjona ghalih, kif ukoll illi jxejjen il-kredibilita` tar-rapport billi jaghmel kontroezami tal-espert, izda baqa` ma ghamel xejn minn dan kollu. Minbarra dan huwa kellu wkoll l-possibilita` li jekk ikun gab ragunijiet serji biex iwaqqa` l-kredibilita tal-espert, jitlob lil Qorti sabiex tahtar espert iehor, izda anke dan ma sarx. Kontrarjament ghall-proceduri civili, fil-proceduri kriminali ma tezistix il-possibilita li jkun hemm espert *ex parte*. L-intimat ma jaqbilx mas-sottomissjoni tar-rikorrent li l-kwistjoni kienet indirizzata fl-appell, ghaliex kontrarjament ghal dak li sostna r-rikorrent, fir-rikors tal-appell, ma kienx hemm aggravju specifiku.

Ikkunsidrat :

V. <u>L-ewwel eccezzjoni</u>

Fis-sostanza, b`dik l-eccezzjoni, l-intimat qieghed jikkontendi illi din il-Qorti ghandha tiddeklina milli tisma` l-ilment tar-rikorrent billi ghalkemm ir-rikorrent appella mis-sentenza tal-Qorti tal-Magistrati, huwa ma pprezentax aggravju <u>specifiku</u> li jinvesti l-ilment li qieghed jaghmel fil-kawza tal-lum. Dan ifisser li kellu rimedju ordinarju ghad-disposizzjoni tieghu u ma pprevaliex ruhu minnu. Kwindi m`ghandux jigi permess lir-rikorrent illi fi procediment specjali bhal ma huwa dak tal-lum ifittex rimedju taht il-Kostituzzjoni u taht il-Konvenzjoni. Ir-rikorrent wiegeb ghal din l-eccezzjoni billi sostna illi fil-fatt huwa kien appella mill-kwistjoni li qeghda tigi trattata fil-kawza tal-lum u l-Qorti tal-Appell cahdet l-appell tieghu.

L-esistenza ta` rimedju ordinarju ghandha tirrizulta lill-Qorti bhala **<u>stat ta` fatt attwali u obbjettiv</u>**, u d-diskrezzjoni ta` l-Qorti li ma tezercitax is-setghat taghha "jekk tqis li jkun desiderabbli li hekk taghmel" minhabba l-esistenza ta` rimedju iehor hija decizjoni fuq dak l-i**<u>stat ta` fatt</u>.** Huwa biss meta jew jekk jirrizulta lill-Qorti bhala fatt li jezisti rimedju iehor **<u>effettiv</u>** ghar-rikorrent li l-Qorti tista` taghzel illi ma tezercitax is-setghat taghha li tisma` l-ilment imressaq quddiemha. F`kaz li ma jirrizultax rimedju iehor xieraq, il-Qorti trid tiehu konjizzjoni tal-ilment. Izda anke f`kaz li jirrizulta li kien hemm rimedju iehor, il-Qorti xorta wahda jibqaghlha s-setgha li tiddeciedi li ma ccedix l-ezercizzju tas-setgha taghha. Id-diskrezzjoni li l-Qorti ghandha trid titwettaq b`mod korrett u tkun mmirata lejn l-iskop tal-legislatur, u cioe` li filwaqt li ma jithallewx isiru kawzi kostituzzjonali bla bzonn, fl-istess waqt persuna ma tinzammx milli tipprocedi b`azzjoni bhal din tal-lum meta jkun jidher li l-kaz huwa wiehed serju li jista` jimplika l-ksur ta` jedd fondamentali. Ghalhekk id-diskrezzjoni ghandha tkun uzata dejjem fl-ahjar interess tal-amministrazzjoni tal-gustizzja sabiex minn naha wahda, il-Qrati ta` indoli kostituzzjonali ma jkunux rinfaccjati b`kawzi li messhom jew setghu tressqu quddiem Qrati ohrajn

kompetenti jew li dwarhom messhom jew setghu jfittxu rimedji ohrajn effettivi, u min-naha l-ohra sabiex persuna ma tkunx imcahhda mir-rimedji li ghandha jedd tfittex taht il-Kostituzzjoni jew taht il-Konvenzjoni.

L-esistenza ta` rimedju iehor ghandha titqies fil-kuntest tal-ksur tad-dritt fondamentali li jkun qed jigi allegat li nkiser. **Ghandu jkun rimedju accessibbli, xieraq, effettiv u adegwat biex jindirizza l-ksur**. Ma hemmx ghalfejn li, biex jitqies bhala effettiv, ir-rimedju jintwera bhala wiehed li sejjer jaghti lir-rikorrent success garantit. Huwa bizzejjed li jintwera li jkun wiehed li jista` jigi segwit b`mod prattiku, effettiv u effikaci. Diversi kienu s-sentenzi tal-Qorti Kostituzzjonali fejn kien determinati l-principji li ghandhom jigu segwiti minn Qorti biex tqis jekk huwiex minnu li rikorrent kellu ghad-dispozizzjoni tieghu rimedju alternattiv effettiv.

Fost dawn il-principji, insibu –

(a) Meta jidher car li jesistu mezzi ordinarji disponibbli biex jikseb rimedju ghall-ilment tieghu, ir-rikorrent ghandu jirrikorri ghal dawk il-mezzi, qabel ma jirrikorri ghar-rimedju kostituzzjonali, u huwa biss wara li jkun fittex dawk il-mezzi jew wara li jidher li dawk il-mezzi ma jkunux effettivament disponibbli li ghandu jintuza r-rimedju kostituzzjonali.

(b) Ghandha torbot id-diskrezzjoni tal-Qorti biex tqis jekk ghandhiex twettaq is-setghat taghha li tisma` kawza ta` natura kostituzzjonali, sakemm ma tingiebx xi raguni serja u gravi ta` illegalita`, ingustizzja jew zball manifest fl-uzu taghha.

(c) Ma hemm l-ebda kriterju stabbilit minn qabel dwar l-uzu ta` din id-diskrezzjoni, billi kull kaz irid jitqies fuq il-fatti u c-cirkostanzi tieghu.

(d) In-nuqqas wahdu ta` tehid ta` mezzi ordinarji mir-rikorrent mhuwiex raguni bizzejjed biex Qorti ta` xejra kostituzzjonali tiddeciedi li ma tuzax is-setghat taghha li tisma` l-ilment, jekk jintwera li l-imsemmija mezzi ma kinux tajbin biex jaghtu rimedju shih lir-rikorrent.

(e) In-nuqqas ta` tehid ta` rimedju ordinarju – ukoll jekk seta` kien ghal kollox effettiv biex jindirizza l-ilment tar-rikorrent - minhabba l-imgieba ta` haddiehor m`ghandux ikun raguni biex il-Qorti ma tezercitax is-setghat taghha li tisma` l-ilment kostituzzjonali tar-rikorrent.

(f) L-ezercizzju minn Qorti tal-ewwel grad tad-diskrezzjoni taghha bla ma tistharreg il-materja necessarja li fuqha tali diskrezzjoni ghandha titwettaq, jaghti lil Qorti tat-tieni grad is-setgha li twarrab dik id-diskrezzjoni.

(g) Meta r-rimedju jaqa` fil-kompetenza ta` organu iehor jew meta s-smigh tal-ilment tar-rikorrent sejjer iwassal biex l-indagni gudizzjarja u l-process l-iehor tas-smigh tar-rimedju ordinarju jkunu duplikazzjoni ta` xulxin, il-Qorti kostituzzjonali ghandha ttendi lejn ir-rifjut li tuza s-setghat taghha kostituzzjonali, sakemm l-indagni gudizzjarja tal-kaz ma tkunx, min-natura taghha, ixxaqleb izjed lejn kwistjoni kostituzzjonali.

(h) Fuq kollox, l-uzu tad-diskrezzjoni ghandha tigi ezercitata bi prudenza, u b`mod li fejn jidher li hemm ksur serju ta` drittijiet fondamentali jew anke fejn sejjer ikun hemm ksur ta` dawk id-drittijiet, allura l-Qorti ghandha xxaqleb lejn it-twettiq ta` dawk is-setghat.

Ghall-konsiderazzjonijiet premessi, din il-Qorti ssib il-konfort ta` dawn is-sentenzi tal-Qorti Kostituzzjoni : 31 ta` Mejju 1999 –“**Zahra v. Awtorita` tal-Ippjanar”** (Kollez. Vol:LXXXIII.i.179) ; 27 ta` Frar 2003 – “**Sammut v. Awtorita` tal-Ippjanar et” ;** 05 ta` April 1991 – “**Vella v. Kummissarju tal-Pulizija et”** (Kollez. Vol:LXXV.i.106) ; 7 ta` Marzu 1994 – “**Vella v. Bannister et”** (Kollez. Vol: LXXVIII.i.48) ; 12 ta` Dicembru 2002 – **“Visual & Sound Communications Ltd. v. Il-Kummissarju tal-Pulizija et” ;** 14 ta` Mejju 2004 – “**Axiaq v. Awtorita` Dwar it-Trasport Pubbliku”;** 31 ta` Ottubru 2003 –

“**Mediterranean Film Studios Limited v. Korporazzjoni ghall-Izvilupp ta` Malta et”** ; 9 ta` Ottubru 2001 – “**McKay v. Kummissarju tal-Pulizija et**” ; 25 ta` Gunju 1999 – “**Spiteri v. Chairman Awtorita` tal-Ippjanar et”** (Kollez. Vol: LXXXIII.i.201) ; 7 ta` April 2000 – “**Adel Mokhtar Al Sakalli v. Onor. Prim Ministru et”** ; 31 ta` Mejju 2000 – “**Rapa v. Chairman ta` l-Awtorita` ta` l-Ippjanar et**” **;** 16 ta` Jannar 2006 – “**Tretyak v. Direttur tac-Cittadinanza u Expatriate Affairs”** ; 6 ta` Jannar 2006 – “**Melita Cable p.l.c. v. Avukat Generali et” ;** 13 ta` April 2007 – **“Green et v. Avukat Generali et” ;** 7 ta` Settembru 2007 – **“Chircop v. Il-Kummissarju tal-Pulizija et” ;** 27 ta` Frar 2009 **– “Xuereb et v. Direttur tax-Xogholijiet et”** ; 15 ta` Jannar 1991 – “**Balzan v. Prim Ministru et ;** 14 ta` Gunju 1995 – **“Briffa v. Kummissarju tal-Pulizija” ;** 27 ta` Frar 2009 **– “Bellizzi v. L-Awtorita` Marittima ta` Malta”.**

Fil-Punt Nru 4 tar-rikors tal-appell, ir-rikorrent ndika “**L-Aggravji**”. Jirrizultaw seba` (7) paragrafi fejn ir-rikorrent ittrattaw il-kwistjoni li qeghda tkun sollevata fil-kawza tal-lum.

Jinghad hekk *inter alia* :

“Illi hija umli fehma tal-appellant li r-rapport imhejji mill-espert kalligrafu fih nuqqasijiet serji li jitfghu dubju skjaccanti fuq kemm wiehed jista` joqghod fuq il-konkluzzjonijiet fallaci li wasal ghalihom dan ir-rapport.”

…

“Illi meta tqis li l-Ewwel Qorti strahet b`mod straordinarju fuq ir-rapport tal-espert kalligrafu sabiex issib lill-appellant hati … wiehed kien jistenna li dan ir-rapport kien jipprova lil hinn min kull dubju dettat mir-raguni illi l-firem kienu verament simulati u li tali simulazzjoni pperpetraha l-appellant.”

"Illi mhux talli l-Ewwel Qorti strahet ghal kollox fuq dan ir-rapport imsemmi, izda meta d-difiza talbet li tigi appuntatatha l-PL Giuliana Scerri Ferrante bhala espert kalligrafu u dan sabiex ikun hemm rapport iehor aktar profond li mieghu setghu jigu mqabbla l-konkluzzjonijiet tal-espert kalligrafu Martin Bajada, din l-Ewwel Qorti cahdet it-talba tad-difiza ghax dehrilha li dak li gie konkluz minn Martin Bajada kien bizzejjed." (enfasi ta` din il-Qorti)

Din il-Qorti hija sodisfatta illi r-rikorrent fittex r-rimedju ordinarju li kellu quddiem il-Qorti tal-Appell Kriminali. Niseg l-ilment tieghu fil-kuntest ta` aggravju li pero` kien respint mill-Qorti flimkien mal-aggravji l-ohra. Xejn ma jzomm lir-rikorrent li jitlob rimedju lil din il-Qorti dment li jipprova li fil-konduzzjoni tal-procediment quddiem il-qrati ordinarji kien tassew hemm lezjoni tal-jedd tieghu ghal smigh xieraq kif mharsa bil-Kostituzzjoni u bil-Konvenzjoni. Fi kwalunkwe kaz, in-natura tal-ilment tar-rikorrent huwa tali li l-Qorti ma kenitx sejra tiddeklina milli tezercita s-setghat taghha anke fl-interess tal-ahjar amministrazzjoni tal-gustizzja.

Il-Qorti qeghda <u>tichad</u> l-ewwel eccezzjoni.

Ikkunsidrat :

VI. <u>Dottrina</u>

Minn Pag 81 sa Pag 267 tar-Raba` Edizzjoni (2011) ta` ***<u>A Practitioner`s Guide to the European Convention on Human Rights</u>*** (Sweet & Maxwell), il-gurista **<u>Karen Reid</u>** tittratta dak li hija ssejjah il-"*problem areas*" tal-"*fair trial*

guarantees". Il-Qorti sejra tislet brani minn din il-kitba li fil-fehma taghha huma rilevanti ghall-mertu tal-kawza tal-lum :-

Pag 81 :-

The key principle governing Art 6 is ***fairness … of the proceedings as a whole*** *…*

Pag 82 :-

The right to a fair trial is seen as holding so prominent a place in democratic society that the Court has stated that there is not justification for interpreting Art 6 Para 1 restrictively. Whatever the importance of public interest in, for example, fighting organised crime, the fair administration of justice cannot be sacrificed to expedience …

As to fairness, it is perhaps simpler to say what it does not mean. The Commission frequently stated, and the Court continues to emphasise, that the Convention organs are not courts of appeal from domestic courts and cannot examine complaints that a court has made errors of fact or law or reached the wrong decision or that a person was, for example, wrongly convicted. They will not enter into the merits of decisions. For this reason, complaints concernming miscarriages of justice are unlikely to succeed before them.

Domestic courts are in the best position to assess the evidence before them, to decide what is relevant or admissible. Matters of appreciation of domestic law and the categorisation of claims in domestic law are also primarily for the appreciation of domestic courts …

Pag 83 :-

From the Convention point of view it is not so much the result that is in question but the process of "hearing" ...

Equality of arms between the parties, or "a fair balance" must be achieved. This means that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent ...

Pag 84 :-

The accused, and in civil proceedings the parties, must be able to particicpate effectively in proceedings ...

Pag 85 :-

Measures taken in the conduct of a criminal trial must be reconcilable with an adequate and effective exercise of the rights of the defence. The importance of securing defence rights in criminal proceedings has been identified as a principle of democratic society and, in this respect, Art 6 must be interpreted to render them practical and effective rather than theoretical and illusory ...

The proceedings are looked at as a whole and one restriction on the defence may be insufficient to render the proceedings as a whole unfair ...

Pag 156 :-

The Commission did not exclude that the refusal by a court to order an expert, hear a witness or to accept other types of evidence might in certain circumstances render the proceedings unfair. Since, however, it was for the national courts to decide what was necessary or essential to decide a case, it commented that only in exceptional circumstances would it conclude that a decision of a national court in such a matter

violated the right to a fair hearing. It gave the example of where an applicant adduced some evidence which the court rejected outright, refusing to allow verification of it and without giving sufficient reasons for its refusal ...

Where in "<u>Accardi v. Italy</u>" (30598/02 – Dec. January 20. 2005 – ECHR 2005-II) the decision of a domestic court not to order a pychologist`s report or to call the expert requested by the defence was based on logical and pertinent arguments and the conclusion that such evidential measures were of no relevance to the proceedings, there was no infringement of the rights of the defence or the fairness principle ...

Ikkunsidrat :

VII. <u>Gurisprudenza</u>

Fis-sentenza taghha tas-26 ta` Lulju 2011 fil-kawza "**<u>Huseyn and Others vs Azerbaijan</u>**" il-Qorti ta` Strasbourg qalet hekk :-

175. More specifically, all of the applicants consistently claimed that neither they nor their counsel had been given sufficient access to the prosecution evidence after the pre-trial investigation had been completed and before the trial commenced, nor had they enjoyed such access after the trial had commenced, despite their repeated complaints to that effect. The Court reiterates that the right to an adversarial trial under Article 6 § 1 of the Convention means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Various ways are conceivable in which national law may meet this requirement. However, whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment on them (see Brandstetter v. Austria, 28 August 1991, §§ 66-67, Series A no. 211). Article 6 § 3 (b) guarantees the accused "adequate time and facilities for the preparation of his defence" and therefore implies that the

substantive defence activity on his behalf may comprise everything which is "necessary" to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility of putting all relevant defence arguments before the trial court and thus of influencing the outcome of the proceedings (see Can v. Austria, no. 9300/81, Commission report of 12 July 1984, § 53, Series A no. 96; Connolly v. the United Kingdom, no. 27245/95, Commission decision of 26 June 1996; and Mayzit v. Russia, no. 63378/00, § 78, 20 January 2005). The facilities which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself for the purposes of preparing his defence with the results of investigations carried out throughout the proceedings (see C.G.P. v. the Netherlands, no. 29835/96, Commission decision of 15 January 1997, and Foucher v. France, 18 March 1997, §§ 31-38, Reports 1997-II). The issue of the adequacy of the time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case.

…

188. The Court reiterates that the principle of equality of arms, as one of the fundamental elements of the broader concept of a fair trial, requires each party to be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his opponent (see Nideröst-Huber v. Switzerland, 18 February 1997, § 23, Reports 1997-I). That right means, inter alia, the opportunity for the parties to a trial to present their own legal assessment of the case and to comment on the observations made by the other party, with a view to influencing the court`s decision (see, mutatis mutandis, Lobo Machado v. Portugal, 20 February 1996, § 31, Reports 1996-I, with further references). The requirement of equality of arms, in the sense of a "fair balance" between the parties, applies in principle to both criminal and civil cases ; in criminal cases a lesser degree of latitude is allowed for any deviations from that requirement (see Dombo Beheer B.V. v. the Netherlands, 27 October 1993, §§ 32-33, Series A no. 274).

…

196. At the outset, the Court notes that the prosecution`s case was based to a large degree on numerous witnesses whose pre-trial statements were produced in court. However, it appears that all of these witnesses were called to testify at the trial and that, in principle, the applicants were given an opportunity to question them. As to the defence witnesses, it is true that the Assize Court allowed the examination of only some of the witnesses requested by the defence, but refused to call all of the persons whom the defence sought to examine. While Article 6 § 3 (d) of the Convention is aimed at ensuring equality in criminal proceedings between the defence and the prosecution as regards the calling and examination of witnesses, it does not give an accused person an unlimited right to obtain the attendance of witnesses in court. The domestic law may thus lay down conditions for the admission and examination of witnesses provided that such conditions are identical for witnesses on both sides. Similarly, the domestic court is free, subject

to compliance with the terms of the Convention, to refuse to call witnesses proposed by the defence, for instance on the ground that the court considers their evidence unlikely to assist in ascertaining the truth (see X v. Austria, no. 4428/70, Commission decision of 1 June 1972). Having regard to the available material, the Court finds that it has not been clearly shown how any of the witnesses whom the Assize Court refused to examine would have been able to assist the applicants` defence against the specific accusations put forward against them.

…

200. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. It must be examined in particular whether the applicants were given the opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see Khan, cited above, §§ 35 and 37, and Allan, cited above, § 43). Where the reliability of evidence is in dispute the existence of fair procedures to examine the admissibility of the evidence takes on an even greater importance (see Allan, cited above, § 47, and Bykov v. Russia [GC], no. 4378/02, § 95, ECHR 2009-...).

Fil-kawza "**Klimentyev vs Russia**" li kienet deciza mill-Qorti ta` Strasbourg fis-16 ta` Novembru 2006 l-ilment tal-applikant kien illi huwa sofra vjolazzjoni tad-dritt tieghu ghal smigh xieraq ghaliex ma kienx inghata l-opportunita` li jezamina r-rapporti tal-esperti tal-qorti. F`dik il-kawza il-Qorti Ewropea ma kenitx sabet vjolazzjoni ghaliex il-ligi domestika kienet taghti l-opportunita` lill-akkuzat li jezamina dawk ir-rapporti u ghalhekk kien nuqqas tal-applikant li ma hax dik l-opportunita`. Il-Qorti qalet hekk :-

95. The Court recalls that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see e.g. Jespers v. Belgium, no. 8403/78, Commission decision of 15 October 1980, Decisions and Reports (DR) 27, p. 61; Foucher v. France, judgment of 18 March 1997, Reports of Judgments and Decisions 1997-II, § 34; Bulut v. Austria, judgment of 22 February 1996, Reports of Judgments and Decisions 1996-II, p. 380-381, § 47).

96. On the facts, the Court observes that the case for the prosecution rested, inter alia, on a number of expert reports (technical, medical, graphological and other) ordered by the prosecution during the pre-trial stage of proceedings in 1995 and 1996. Four out of more than sixteen decisions ordering such reports

were served on the applicant with delays ranging from two to three and a half months, whilst the remaining twelve decisions were served within a month from the respective dates of their delivery (see paragraphs 34-37 in the summary of facts). The applicant principally argued that the late notification of these decisions had effectively deprived him of the possibility to participate in the ordering of the expert examinations and that the subsequent admission of the respective expert examinations had been in breach of Article 6.

97. Having regard to the circumstances of the case, the relevant domestic law and the parties` submissions, the Court cannot subscribe to the applicant`s argument. To begin with, the Court observes that at the time of service of these sixteen decisions both the applicant and his counsel were officially informed about the procedural rights of the accused, including the right to challenge an expert, seek the appointment of a particular person as an expert, adduce further questions, be present during the expert examination in person and make any comments and be informed of expert conclusions (see paragraph 37 above). The applicant and his counsel had an unrestricted opportunity to make related requests and motions in writing and, indeed, there is no indication in the case-file that any of the requests of the defence were turned down as belated or otherwise inadmissible. On the contrary, the authorities granted and implemented all of the applicant`s requests in this respect. Moreover, there is nothing in the case-file to suggest, and indeed the applicant has not alleged that he was unable, personally or with the assistance of his defence counsel, to study the impugned expert examinations beforehand, contest them throughout the trial and appeal proceedings or avail himself of his rights under Sections 89 and 290 of the Criminal Procedure Code by requesting the trial court to order additional or repetitive expert examinations.

Ikkunsidrat :

VIII. <u>Risultanzi</u>

Fis-sentenza taghha tat-30 ta` Settembru 2011 fil-kawza "**<u>J.E.M Investments Ltd v. Avukat Generali et</u>**" il-Qorti Kostituzzjonali qalet hekk –

id-dritt ghas-smigh xieraq ma jiggarantix il-korrettezza tas-sentenzi fil-meritu izda jiggarantixxi biss l-aderenza ma` certi principji procedurali (indipendenza u imparzjalita` tal-Qorti u tal-gudikant, audi alteram partem u smigh u pronuncjament tas-sentenza fil-pubbliku) li huma konducenti ghall-amministrazzjoni tajba tal-gustizzja. Il-funzjoni tal-Qorti, fil-gurisdizzjoni Kostituzzjonali taghha, m`hijiex illi tirrevedi s-sentenzi ta` Qrati ohra biex tghid jekk dawn gewx decizi `sewwa` jew le, izda hija limitata ghall-funzjoni li tara jekk dawk is-sentenzi kisrux il-Kostituzzjoni jew il-Konvenzjoni Ewropea.

Ighidu Harris, O`Boyle & Warbrick fil-ktieb **"*Law of the European Convention on Human Rights*"** (Tieni Edizzjoni – 2009 - OUP) illi **in linea ta` principju** *the Court* (u cioe` l-ECHR) *allows States a wide margin of appreciation as to the manner in which national courts operate … A consequence of this is that in certain contexts the provisions of Article 6 are as much obligations of results as of conduct,* ***with national courts being allowed to follow whatever particular rules they choose so long as the end result can be seen to be a fair trial***. (enfasi ta` din il-Qorti) [ara pag 202]. U jkomplu li ***in some contexts a breach of Article 6 will only be found to have occurred upon proof of "actual prejudice" to the applicant*** (enfasi ta` din il-Qorti) [ara pag 204]

Ir-rikorrent qieghed jilmenta illi bil-fatt illi ma kienx inghata l-opportunita` li jressaq jew li jkollu ghajnuna esperta sabiex jirribatti r-rapport tekniku tal-espert kalligrafu nominat mill-qorti sehhet lezjoni tad-dritt tieghu ghal smigh xieraq kif tutelati bil-Kostituzzjoni u bil-Konvenzjoni.

Fi procedimenti civili, l-ammissibilita` bhala prova tal-opinjoni ta` espert *ex parte* kienet introdotta bl-emendi ghall-Kap 12 li kienu saru bl-Att XXIV tal-1995. **L-Art 563A** jaqra hekk :-

(1) Meta persuna tissejjah bhal xhud, l-opinjoni taghha fuq kull kwistjoni rilevanti li dwarha hi kwalifikata taghti xiehda bhala espert, ghandha tintlaqa` bhala xiehda biss jekk, fil-fehma tal-qorti, dik il-persuna jkollha l-kwalifiki mehtiega dwar dik il- kwistjoni.

(2) Meta persuna tissejjah bhala xhud, dikjarazzjoni ta` opinjoni li ssir minnha fuq kull kwistjoni rilevanti li dwarha mhijiex kwalifikata taghti xiehda bhala espert, jekk din ix-xiehda tinghata b`mod li jinghadu fatti rilevanti li jkunu jew konstatati personalment minnha, ghandha tkun ammissibbli bhala prova ta` dak li dik il-persuna tkun hemm ikkonstatat.

(3) L-opinjoni moghtija minn persuna skond id-disposizzjonijiet ta` dan l-artikolu ghandha tkun minghajr pregudizzju ghad-disposizzjonijiet ta` l-artikolu 681 u ghas-setgha tal-qorti li tahtar perit skond id-disposizzjonijiet ta` l-artikolu 646.

Disposizzjoni simili ma tirrizultax fil-Kap 9. Il-hatra ta` periti hija regolata bl-Art 650 sa 657 tal-Kap 9. Il-Kodici Kriminali (ghad-differenza tal-Kap 12) ma jsemmi xejn dwar prova kostitwita mill-opinjoni ta` espert *ex parte.* L-istess Kodici lanqas ma jaccenna ghall-possibilita` tal-hatra ta` periti addizzjonali. Billi jipprevali l-principju illi *ubi lex voluit dixit,* din il-Qorti tghid illi ladarba fil-Kap 9 ma hemmx riferenza, il-prova permezz ta` espert *ex parte* u l-hatra ta` periti addizzjonali huma eskluzi fi procedimenti penali.

Fis-sentenza taghha tat-13 ta` Mejju 2011 fil-kawza "**Il-Pulizija vs Daniela Mercieca**", il-Qorti tal-Appell Kriminali qalet hekk :-

In kwantu ghax-xhud Mario Buttigieg din il-Qorti ma hix ser tiehu konjizzjoni tal-opinjonijiet espressi minnu peress li dan ma jirrizultax li kien xi espert nominat mill-Qorti u anzi jirrizulta li kien gie nominat ex parte minn u fl-interess tas-socjeta` assiguratrici Gasan Mamo Insurance li taghha kien impjegat u li kellha bhala klient taghha lil Joseph Saliba.

Fis-sentenza taghha tas-16 ta` Gunju 2011 fil-kawza "**Il-Pulizija vs Paul Micallef**" il-Qorti tal-Appell Kriminali qalet hekk :-

Dwar ***it-tieni aggravju*** *fis-sens li ma saritx l-ahjar prova dwar il-valur tal-hamiema li nqatlet l-imputat ghandu ragun. L-unika prova f`dan ir-rigward kien Marco Farrugia, il-President tal-Federazzjoni tat-hamiem tal-giri izda dan gie prodott ex parte minn Victor Agius u ma giex nominat espert mill-Qorti u ghalhekk l-istima tieghu tal-valur tal-hamiema in kwistjoni ma tistax tigi accettata. Meta si tratta ta` stima ta` valur ta` oggett bhal dak hawn in kwistjoni fejn hemm element qawwi ta` spekulazzjoni involuta li mhux necessarjament tikkorrispondi mal-valur naturali tal-oggett hi aktar impellenti li l-istima ssir minn persuna bil-garanziji necessarji ta` indipendenza u imparzjalita` li jista` jipprovdi persuna esperta nominata mill-Qorti. Dan ma sarx u ghalhekk din il-Qorti ma hix ser toqghod fuq l-istima li ghamel ix-xhud imsemmi.*

Qabel ma tesprimi ruhha dwar l-ilment tar-rikorrent fil-procediment tal-lum, il-Qorti sejra tikkummenta dwar xi sottomissjonijiet li saru mir-rikorrent.

Ir-rikorrent ighid a fol 290 illi huwa kien ghamel talba sabiex Dott Giuliana Scerri Ferrante tigi appuntata bhala espert kalligrafu *ex parte*. Kif diga` rajna qabel (II. Fatti) l-affarijiet mhux hekk graw. Ir-rikorrent qatt ma ghamel talba f`dan is-sens, anke ghaliex proceduralment huwa ma setax jaghmilha. Dak li ghamel huwa li ddikjara li l-ahhar xhud tieghu kienet proprju Dottor Scerri Ferrante.

Imprecizjoni ohra tar-rikorrent hija meta jsostni li l-Ewwel Qorti ddikjarat maghluq l-istadju tal-provi tad-difiza minkejja l-protesti tad-difiza. Dak allegat mir-rikorrent mhux riskontrat fil-verbal tas-seduta tat-3 ta` Dicembru 2009. Infatti ghalkemm dakinhar il-Qorti tassew ghalqet il-provi tal-akkuzat, u f`dik is-seduta, ir-rikorrent ma kienx assistit, ma tirrizulta l-ebda protesta jew ilment da parti tar-rikorrent ghall-fatt li l-Ewwel Qorti ghalqet il-provi tieghu.

Wara li qieset bir-reqqa kollha l-fatti u c-cirkostanzi ta` dan il-kaz, il-Qorti ma ssibx li bil-mod kif gabet ruhha l-Ewwel Qorti mar-rikorrent kien hemm lezjoni tad-dritt tieghu ghal smigh xieraq kif tutelat bil-Kostituzzjoni u bil-Konvenzjoni.

Il-Qorti tghid dan abbazi tas-segwenti konsiderazzjonijiet :-

Fis-seduta tal-1 ta` Dicembru 2008 quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti Struttorja (fol 101 u 102), il-Prosekuzzjoni talbet in-nomina ta` espert kalligrafu biex janalizza l-genwinita` o meno tal-firma tal-account holder li tidher fuq numru ta` cheques. Il-Qorti laqghet t-talba u hatret lil Martin Bajada bhala espert ghal dak l-iskop.

Fis-seduta tat-12 ta` Jannar 2009 (fol 126), l-espert Martin Bajada xehed, ipprezenta r-relazzjoni tieghu quddiem il-Qorti u kkonferma l-kontenut taghha bil-gurament.

Ghalkemm ir-relazzjoni kienet ipprezentata propju dakinhar tat-12 ta` Jannar 2009, id-difensur tal-akkuzat ghazel li jaghmel il-kontroezami tal-espert tal-Qorti. U kif jirrizulta kemm mit-traskrizzjoni tad-deposizzjoni (ara fol 128 u 129) <u>kif ukoll</u> mill-verbal tas-seduta, il-kontroezami intemm f`dik l-udjenza u l-akkuzat b`ebda mod ma talab li jzomm riservat kull kontroezami ulterjuri.

Fl-istess seduta, il-Prosekuzzjoni ddikjarat li ma kellhiex aktar provi. Kif appena r-relazzjoni kienet mahlufa, kienet prontament inserita fl-atti tal-kawza.

L-atti tal-kawza kienu dejjem ghad-disposizzjoni tal-akkuzat. Ir-relazzjoni tal-espert kienet ghad-disposizzjoni tar-rikorrent sa mit-12 ta` Jannar 2009. Huwa ben evidenti pero` li ghalkemm l-akkuzat kien edott bil-konkluzjonijiet tal-espert, huwa naqas milli jiehu kopja tar-relazzjoni ghall-fini tad-difiza tieghu.

Din hija konkluzjoni ta` l-Qorti li pero` hija sostnuta mill-assjem tal-fatti.

Infatti fis-seduta tas-26 ta` Ottubru 2009 (fol 197) id-difiza ddikjarat illi kien fadlilha xhud wiehed u cioe` l-PL Giuliana Scerri Ferrante. Mill-verbal tal-udjenza, ma jirrizultax x`kien l-oggett tal-prova li ried jaghmel l-akkuzat bix-xiehda ta` Dott. Scerri Ferrante.

Fl-udjenza tat-3 ta` Dicembru 2009, il-Qorti vverbalizzat illi qabel il-hin tas-seduta Dott Scerri Ferrante dehret u nfurmat lill-Qorti li dwar il-fatti tal-kaz ma kien taf xejn, pero` kienet avvicinata mill-imputat biex hija tezemina l-atti u taghmel rapport dwar il-firem mertu ta` dawn il-proceduri.

Ghal din il-Qorti dan ifisser li certament sat-3 ta` Dicembru 2009, u allura ghal hdax-il xahar shah) l-akkuzat kien naqas li jghaddi kopja tal-atti tal-kawza (inkluza r-relazzjoni) ighaddiha lil Dott Scerri Ferrante sabiex taghtih il-fehma taghha.

Ghal xiex kienet se ssarraf dik il-fehma r-rikorrent baqa` ma spjegax car u tond fil-procediment tal-lum meta l-Qorti tqis illi l-kontroezami tal-espert tal-Qorti kien diga` nghalaq, u l-eventwali opinjoni ta` Dott Scerri Ferrante ma kenitx tikkostitwixxi prova fil-procediment penali.

Rinfaccjata mid-dikjarazzjoni tal-akkuzat stess illi l-ahhar xhud tieghu kienet Dott Scerri Ferrante u rinfaccjata mid-dikjarazzjoni tal-istess Dott Scerri Ferrante li ma kienet taf xejn dwar il-kaz, il-Qorti tal-Magistrati ghalqet il-provi tal-akkuzat.

Fic-cirkostanzi partikolari ta` dan il-kaz, din il-Qorti ma ssibx li d-decizjoni tal-Qorti tal-Magistrati kienet lesiva ghad-dritt ta` smigh xieraq tar-rikorrent.

Il-kawtela tal-Qorti f`dik l-istess udjenza – kif del resto jidher car illi kienet fl-udjenzi kollha – hija manifesta wkoll mill-fatt illi ghalkemm f`dik l-udjenza *l-imputat iddikjara li ghas-seduta tal-lum mhux qieghed jesigi l-assistenza ta` l-avukat tieghu,* u ghalkemm il-Prosekuzzjoni u l-parte civile ghamlu s-sottomissjonijiet finali taghhom, il-Qorti halliet il-*kawza ghas-sentenza ghall-11 ta` Jannar 2010 fid-9.00 a.m. b`dan li l-imputat ghandu zmien sat-18 ta` Dicembru 2009 biex jaghmel nota ta` sottomissjonijiet tieghu jekk jixtieq.*

Fil-fatt l-imputatipprezenta nota ta` osservazzjonijiet fit-22 ta` Dicembru 2009.

Ghalkemm fis-7 ta` Dicembru 2009, l-imputat ipprezenta rikors (fol 257) fejn talab lill-Qorti sabiex tissospendi l-prolazzjoni tas-sentenza u tawtorizzah biex iressaq bhala xhud lil Dr Giuliana Scerri Ferrante billi skond l-imputat dik

kienet xhud indispensabbli sabiex ikollu smigh xieraq, ghalkemm b`digriet taghha tad-9 ta` Dicembru 2009 (fol 260) il-Qorti tat lill-imputat gimgha zmien min-notifika tad-digriet lil Dr Chris Cardona biex jindika x`hinu l-iskop tax-xiehda ta` Dr Scerri Ferrante u dan in vista ta` dak verbalizzat fl-udjenza tat-3 ta` Dicembru 2009, kien biss fl-udjenza tal-11 ta` Jannar 2010 fejn l-akkuzat (sprovvist mill-avukat tieghu) *ddikjara li huwa xtaq lil Dr Giuliana Scerri Ferrante bhala espert biex tezamina l-atti u taghti l-opinjoni taghha dwar il-firem mertu ta` dawn il-proceduri.* Li jfisser li ma kien inbidel propju xejn minn dak illi sehh fl-udjenza tat-3 ta` Dicembru 2009.

Ghalhekk il-Qorti cahdet it-talba tal-akkuzat kif dedotta fir-rikors tas-7 ta` Dicembru 2009, halliet il-kawza ghas-sentenza ghat-18 ta` Jannar 2010 u tat is-sentenza dakinhar.

F`dan ir-resokont kapillari tal-fatti tal-kawza, il-Qorti terga` ssostni li ma ssib l-ebda ksur tad-dritt fondamentali tar-rikorrent.

Ighidu Harris, O`Boyle & Warbrick fil-pagna 251 tal-ktieb "***<u>Law of the European Convention on Human Rights</u>***" (op. cit.) –

The right to a fair hearing supposes compliance with the principle of equality of arms. This principle, which applies to civil as well as criminal proceedings requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. In general terms, the principle incorporates the idea of a fair balance between the parties.

Il-Qorti ma ssibx illi fil-konduzzjoni tal-procediment penali, ir-rikorrent kien ipprivat mill-opportunita` ragonevoli li jiddefendi ruhu mill-akkuzi dedotti

kontra tieghu jew tqieghed fi zvantagg fil-konfront tal-kontroparti. Il-perit tekniku inhatar mill-Qorti tal-Magistrati skond il-ligi. Hadd ma kkontesta l-kompetenza tieghu. Lanqas l-indipendenza jew l-imparzjalita` tieghu. Ghalkemm kien hemm rapport ta` espert tal-Qorti, l-ahhar kelma baqa` tal-Qorti u meta esprimiet ruhha fis-sentenza taghha l-Qorti kienet rigoruza fl-osservanza tal-Art 656 tal-Kap 9.

Din il-Qorti mhijiex tarax *actual prejudice* fil-mod kif il-qrati penali ordinarji ttrattaw mar-rikorrent. Anzi din il-Qorti tghid illi dawk il-qrati ttrattaw mar-rikorrent korrettement u skond il-ligi, u fl-agir taghhom ma ghamlu xejn lesiv ghall-jedd tar-rikorrent ghal smigh xieraq kif protett mill-Kostituzzjoni u mill-Konvenzjoni.

Fis-sentenza taghha tal-5 ta` Novembru 2013 fil-kawza `**The Republic of Malta v. Ana-Maria Beatrice Ciocanel**` il-Qorti tal-Appell Kriminali (komposta kolleggjalment) qalet hekk –

"it is a well established principle that as a rule questions relating to fair trial are to be addressed upon an assessment of the trial as a whole and that it is only at the conclusion of such trial that a proper assessment of whether there has been a fair trial can be made."

Din il-Qorti hija tal-fehma illi fil-procediment kollu – mill-bidu sal-ahhar – illi r-rikorrent kellu quddiem il-qrati penali ordinarji kien rispettat bis-shih id-dritt tieghu ghal smigh xieraq.

Decide

Ghar-ragunijiet kollha premessi, il-Qorti qeghda taqta` u tiddeciedi din il-kawza billi –

Tichad l-ewwel eccezzjoni tal-intimat.

Tilqa` l-eccezzjonijiet l-ohra tal-intimat.

Tichad it-talbiet kollha tar-rikorrent.

Tikkundanna lir-rikorrent sabiex ihallas l-ispejjez kollha ta` din il-kawza.

< Sentenza Finali >

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