MALTA

QORTI CIVILI

PRIM' AWLA

(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF

JOSEPH ZAMMIT MC KEON

Seduta tal-15 ta' Mejju, 2014

Referenza Kostituzzjonali Numru. 46/2013

Il-Pulizija

[Spettur Spiridione Zammit]

kontra

Sandra Spagnol

Il-Qorti :

Rat illi Sandra Spagnol ta` 38 sena bint Anthony u Teresa nee` Vella mwielda Pieta` fit-23 ta` Gunju 1972 u toqghod Block J Flat 6 Qasam Hal-Tmiem Zejtun detentrici tal-karta ta` l-identita` b`numru 284672M tinsab akkuzata talli fis-7 ta` Ottubru 2010 u zminijiet qabel waqt li kienet fil-Facilita` Korrettiva ta` Kordin u f`dawn il-Gzejjer :- 1) bieghet jew xort`ohra ittraffikat fir-raza mehuda mill-pjanta Cannabis jew xi preparazzjonijiet li jkollhom bhala bazi dina r-raza, u dan bi ksur tal-Ordinanza dwar il-Medicini Perikoluzi, Kap 101 tal-Ligijiet ta` Malta ; 2) ukoll talli fl-istess cirkustanzi kellu fil-pussess tieghu il-pjanta Cannabis kollha jew bicca minnha u dan bi ksur tal-Artikolu 8(d) tal-Kapitolu 101 tal-Ligijiet ta` Malta 3) ukoll talli fl-istess cirkustanzi bhala persuna li m`hix ufficjal tal-habs jew persuna ohra mpjegata fil-habs, minghajr l-awtorita` legittima dahhlet jew ippruvat iddahhal f`xi parti tal-konfini ta` habs xi oggett li jkun li hu projbit skond xi regolamenti maghmula skond dan l-Att jew ippruvat iggorr xi ogett bhal dak barra mill-habs u dan bi ksur tal-artikolu 7 tal-Kap 260.

Rat illi fil-kors tal-procediment quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali, u precizament fil-25 ta` Gunju 2013, id-difiza talbet li *ssir referenza kostituzzjonali u dan billi kien hemm ksur tal-artikolu 39 tal-Kostituzzjoni ta` Malta u tal-artikolu 6 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem u dan billi l-imputata ma hix ser tigi gudikata minn Qorti indipendenti u mparzjali kif inhu d-dritt fundamentali taghha billi dik l-istess Qorti (bhala Qorti tal-Magistrati) kif diversament preseduta kienet qdiet funzjonijiet investigattivi fl-istess kaz u dana kif jirrizulta mid-dokument JM2 esebit in atti u cioe` il-process verbal dwar sejba ta` allegata droga fuq il-prigunier Patrick Spagnol nhar is-7 ta` Ottubru 2013.*

Rat illi dakinhar stess tal-25 ta` Gunju 2013, il-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali tat provvediment li jaqra testwalment hekk :-

wara li rat l-artikolu 46(3) tal-Kostituzzjoni ta` Malta tqis illi l-kwistjoni sollevata mid-difiza la hija frivola u lanqas vessatorja u tordna illi l-punt kostituzzjonali sollevat mill-akkuzat ghandha tigi referuta lil Prim Awla tal-Qorti Civili Sede Kostituzzjonali. Dana sabiex il-Qorti tiddeciedi jekk kienx hemm vjolazzjoni tal-artikolu 39 tal-Kostituzzjoni ta` Malta u tal-artikolu 6 tal-

Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem u dana minhabba l-fatt illi l-imputata mhix ser tinghata smigh xieraq minn qorti indipendenti u mparzjali billi l-Qorti tal-Magistrati li qed tisma` u li ser tiddeciedi l-istess kaz taghha hija l-istess Qorti (ghalkemm diversament presjeduta) illi qdiet funzjonijiet investigattivi fuq l-istess kaz qabel ma l-imputata tressqet il-Qorti bl-akkuzi odjerni. Dan johrog minn Dok JM2 il-process verbal dwar sejba ta` droga fuq prigunier Patrick Spagnol nhar is-7 ta` Ottubru 2010 fejn jirrizulta illi dan il-process investigattiv gie esegwit mill-Qorti tal-Magistrati. (enfasi tal-qorti)

Rat id-digriet taghha tas-27 ta` Gunju 2013 il-Qorti wara li rat ir-referenza kostituzzjonali, ordnat in-notifika taghha lill-Kummissarju tal-Pulizija u lill-avukat Generali b`sebat ijiem zmien ghar-risposta, u appuntat ir-referenza ghas-smigh ghall-udjenza ta` nhar it-Tlieta 17 ta` Settembru 2013 fid-9.00 a.m.

Rat ir-risposta li pprezenta l-Kummissarju tal-Pulizija fit-22 ta` Lulju 2013 u li taqra hekk :-

Illi fir-riferenza kostituzzjonali odjerna din l-Onorabbli Qorti qieghda tigi mitluba biex tiddetermina jekk a tenur tal-Artikolu 39 tal-Kostituzzjoni u tal-Artikolu 6 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem l-imputata Sandra Spagnol hijiex ser tinghata smigh xieraq minn Qorti indipendenti u mparzjali billi l-Qorti tal-Magistrati li qed tisma` u li ser tiddeciedi l-istess kaz taghha hija l-istess Qorti (ghalkemm diversament preseduta) illi qdiet funzjonijiet investigattivi fuq l-istess kaz qabel ma l-imputata tressqet il-Qorti bl-akkuzi in kwistjoni.

Illi fl-ewwel lok ***u in linea preliminari****, in kwantu l-mertu tar-riferenza kostituzzjonali odjerna jikkoncerna l-funzjoni u l-operat tal-Magistrat Inkwirenti u tal-Qorti tal-Magistrati kif stabbiliti mil-ligi ghandu jigi kjamat fil-proceduri l-Avukat Generali.*

*Illi subordinatament u bla pregudizzju ghas-suespost, **fil-mertu** l-esponent jeccepixxi li fil-kaz odjern ma hemmx lezjoni tad-drittijiet fundamentali tal-Bniedem ghar-ragunijiet segwenti:*

Dwar ir-rwol u l-funzjoni tal-Magistrat Inkwirenti u tal-Qorti tal-Magistrati

Illi l-premessa li fuqu hija bazata r-riferenza kostituzzjonali hija li l-Qorti tal-Magistrati li qed tisma` u li ser tiddeciedi l-istess kaz tal-imputata hija "l-istess Qorti" illi qdiet funzjonijiet investigattivi fuq l-istess kaz. Bir-rispett kollu l-esponent ma jaqbilx – Il-Magistrat Inkwirenti mhuwiex "Qorti" u ghalhekk ma jistax jitqies "l-istess" bhal Qorti tal-Magistrati. Anzi bhala stat ta` fatt u kif jirrizulta mill-istess Kodici Kriminali hemm distinzjoni netta, cara u inekwivoka bejn ir-rwol u l-parametri tal-funzjonijiet tal-Magistrati Inkwirenti u r-rwol u l-funzjoni tal-Qorti tal-Magistrati (sew jekk hija fil-kompetenza ta` gudikatura kriminali u anke jekk hija fil-kompetenza Istruttorja taghha).

Illi huwa l-istess Kodici Kriminali li jipprovdi dwar il-Qorti tal-Magistrati fit-Taqsima I Titoli II filwaqt li b`mod separat jipprovdi dwar il-Magistrat Inkwirenti fit-Taqsima II Titolu II. Inoltre fejn il-legislatur ried li jakkorda lill-Magistrat Inkwirenti uhud mill-poteri tal-Qorti tal-Magistrati, dan ghamlu bl-aktar mod esplicitu [Ara Artikolu 554 tal-Kap 9 partikolarment is-sub-artikolu 3]. Pero` billi Magistrat Inkwirenti jkollu poteri bhal tal-Qorti tal-Magistrati, dan ma jaghmlux "Qorti" anke jekk bhala prassi whud mill-process-verbal kompilati minn Magistrati Inkwirenti juzaw in-nomenklatura "Qorti tal-Magistrati (Malta)". Hija l-ligi pero` li testabilixxi r-regola u mhux il-prassi.

*Illi dawn il-principji gew konstati mill-Qorti tal-Appell Kriminali fil-kaz "**Ir-Repubblika ta` Malta vs Jason Calleja**" [Deciz 3 ta` Lulju 1997] fejn intqal hekk:*

"Il-Magistrat Inkwirenti fil-kors tal-inkjesti ma jagixxix bhala Qorti Istruttorja, izda bhala Magistrat ut sic. Anzi f`certi partijiet tal-Kodici Kriminali, bhal per ezempju,

fl-Artikolu 549(4), hemm cara d-distinzjoni bejn il-Magistrat Inkwirenti u l-Qorti tal-Magistrati bhala Qorti Istruttorja. Huwa anqas ma ghandu funzjoni ta` Qorti ta` Gudikatura Kriminali. Il-Magistrat Inkwirenti hu fdat lilu l-inkariku li fil-kazijiet previsti mill-istess titolu, jinvestiga r-reat jew il-fatt rapportat lilu u / jew izomm l-access li l-ligi tipprevedi u fl-ahharnett jidderigi process verbal li l-ligi stess tirregola u tattribwilu valur probatorju. Dan kollu jifforma parti integrali mill-process generali tar-ricerka tal-verita` u jikkonsisti principalment fil-gbir u preservazzjoni ta` dawk il-provi kollha, diretti u ndiretti, li l-Magistrat Inkwirenti jirnexxielu jidentifika bhala pertinenti ghall-grajja jew reat li jkun qed jinvestiga ... Certament mhix il-funzjoni tal-Magistrat Inkwirenti li jiddeciedi li ghar-reat investigat minnu huwa certament jew probbabilment responsabbli xi hadd partikolari, ghax kif inghad huwa ma jagixxix qua Qorti, la tal-Istruttorja u lanqas ta` Gudikatura."

Ebda ksur tal-Artikolu 39 tal-Kostituzzjoni u tal-Artikolu 6 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem

Illi stabbilita d-distinzjoni fil-kompetenza u fir-rwoli suesposti l-esponent jeccepixxi li ma hemm ebda pregudizzju li l-imputata Spagnol ser tigi gudikata minn tribunal li ma hux indipendenti u mparzjali.

Illi l-awturi Harris, O`Boyle and Warbrick [Law of the European Convention on Human Rights] b`riferenza ghall-gurisprudenza tal-Qorti Ewropea jiddefinixxu t-termini "tribunal indipendenti u mparzjali" b`dan il-mod :

i. "a tribunal" is characterized in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner [Belilos v Switzerland {A 132(1998)}] ... As to the functional manner, an important feature of a tribunal is that it must be competent to take legally binding decisions: the capacity to make recommendations or give advice (even if normally followed) is not enough." [Pagna 285 – 286]

Illi fid-dawl tad-distrazzjoni spjegata aktar `il fuq, jigi eccepit li peress li l-Magistrat Inkwirenti ma huwiex Qorti huwa ma jaghtix "legally binding decisions". Fil-fatt wara li jigbor u jippreserva l-provi konnessi mar-reat li jkun qieghed jinvestiga, huwa jibghat l-inkartament lill-Avukat Generali skont il-ligi. Addirittura b`referenza specifika ghal kaz odjern, il-Magistrat Inkwirenti Marse-Ann Farrugia lanqas biss lahqet ghamlet almenu l-konkluzjonijiet taghha peress li PS 171 Karl Glanville ma kienx lahaq prezenta r-relazzjoni tieghu. Ahseb u ara allura kemm tista` din il-Magistrat Inkwirenti li agixxiet biss fil-parametri tal-funzjoni investigattiva taghha timpingi fuq id-drittijiet fundamentali tal-imputata Spagnol li issa qed tigi processata minn Qorti li hi preseduta minn Magistrat differenti b`funzjonijiet differenti.

ii. "An indipendent tribunal – By "indipendent" is meant "indipendent of the executive and also of the parties" [Pagna 286]

Illi l-Magistrat Inkwirenti u l-Qorti tal-Magistrati huma ndipendenti mhux biss fil-qadi tal-funzjonijiet rispettivi taghhom imma anke ndipendenti minn xulxin. Ghalhekk ebda nuqqas ta` indipendenza ma hija attribwibbli lilhom.

iii. "An impartial tribunal – "Impartiality" means lack of prejudice or bias. To satisfy the requirement, the tribunal must comply with both a subjective and an objective test [Hauschildt v Denmark A 154(1989)] : The existence of impartiality for the purpose of Article 6(1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect." [Pagna 290]

Illi ghal darb`ohra u fid-dawl tas-suespost l-esponent jeccepixxi li l-qafas legali li fih iffunzjonat il-Magistrat Inkwirenti Marse-Ann Farrugia huwa wiehed li ma jaghtix lok ghal nuqqas ta` imparzjalita` oggettiva. L-istess jinghad ghall-Qorti tal-Magistrati preseduta mill-Magistrat Edwina Grima li qieghda tisma` l-kaz tal-imputata prezentement. Inoltre ma saret ebda allegazzjoni ta` nuqqas ta` imparzjalita` suggettiva da parti taz-zewg Magistrati nvoluti fil-kaz odjern u fi kwalunkwe kaz din ghandha tigi meqjusa bhala nfondata fil-fatt u fid-dritt.

Illi finalment jigi eccepit li lanqas fil-kaz fejn il-Magistrat Inkwirenti kien l-istess wiehed li sussegwentement ippresjeda l-Qorti tal-Magistrati bhala Qorti Istruttorja ma nstab ksur tal-Artikolu 39 tal-Kostituzzjoni u tal-Artikolu 6 tal-Konvenzjoni Ewropea ahseb u ara fil-kaz odjern fejn il-Magistrati huma differenti – ***Mario Borg vs Kummissarju tal-Pulizija vs Kummissarju tal-Pulizija et deciza 25 ta` Jannar 2013*** *[Rik. 57/2011 Qorti Kostituzzjonali].*

Ghaldaqstant u fid-dawl tas-suespost l-esponent jitlob lil din l-Onorabbli Qorti sabiex twiegeb ghall-kwistjoni riferita lilha mill-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali fil-25 ta` Gunju 2013 billi ssib li ma hemm ebda ksur tal-Artikolu 39 tal-Kostituzzjoni u tal-Artikolu 6 tal-Konvenzjoni Ewropea ghad-Drittijiet u l-Libertajiet Fundamentali tal-Bniedem.

Salvi eccezzjonijiet ulterjuri.

Rat id-digriet taghha moghti fl-udjenza tas-17 ta` Settembru 2013 fejn ipprovdiet dwar l-ewwel eccezzjoni preliminari tal-intimat Kummissarju tal-Pulizija billi ordnat il-kjamata fil-kawza tal-Avukat Generali. Dr. Susan Sciberras mill-Ufficcju tal-Avukat Generali laqghet in-notifika tal-atti ghan-nom tal-Avukat Generali u ddikjarat illi l-Avukat Generali kien qieghed jaghmel tieghu r-risposta li kien ipprezenta l-Kummissarju tal-Pulizija fil-procediment tal-lum hlief ghall-ewwel eccezzjoni preliminari.

Semghet ix-xiehda tal-Av. Dr. Elizabeth Quintano fl-udjenza tas-7 ta` Jannar 2014.

Rat l-atti tal-kawza "Il-Pulizija (Spettur Spiridione Zammit) vs Sandra Spagnol" li kienu allegati mal-atti tal-procediment tal-lum.

Semghet is-sottomissjonijiet tal-ahhar li ghamlu bil-fomm id-difensuri tal-partijiet fl-udjenza tas-7 ta` Jannar 2014.

Rat id-digriet taghha moghti fl-udjenza tas-7 ta` Jannar 2014 fejn halliet il-kawza ghas-sentenza.

Rat l-atti l-ohra tal-procediment.

Ikkunsidrat :

II. <u>Id-Dok JM2</u>

Skond ir-rikorrenti, fil-proceduri kriminali istitwiti kontra taghha hija mhix sejra tinghata smigh xieraq minn qorti indipendenti u mparzjali ghaliex il-Qorti tal-Magistrati li sejra tisma` u tiddeciedi il-kaz taghha, ghalkemm hija presjeduta minn Magistrat iehor, hija l-istess Qorti tal-Magistrati illi qdiet funzjonijiet investigattivi dwar l-istess kaz taghha qabel kienet mixlija bl-akkuzi li jaghmlu l-mertu tal-procediment kriminali pendenti. Bhala prova ta` dan, ir-rikorrenti ghamlet riferenza ghad-Dok JM2 li kien prezentat bhala prova fil-kawza "Il-Pulizija (Spettur Spiridione Zammit) vs Sandra Spagnol". L-ordni ta` referenza jinvesti propju dan l-ilment tar-rikorrenti.

Dok JM2 (bl-annessi tieghu) huwa l-proces-verbal datat 12 ta` Ottubru 2012 ta` "*inkjesta dwar sejba ta` allegata droga fuq il-prigunier Patrick Spagnol nhar is-7 ta` Ottubru 2010*". Il-proces-verbal li jgib il-firma tal-Magistrat Inkwirenti Dr Marse-Ann Farrugia jghid hekk :-

Fuq rapport ta` l-Ispettur Spiridione Zammit tas-7 ta` Ottubru 2010, il-Magistrati Inkwirenti kienet infurmata illi dakinhar ghall-habta tal-5.00 p.m., il-pulizija ta` Rahal Gdid giet infurmata mill-Facilita` Korrettiva ta` Kordin li bicca zghira kannella suspettata raza tal-cannabis kienet instabet fuq il-prigunier Patrick Spagnol ID 23082(M).

Illi l-pulizija accedew fuq il-post u minn investigazzjoni preliminari rrizulta li ftit tal-hinijiet qabel CO 168 Mark Briffa ASCO kien sab l-imsemmi oggett f`bicca tal-fidda ma` tabakk u xi filters tas-sigaretti li kienu f`idejn Patrick. Patrick li jabita f`cella numru 174 f`divizjoni 4 kien ghadu kemm ikollu vista ta` kuntatt ma` hutu Sandra Spagnol ID 284672(M) u Doreen Spagnol, flimkien ma` ommu Tessie Spagnol, lkoll residenti Block J Flat 5, Qasam Hal-Tmiem, Zejtun. Wara din is-sejba li saret fil-post maghruif "debtor`s area", CO 168 Mark Briffa nforma lill-Maggur Frans Agius.

Il-Magistrat Inkwirenti giet infurmata b`dan ir-rapport sabiex il-Pulizija tiehu minghandha l-ordnijiet mehtiega skond il-Kodici Kriminali u sabiex jittiehdu l-proceduri mehtiega skond l-Artikoli 540 u 546 et sequitur ta` l-istess Kodici.

Fuq tali rapport il-Magistrat Inkwirenti nnominat lis-sewgenti :

PS 171 Karl Glanville

Illi hlief ghas-Scene of the Crime Officers, l-esperti kollha kellhom il-fakolta` li jisimghu bil-gurament ix-xhieda kollha rilevanti u opportuni ghall-ezekuzzjoni tal-inkarigu taghhom. Illi l-persuni kollha nominati kellhom jaghmlu l-osservazzjonijiet kollha rilevanti u opportuni ghall-fini tal-inkarigu taghhom u kellhom jirrelataw minghajr dewmien.

L-espert Godwin Sammut nnominat mill-Magistrat Inkwirenti pprezenta u halef r-relazzjoni tieghu. Din tinsab mehmuza hawnhekk u tifforma parti minn dan il-proces-verbal.

Illi Godwin Sammut kkonkluda bil-mod segwenti :-

"Illi fl-estratti mehuda mis-sustanzi ta` lewn kannella li hemm fid-dokument 400/10/01 nstabet is-sustanza tetrahydrocannabinol, sustanza li tigi mill-pjanta tal-cannabis. Il-piz tas-sustanzi ta` lewn kannella kien ta` 1.45 grammi u l-purita` kienet ta` cirka 100%. Is-sustanza tetrahydrocannabinol hija kkontrollata bil-ligi that it-Tielet Skeda, Taqsima A tal-Kapitolu 31 tal-Ligijiet ta` Malta".

Illi nhar it-13 ta` Marzu 2012 gie pprezentat rikors mill-Ispettur Spiridione Zammit fejn talab lill-Magistrat Inkwierenti taghlaq dan il-proces verbal minhabba li kienu ser jitressqu xi nies.

Illi PS 171 Karl Glanville ma lahaqx pprezenta r-relazzjoni tieghu u ghalhekk il-Magistrat sottoskritta ma tistax taghmel il-konkluzjonijiet taghha.

***Ghaldaqstant il-Magistrat Inkwierenti qed taghlaq dan il-proces-verbal bir-rizultanzi li ghandha u filwaqt li qed tghaqqad mieghu r-rapport tal-Ispettur Spiridione Zammit u r-relazzjoni ta` l-espert nominat u l-atti l-ohra kollha pprezentati quddiemha, tordna li dan l-inkartament jintbaghat lill-Avukat Generali fi zmien li trid il-ligi.*** (enfasi ta` din il-qorti).

Ikkunsidrat :

III. <u>Provi ohra</u>

Fil-kawza tal-lum xehdet l-<u>Av. Dr. Elizabeth Quintano</u> bhala rapprezentant tad-Direttur Qrati Kriminali. Ikkonfermat illi fil-kamp kriminali, lil kull Magistrat (inkluza l-Magistrat Edwina Grima) jigu assenjati kemm kawzi biex jisma` l-provi u jaghti decizjoni, kif ukoll inkjesti. L-inkjesti jigu assenjati skond l-Ghassa. Kull Magistrati jkollu Ghassa li tkopri perijodu ta` 24 siegha. L-unika assenjazzjoni li ma ssirx permezz ta` roster hija meta Magistrat jirtira, jew imut, inkella jsir Imhallef, ghax hemm il-prerogattiva tal-assenjazzjoni tax-xoghol tkun tal-Prim` Imhallef. Ir-registru huwa wiehed kemm ghall-kumpilazzjonijiet kif ukoll ghall-inkjesti. Fejn si tratta ta` kawzi sommarji tad-distrett, dawk imorru direttament ghand il-Magistrati li jkun jisma` l-kawzi tad-distrett partikolari.

Ikkunsidrat :

IV. **Dritt**

Ir-rikorrenti talbet ir-referenza ghaliex qeghda tilmenta minn ksur tal-Art 39 tal-Kostituzzjoni u tal-Art 6 tal-Konvenzjoni.

L-Art 39(1) tal-Kostituzzjoni jaqra hekk :-

Kull meta xi ħadd ikun akkużat b'reat kriminali huwa għandu, kemm-il darba l-akkuża ma tiġix irtirata, jiġi mogħti smigħ xieraq għeluq żmien raġonevoli minn qorti indipendenti u imparzjali mwaqqfa b'liġi.

L-Art 6(1) tal-Konvenzjoni jaqra hekk :-

Fid-decizjoni tad-drittijiet civili u ta' l-obbligi tieghu jew ta' xi akkuza kriminali kontra tieghu, kulhadd huwa ntitolat ghal smigh imparzjali u pubbliku fi zmien ragonevoli minn tribunal indipendenti u imparzjali mwaqqaf b'ligi. Is-sentenza ghandha tinghata pubblikament izda l-istampa u l-pubbliku jista' jigi eskluz mill-proceduri kollha jew minn parti minnhom fl-interess tal-morali, ta' l-ordni pubbliku jew tas-sigurtà nazzjonali f`socjeta` demokratika, meta l-interessi tal-minuri jew il-protezzjoni tal-hajja privata tal-partijiet hekk tehtieg jew safejn ikun rigorozament mehtieg fil-fehma tal-qorti f`cirkostanzi specjali meta l-pubblicita` tista' tippregudika l-interessi tal-gustizzja.

Fuq l-iskorta ta` dawn id-disposizzjonijiet, ir-rikorrenti qeghda tilmenta li ghax fil-kaz tal-lum il-Qorti tal-Magistrati (ghalkemm presjeduta diversament) qdiet funzjonijiet investigattivi qabel hi giet akkuzata hija ma kenitx sejra tigi gudikata minn qorti indipendenti u mparzjali ladarba sejra tkun il-Qorti tal-Magistrati bhala Qorti ta` Gudikatura Kriminali li tiggudikaha fil-procediment in kwistjoni.

Fit-talba ghar-referenza, ir-rikorrenti tirreferi ghall-proces-verbal (Dok JM2).

Fil-Kodici Kriminali taghna, il-"funzjonijiet investigattivi" li tirreferi ghalihom ir-rikorrenti huma dawk regolati bl-Art 546 sa 569 li jittrattaw l-"*In genere*", l-Aċċessi u r-"*Reperti*". Il-process verbal jinkwadra ruhu fost dawn id-disposizzjoni. In partikolari l-Art 550(1) ighid illi *l-proċess verbal magħmul regolarment, jista' jingħata bħala prova fis-smigħ tal-kawża u x-xhieda, il-periti jew persuni oħra li jkunu dehru fl-aċċess ma jistgħux jinġiebu biex jagħtu xiehda fl-inkjesta quddiem il-Qorti tal-Maġistrati bħala qorti istruttorja.*

<u>Unikament sabiex jinghata kwadru kemm jista` jkun shih</u>, il-Qorti tirrileva illi fit-Titolu II il-Kodici Kriminali jittratta dwar il-Qorti tal-Maġistrati. Fis-Subtitolu I jitkellem dwar il-Qorti tal-Maġistrati bħala Qorti ta' Ġudikatura Kriminali. Fis-Subtitolu II jitkellem dwar il-Qorti tal-Maġistrati bħala Qorti Istruttorja.

Mill-Art 370 sal-Art 388, il-Kap 9 jittratta l-Qorti tal-Magistrati bhala Qorti ta` Gudikatura Kriminali. Jistabilixxi r-reati li huma kompetenza ta` din il-Qorti. Jirreferi ghal dawk ir-reati fejn ghalkemm jeccedu l-piena ta` sitt xhur prigunerija pero` mhux l-ghaxar snin prigunerija, l-Avukat Generali jaghzel li jibghat lill-akkuzat biex jigi gudikat minn dik il-Qorti u l-akkuzat ma joggezzjonax li jkun hemm gudikat. Ighid kif tigi stabbilita l-kompetenza tal-Qorti, u kif titnissel il-kompetenza bejn il-Qrati tal-Magistrati. Jittratta kif tigi ezercitata l-azzjoni kriminali. Janalizza kif jitmexxa l-procediment meta l-azzjoni tigi inizjata wara kwerela kif ukoll meta tibda fuq istanza tal-Pulizija Ezekuttiva.

Mill-Art 389 sal-Art 409A, il-Kodici Kriminali jittratta l-Qorti tal-Magistrati bhala Qorti Istruttorja. Issir istruttorja, u allura tmexxi l-kompilazzjoni li tehtieg, fil-kaz ta` reati fejn il-piena ghalihom taqbez il-kompetenza taghha bhala Qorti ta` Gudikatura Kriminali. Hemm stabbilit il-mod kif titmexxa l-kompilazzjoni nkluz kif isir il-gbir tal-provi. Hemm trattat ir-rwol tal-Avukat Generali. Il-ligi tistabilixxi l-mod kif tinghalaq il-kompilazzjoni. Hemm il-Qorti tiddeciedi jekk ikunx hemm jew ma jkunx hemm ragunijiet bizzejjed biex l-akkuzat jitqieghed that att ta` akkuza. Fl-ewwel kaz,

il-Qorti tibghat l-imputat biex jitqieghed taht att ta` akkuza quddiem il-Qorti Kriminali u fit-tieni kaz, tordna l-liberazzjoni tieghu. Kemm f`kaz kif ukoll f`iehor l-atti tal-kompilazzjoni flimkien mal-oggetti li jkollhom x`jaqsmu mad-delitt jintbaghtu lill-Avukat Generali.

Hemm imbaghad l-Art 410 sa 412D li huma disposizzjonijiet generali li jghoddu ghall-Qorti tal-Magistrati sew bħala Qorti ta` Gudikatura Kriminali kemm bhala Qorti Istruttorja.

Ikkunsidrat :

V. <u>Il-Magistrat Inkwirenti</u>

Il-Kummissarju tal-Pulizija u l-Avukat Generali jaghmlu riferenza ghas-sentenza tal-Qorti tal-Appell Kriminali tat-3 ta` Lulju 1997 fil-kawza "**<u>Ir-Repubbblika ta` Malta vs Jason Calleja</u>**". Il-Qorti qalet hekk :-

L-ewwel ma jrid jigi ccarat huwa li l-Magistrat Inkwirenti fil-kors tal-inkjesti li l-imsemmi Titolu jirriservaw ghalih ma jagixxix bhala Qorti Istruttorja izda bhala Magistrat ut sic. Anzi f`certi partijiet tal-Kodici Kriminali, bhal per ezempju, fl-artikolu 549(4) hemm cara id-distinzjoni bejn il-Magistrat Inkwirent u l-Qorti tal-Magistrati bhala Qorti Istruttorja.

Stabbilit li l-Magistrat Inkwirenti fl-inkjesti ma jagixxix bhala Qorti Istruttorja x`hini allura l-funzjoni tieghu ? M`hemmx dubbju li l-ewwel konkluzjoni hija illi fl-inkjesta huwa anqas ma ghandu funzjoni ta` Gudikatura Kriminali. Certament huwa persuna intiza mil-ligi stess ta` importanza fondamentali fil-process tar-ricerka tal-verita` izda l-Magistrat Inkwirent m`ghandux il-funzjoni li jistabilixxi l-htija jew l-innocenza ta` xi persuna, indiuzjata jew m`hijiex. F`dan il-kuntest wiehed irid joqghod attent ghaliex certu kliem uzat mil-ligi specjalment fl-artikolu 554 tal-Kodici Kriminali jista` jaghti l-impressjoni illi fost il-funzjonijiet tal-Magistrat Imkwirent hemm dik li jikxef il-hati. Pero` dan m`huwiex il-kaz u jista` jigi affermat minghajr l-icken esitazzjoni illi dan qatt ma gie dubitat. Isegwi li l-kliem mill-artikolu 554(1) tal-Kodici Kriminali : "Il-Magistrat jista` jordna l-arrest ta` kull persuna li waqt access jikxef li hija hatja, jew li kontra taghha jkunu ingabru indizji bizzejjed ... (fit-test Ingliz : "It shall be lawful for the Magistrate

to order the arrest of any person whom, at the inquest, he discovers to be guilty or against whom there is suffcient circumstantial evidence ..." mhux hlief poter ta` arrest li l-ligi testendi lil Magistrat Inkwirent fejn fil-kors ta` xi inkjesta jemergu provi cari jew indikazzjonijiet qawwija li xi persuna partikolari aktarx hija responsabbli ghal kummissjoni tar-reat li jkun qed jigi investigat. Specjalment mit-test Ingliz, fejn jissemmew espressament "circumstantial evidence" jidher li l-ligi qed tipprospetta kemm il-prova <u>diretta</u> kif ukoll dik <u>indiretta</u>: fejn dawn ikunu cari bizzejjed il-Magistrat Inkwirenti, ghalkemm kif inghad, m`ghandux il-funzjoni li jistabilixxi htija jew innocenza, ghandu il-fakolta` li jordna l-arrest ta` dik il-persuna biex possibilment il-gustizzja tiehu l-kors taghha tempestivament u awtorevolment u mhux fid-diuskrezzjoni tal-pulzija. Dan hu l-uniku mod kif dak li hemm provdut fl-artikolu 554(1) tal-kodici Kriminali jista jaghmel sens jekk il-principju tal-innocenza fis-sistema taghna ghandu jkollu, kif fil-fatt dejjem imghata, valur assolut.

In linea generali, il-Magistrat Inkwirenti hu fdat lilu l-inkariku li fil-kazijiet previsti mill-istess Titolu, jinvestiga r-reat jew il-fatt rapportatlilu u/jew izomm l-access li l-ligi tipprevedi u fl-ahharnett jirredigi proces verbal li l-ligi stess tirregola u tattribwilu valur probatorju. Dan kollu jifform parti integrali mill-process generali tar-ricerka tal-verita` u jikkonsisti principalment fil-gbir u presrvaazzjoni ta` dawk il-provi kollha, diretti jew indiretti. Il-Magistrat Inkwirenti jirnexxielu jidentifika bhala pertinenti ghall-grajja jew reat li jkunqed jinvestiga. Bhala tali u kuntrarjament ghal dak li jigri f`certi sistemi kontinentali, il-Magistrat Inkwirenti mhux parti mill-pulizija u wisq anqas mill-prosekuizzjoni ; anzi jidher car li fis-sistema taghna huwa previst biex f`numru ta` kazijiet serji li l-ligi stess tispecifika, l-investigazzjoni ma ssirx biss, u l-provi ma jingrabrux u ma jigux preservati biss mill-Pulizija, izda ukoll anzi essenzjalment minn persuni ndipendenti mill-poter esekuttiv tal-Istat u li jiggarantixxu li r-ricerka tal-verita` ma tkunx inkwadrata minn xi interessi hlief dak suprem li kollox issir skond il-haqq u l-gustizzja ...

Ikkunsidrat :

VI. <u>Dottrina</u>

Kopjuza hija d-dottrina (u l-gurisprudenza) li tittratta dawk ic-cirkostanzi fejn nuqqas ta` imparzjalita` igib mieghu ksur tad-dritt ghal smigh xieraq. Il-Qorti sejra tigbor u tirreferi ghall-principji li huma pacifikament akkolti sabiex imbaghad, anke fuq l-iskorta taghhom, tghaddi ghall-konsiderazzjoni tal-istanza tar-rikorrenti.

Kwalsiasi analizi tar-rekwiziti tal-indipendenza u tal-imparzjalita` bhala parti vitali tal-kolonna vertebrali tad-dritt ghal smigh xieraq ma tistax tiddistakka ruhha mill-konsiderazzjoni tal-elementi soggettivi u oggettivi li jqeghdu taht skrutinju dawk ir-rekwiziti.

Fil-pag 266 ta` ***The European Convention on Human Rights*** (OUP – Fifth Edition – 2010) l-awturi Jacobs, White & Ovey ighidu hekk :–

The Strasbourg Court is concerned both with the subjective and objective elements of independence and impartiality. The subjective element involves an enquiry into whether the personal conviction of a judge in a particular case raises doubts about his or her independence or impartiality. The judge`s lack of bias is presumed unless there is evidence to the contrary and there are exceedingly few cases where subjective bias has been established since in practice such evidence can be very hard to come by. The objective element involves determination of whether in terms of structure or appearance a party`s doubts about the tribunal`s independence and impartiality may be legitimate.

Fil-pag 290-291 ta` ***Law of the European Convention on Human Rights*** (OUP – Second Edition – 2009) l-awturi Harris, O'Boyle & Warbrick ighidu hekk :-

"Impartiality" means lack of prejudice or bias. To satisfy the requirement, the tribunal must comply with both a subjective and an objective test : The existence of impartiality for the purpose of Article 6(1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubts in this respect [Hauschild v Denmark A 154 (1989) 12 EHRR 266 para 46] …

As to the subjective test, the question is whether it can be shown on the facts that a member of the court "acted with personal bias" against the applicant. In this connection there is a presumption that a judge is impartial, "until there is proof to the contrary" (Kyprianou v Cyprus – 2005-XIII ; 44 EHRR 565 GC) Given this presumption and the need to prove actual bias, it is not surprising that a breach of the subjective test is difficult to establish …

The objective test is comparable to the English law doctrine that "justice must not only be done ; it must also be seen to be done". In this context the Court emphasizes the importance of "appearances" (Sramek vs Austria A 84 1984 para 442 ; 7 EHRR 351). As the Court has stated "what is at stake is the confidence which the courts in a democratic sosciety must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused" (Fey vs Austria – A 255 – A 1993 ; 6 EHRR 387 para 30). In applying the objective test, the

opinion of the party to the case who is alleging partiality is important but not decisive ; what is crucial is whether the doubt as to impartiality can be objectively justified. If there is a legitimate doubt as to a judge`s impartiality, he must withdraw from the case.

Ighidu wkoll Harris, O`Boyle & Warbrick fl-istess ktieb illi **in linea ta` principju** : *the Court* (u cioe` l-ECHR) *also 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]

Fil-pag 162-164 ta` ***A Practitioner`s Guide to the European Convention on Human Rights*** (Sweet & Maxwell – Fourth Edition , 2011) Karen Reid tghid hekk –

The Court has commented that the fact that a judge takes a strong negative view of an applicant`s case or even of its character is not sufficient to disclose bias, and that unduly harsh or oppressive behaviour is not necessarily a reflection of personal prejudice (Ranson vs UK 14180/03 : 02/09/2003) …

At higher levels, judges should not be involved in hearing appeals against themselves or have been involved in ruling on the same issues in a different forum. As admissibility of appeal issues may be procedural and unconnected with the merits, it may not offend for a judge, who has already issued a substative decision to sit on the panel deciding leave to appeal. However where most of the members of the appellate or cassation body appear to be redeciding on essentially the same factual issues as they did on an earlier occasion, a problem may arise ; this appears to be a very fine line.

Fil-pag 614 ta` ***Theory and Practice of the European Convention on Human Rights*** (Intersentia – Fourth Edition – 2006) l-awturi van Dijk, van Hoof, van Rijn u Zwaak ighidu hekk –

For impartiality it is required that the court is not biased with regard to the decision to be taken, does not allow itself to be influenced by information from outside the court room, by popular feeling or by any pressure whatsoever, but bases its opinion on objective arguments on the ground of what has been forwarded at the trial.

Ikkunsidrat :

VII. <u>Gurisprudenza</u>

Il-Kummissarju tal-Pulizija u l-Avukat Generali jaghmlu riferenza ghas-sentenza li tat il-Qorti Kostituzzjonali fil-25 ta` Jannar 2013 fil-kawza "**<u>Mario Borg vs Kummissarju tal-Pulizija et</u>**". Il-Qorti qalet hekk :-

33. It-tielet aggravju jolqot ir-rwol tal-maġistrat inkwirenti u l-maġistrat li quddiemu ssir il-kumpilazzjoni. L-attur igħid illi l-maġistrat inkwirenti ma huwiex indipendenti mill-pulizija u dan il-fatt idgħajjef ilpreżunzjoni ta' innoċenza meta l-istess maġistrat "tinża lkappell ta' inkwirenti u tilbes dak ta' qorti istruttorja u talvolta ġudikanti".

34. Din il-qorti taqbel għal kollox mal-konsiderazzjonijiet tal-ewwel qorti dwar dan l-ilment u ftit tara ħtieġa li żżid magħhom. Is-sejbien ta' ħtija ma sarx mill-maġistrat iżda mill-ġurati. Barra minn hekk, kif sewwa qalet l-ewwel qorti, il-maġistrat hija indipendenti mill-prosekuzzjoni, ma esprimiet ebda opinjoni dwar il-ħtija tal-attur fil-verbal li bih għalqet l-inkjesta, u, f'kull każ l-attur mhux biss ma ressaqx eċċezzjoni ta' rikuża tal-maġistrat iżda wkoll l-eċċezzjoni li ressaq ta' nullita tal-atti tal-istruttorja irtiraha. (enfasi ta` din il-qorti)

Il-Qorti taghmel ukoll riferenza ghas-sentenza li l-Qorti ta` Strasbourg tat fit-13 ta` Gunju 2013 fil-kawza "**<u>Romenskiy vs Russia</u>**"(22875/02) fejn inghad hekk :-

" … The Court reiterates that "[a] tribunal must be subjectively impartial, that is, no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is presumed unless there is evidence to the contrary" (see Padovani v. Italy, 26 February 1993, § 26, Series A no. 257 B, and Daktaras v. Lithuania, no. 42095/98, § 30, ECHR 2000 X). The Court may also employ an objective approach, that is, determine whether the judge offered sufficient guarantees to exclude any legitimate doubt in respect of his impartiality (see Piersack v. Belgium, 1 October 1982, § 30, Series A no. 53, and Grieves v. the United Kingdom [GC], no 57067/00, § 69, ECHR 2003-XII). The Court is mindful that there is no watertight division between the two notions, and that the same act or statement by a judge may be analysed through the prism of a "subjective" or "objective" test (see Olujić v. Croatia, no. 22330/05, §§ 57 et seq., 5 February 2009). The Court further reiterates that "in maintaining confidence in the ... impartiality of a tribunal, appearances may be important" (Brudnicka and

Others v. Poland, no. 54723/00, § 41, ECHR 2005 II). Finally, the Court has always stressed the importance of "national procedures for ensuring impartiality" which are directed, inter alia, "at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public" (see Mežnarić v. Croatia, no. 71615/01, § 27, 15 July 2005, and Huseyn and Others v. Azerbaijan, nos. 35485/05, 45553/05, 35680/05 and 36085/05, § 162, 26 July 2011).

27. In general, one of the roles of the trial judge is to manage the proceedings with a view to ensuring the proper administration of justice. It is perfectly normal that a judge may consider and dismiss an application for release lodged by a detained defendant. In doing so the judge is required, under both the Convention and the domestic law, to establish the existence of a "reasonable suspicion" against the defendant. The mere fact that a trial judge has already taken pre-trial decisions in the case, including decisions relating to detention, cannot in itself justify fears as to his impartiality; only special circumstances may warrant a different conclusion (see Hauschildt v. Denmark, 24 May 1989, § 51, Series A no. 154, and Sainte-Marie v. France, no. 12981/87, § 32, 16 December 1992). That being said, while deciding on an application for release lodged by a defendant, the court must not assess whether or not the defendant is guilty (see Gultyayeva v. Russia, no. 67413/01, § 197, 1 April 2010). The court`s role is limited to establishing the state of suspicion, which may be insufficient to prove the defendant`s guilt beyond reasonable doubt, but which connects the defendant, his actions, whereabouts, and so on, to the actus reus of the case. "Suspicion and formal finding of guilt are not to be treated as being the same" (Jasiński v. Poland, no. 30865/96, § 55, 20 December 2005)."

Ikkunsidrat :

VIII. <u>Risultanzi</u>

Ibda biex din il-Qorti taghmel taghha <u>fl-intier taghhom</u> (ghall-fini tal-provvediment tal-lum) id-dottrina u l-gurisprudenza li ghalihom diga` ghamlet riferenza.

Ghaliex qeghda taghmel hekk, din il-Qorti tesprimi l-fehma li l-pretensjoni tar-rikorrenti li wasslet ghar-referenza odjerna hija <u>fattwalment u legalment insostenibbli</u>.

Tenut kont ta` dak li diga` stabbiliet il-gurisprudenza tal-qrati taghna dwar ir-rwol u l-funzjoni ta` Magistrat waqt inkjesta, m`ghandu jghaddi dubbju f`mohh hadd – lanqas f`mohh ir-rikorrenti – illi – oltre dak kollu li kien preservat bhala prova - fil-process verbal Dok JM2 ma kien deciz propju xejn li b`xi mod jinkolpa lir-rikorrenti b`xi reat jew addirittura jxejjen il-prezunzjoni tal-innocenza taghha.

Harris O`Boyle & Warbrick (op cit) fil-pag 290 et seq ighidu hekk :-

The Court has applied the objective test in many cases in which the trial judge in a criminal couirt has previously taken part in the proceedings at the pre-trial stage in a variety of different capacities. The Court has stated that "the mere fact that a judge has also made pre-trial decisions in the case cannot be taken as in itself justifying fears as to his impartiality … What matters is the extent and nature of those decisions (Fey vs Austria op cit).

Multo magis – fil-kaz tal-lum fejn irrizulta illi l-Magistrat tal-Inkjesta mhux biss mhijiex l-istess persuna li sejra tisma` u tiddeciedi l-kawza istitwita kontra taghha, izda dik il-Magistrat ma ddecidiet propju xejn – la favur u lanqas kontra – r-rikorrenti anke ghaliex l-inkariku taghha – kif jirrizulta minghajr ombra ta` dubju – intemm hekk kif il-Pulizija Esekuttiva ddecidiet li tixli lir-rikorrenti b`akkuzi.

Karen Reid (op cit) fil-pag 163 et seq tghid hekk :-

A conflict of roles commonly arises where judges have an investigating role or there is overlap between the prosecution and the trial court. The mere fact that a judge has been involved in decisions before the trial is not sufficient to render him lacking in objective impartiality, special features being required beyond the judge`s knowledge of the case file, the fact that he has looked at questions of risk on remand decisoions or made assessment of the existence of a prima facuie case. It is necessary for the judge to have been squarely involved in deciding issues relevant to those in the trial or to have been

involved in a prosecution capacity or as a party to the proceedings. The fact that a judge has detailed prior knowledge of the case is not sufficient, attention being given to the scope and nature of any measures taken before the trial.

Fil-kaz tal-lum, il-konfort ta` din il-Qorti huwa sostnut mhux biss minn dak li diga` nghad, izda mill-mod kif in linea generali l-ligi taghna tittratta r-rwoli tal-Magistrat fl-ambitu ta` inkjesta, u l-ohrajn tieghu meta jassumi l-funzjonijiet l-ohra specifikati fil-Kap 9.

<u>Decide</u>

Ghar-ragunijiet kollha premessi, il-Qorti qeghda taqta` u tiddeciedi illi bil-fatti lamentati minn Sandra Spagnol fit-talba ghar-riferenza kostituzzjonali li ressqet fl-udjenza tal-25 ta` Gunju 2013 tal-kawza fl-ismijiet *Il-Pulizija (Spettur Spiridione Zammit) vs Sandra Spagnol* li hija pendenti quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali, u li abbazi taghhom sar l-ordni ta` referenza, ma kien hemm l-ebda vjolazzjoni tal-Artikolu 39 tal-Kostituzzjoni ta` Malta u tal-Artikolu 6 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali. Ghalhekk qeghda tibghat din id-decizjoni flimkien mal-atti lill-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali sabiex tkompli tisma` u tiddeciedi skond il-ligi l-kawza fl-ismijiet *Il-Pulizija (Spettur Spiridione Zammit) vs Sandra Spagnol.* Tordna li l-ispejjez ta` dan il-provvediment jithallsu kollha minn Sandra Spagnol.

< Sentenza Finali >

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