QORTI TAL-MAGISTRATI (GHAWDEX)
BHALA QORTI TA' GUDIKATURA KRIMINALI

Magistrat Dr. Joseph Mifsud B.A. (Legal & Int. Rel.),
B.A. (Hons), M.A. (European), LL.D.

Il-Pulizija
(Spettur Josric Mifsud)
(Spettur Frank Anthony Tabone)

vs.

Karen Mercieca

Numru: 111/2011

Illum 19 ta' Novembru 2015

Il-Qorti,

Rat l-imputazzjonijiet migjuba kontra l-imputata **Karen Mercieca,** ta' tlieta u tletin (33) sena, bint Alfred u Josephine nee' Mercieca, imwielda Victoria, Ghawdex nhar it-2 ta' Settembru 1978, residenti fil-fond numru 20, Triq il-Mithna, Qala, Ghawdex u detentrici tal-karta tal-identita' bin-numru 21778(G), akkuzata talli f'Novembru, 2011, u fix-xahar ta' qabel, gewwa l-Iskola Primarja ta' Ghajnsielem, Ghawdex u/jew f'lokalitajiet ohra f'dawn il-Gzejjer, b'diversi atti maghmulin minnha, ukoll jekk fi zminijiet differenti, u li jiksru l-istess dispozizzjoni tal-ligi u li gew maghmulin b'rizoluzzjoni wahda:

a) B'eghmil zieni kkorrompiet persuna ta' taht l-eta' u cioe' lil OMISSIS minuri ta' 11-il sena liema minuri giet fdata lilha, imqarr ghal xi zmien, sabiex tiehu hsiebha, tedukaha, tghallimha, tindukraha jew izommha;

b) Ikkommettiet attentat vjolenti ghall-pudur fuq l-imsemmija minuri OMISSIS, liema minuri ma setghetx tirrezisti minhabba marda tal-gisem jew tal-mohh u liema delitt sar minn tutur;

c) Offendiet il-pudur jew il-morali b'eghmil li sar f'lok pubbliku u/jew f'lok espost ghall-pubbliku;

Il-Qorti giet mitluba sabiex jekk jidhrilha xieraq, tipprovdi ghas-sigurta' tal-imsemmija OMISSIS u l-familja taghha, u minn issa tapplika l-provvedimenti tal-Artikoli 412C tal-Kodici Kriminali u taghmel Ordni ta' Protezzjoni taht dawk il-kawtieli li din il-Qorti jidhrilha li huma xierqa;

Il-Qorti giet gentilment mitluba li f'kaz ta' htija minbarra li tinflingi l-pieni stabbiliti mil-Ligi, tordna lill-imsemmija persuna sabiex thallas l-ispejjez li ghandhom x'jaqsmu mal-hatra tal-esperti, jekk ikun il-kaz, kif provdut fl-Artikolu 533 tal-Kapitolu 9 tal-Ligijiet ta' Malta;

Rat id-dokumenti esebiti u l-atti processwali kollha.

Rat ix-xiehda ta' Daniela Galea (*a fol.* 21-43), OMISSIS (il-minuri) (*a fol.* 47-143), Spettur Josric Mifsud (*a fol.* 150-154 u *a fol.* 295-299), Romina Vella (*a fol.* 158-174), WPC114 Georgina Schembri (*a fol.* 184), PS581 Loreto Buttigieg (*a fol.* 185-186), OMISSIS (omm il-minuri) (*a fol.* 195-204 u *a fol.* 254-256), Marianne Zammit (*a fol.* 260-263, *a fol.* 278 -279 u *a fol.* 309 – 316), Dr. Michael Galea (*a fol.* 229-239), Josianne Buttigieg nee' Grima (*a fol.* 243-247), Dr. Gino Mule' Stagno (*a fol.* 287-293), Karen Mercieca (l-imputata) (*a fol.* 327-352) u Pauline Grech (*a fol.* 357-364).

Rat in-nota tal-Avukat Generali (*a fol.* 249) datata 23 ta' Ottubru 2012 li permezz taghha baghat lill-imputata Karen Mercieca biex tigi ggudikata minn din il-Qorti bhala Qorti ta' Gudikatura Kriminali kif mahsub taht:

(a) Artikoli 203(1)(a)(c) u 18 ta-Kapitolu 9 tal-Ligijiet ta' Malta;
(b) Artikoli 207 u 18 tal-Kapitolu 9 tal-Ligijiet ta' Malta;
(c) Artikoli 209 u 18 tal-Kapitolu 9 tal-Ligijiet ta' Malta;
(d) Artikoli 382A, 383, 384, 386 u 412C tal-Kapitolu 9 tal-Ligijiet ta' Malta;
(e) Artikoli 17, 18, 23, 31 u 533 tal-Kapitolu 9 tal-Ligijiet ta' Malta;

Rat illi, waqt l-udjenza tal-24 ta' Lulju 2013 (*a fol.* 285 u 286), gew moqrija l-Artikoli mibghuta mill-Avukat Generali fit-23 ta' Ottubru 2012, u f'liema seduta l-imputata ddikjarat li ma kellhiex oggezzjoni li l-kaz taghha jigi trattat u deciz minn din il-Qorti bi procedura sommarja.

Rat illi din il-kawza giet assenjata lil din il-Qorti kif preseduta b'digriet datat 30 ta' Gunju 2015 moghti mis-Sinjurija Tieghu l-Prim'Imhallef.

Ikkunsidrat

Il-kaz beda jkun investigat mill-pulizija fl-erbatax (14) ta' Novembru tas-sena elfejn u hdax (2011) b'rapport tal-genituri tal-minuri OMISSIS li kellha hdax (11)-il sena, certu OMISSIS u OMISSIS konjugi OMISSIS fejn kien allegat li l-Learning Support Assistant (LSA) li kienet assenjata ma' binthom identifikata bhala Karen Mercieca kienet messet lit-tifla taghhom waqt li kienet qeghda l-iskola primarja ta' Ghajnsielem. Dwar il-kaz sar rapport minn Daniela Gatt u Romina Vella mill-Agenzija Appogg wara li kellmu lit-tifla. L-imputata Karen Mercieca cahdet l-allegazzjoni li saret fil-konfront taghha u dan mill-bidu nett x'hin baghtu ghaliha l-pulizija.

Il-minuri kienet tbati mill- Global Development delay. Global Developmental Delay (GDD) hija deskritta fil-kamp mediku legali bhala *"the general term used to describe a condition that occurs during the developmental period of a child between birth and 18 years. It is usually defined by the child being diagnosed with having a lower intellectual functioning than what is perceived as 'normal'."*

Dewmien ta' procedura

Il-Qorti minnufih tigbed l-attenzjoni ghall-fatt li minn meta nqraw l-Artikoli mibghuta mill-Avukat Generali sakemm din il-kawza marret ghas-sentenza ghaddew sentejn u tliet xhur, u ghaddew tliet snin minn meta l-Avukat Generali baghat l-Artikolu fit-23 ta' Ottubru 2012.

F'dan ix-xenarju ta' dewmien bla bzonn, din il-Qorti ittenni dak li qalet f'sentenza l-Qorti tal-Appell Kriminali fil-kawza "Il-**Pulizija vs. Anthony Azzopardi**" [4.2.2010] u cioe' li:-

> *"Ghalkemm din il-Qorti tifhem u tapprezza li biz-zieda enormi fil-kompetenza taghhom f'dawn l-ahhar snin il-Qrati tal-Magistrati gew inondati bix-xoghol u qed jahdmu taht pressjoni liema bhalha, dan id-dilungar zejjed biex jigu decizi kawzi fil-Qrati tal-Magistrati bhala Qrati ta' Gudikatura Kriminali, wara li l-Avukat Generali jkun baghat l-artikoli, qed johloq znaturazzjoni tal-processi kriminali li min-natura taghhom ghandhom jigu decizi kemm jista' jkun malajr kemm fl-interess tal-persuna akkuzata w kif ukoll fl-interess tas-socjeta' li f'isimha tkun qed issir il-prosekuzzjoni. Huma l-gudikanti li jirregolaw it-tempo li bih titmexxa – jew ma titmexxiex – kawza. Din is-sitwazzjoni, li ma tikkoncernax biss din il-kawza, ma hix accettabbli w hemm bzonn li tigi korretta b'mizuri legizlattivi li jassikuraw li dawn il-kawzi jigu decizi fi zmien ragjonevoli izda li jkun mandatorju w stabbilit bil-ligi."*

Ghaddew hames snin minn dawn il-kummenti u ghadna fejn konna. Il-Qorti ttenni li din is-sitwazzjoni, li ma tikkoncernax biss din il-kawza, ma hix accettabbli u hemm bzonn li tigi korretta b'mizuri legizlattivi li jassiguraw li dawn il-kawzi jigu decizi fi zmien ragjonevoli izda li jkun mandatorju u stabbilit bil-ligi.

Abbuzi Sesswali fuq it-tfal

L-organizzazzjoni Ingliza li tohloq kuxjenza favur il-harsien tat-tfal ***Kidscape*** taghti linja gwida fejn wiehed jista' jissuspetta li tfal ikunu abbuzati.

<u>When should you suspect a child is being abused?</u>

There are many different signs of possible child abuse and these include:

- *Bruises or burns in unusual places.*
- *Changes in the behaviour of a child such as being aggressive or very withdrawn.*
- *Unexplained changes in their emotions such as being depressed or anxious.*
- *Looking as though they are not being properly looked after, such as being unusually dirty, smelly or hungry.*
- *Having sexual knowledge or behaviour that is not appropriate for their age.*
- *Being afraid of a particular adult or reluctant to be alone with them.*

Physical abuse

When the child is physically harmed, such as hitting, shaking, throwing, poisoning, burning or scalding, drowning or suffocating.

Sexual abuse

Sexual abuse involves forcing or encouraging the child or young person to take part in sexual activities, including prostitution, whether or not the child is aware of what is happening. This may include sexual contact or non-contact activities, such as involving children in looking at, or in the making of, sexual images, watching sexual activities, or encouraging a child to behave in sexually inappropriate ways[1]*.*

Il-Qorti tinnota li f'dan il-kaz l-allegazzjoni qeghda ssir fuq persuna tas-sess femminili fuq tifla. Dwar dan il-Qorti rat dak li jinghad fid-dokument **Sex offending against children: Understanding the risk**[2] tal-pulizija Ingliza b'mod partikolari fejn l-allegata persuna li tkun wettqet l-abbuz hija mara.

[1] https://www.kidscape.org.uk/professionals/childabuse.shtml
[2] Police Research Series Paper 99, Pg 23

The issue of women as perpetrators of child sexual abuse has been taken seriously only over about the last 15 years, and the actual extent of the problem is even more difficult to determine than it is for male offenders. Part of the difficulty, of course, is in the definition of sexual abuse, as in western societies women are permitted greater freedom than men in their physical interactions with children. In addition, overt sexual activity between an adult female and a boy may not be conceptualised by the child as "sexual abuse" even if he is emotionally unprepared for it and psychologically destabilised as a result (Johnson and Shrier, 1987). Indeed, in spite of his confusion the child may be encouraged to view the event as proof of his virility.

Figures for recorded offences of child sexual abuse by women, and allegations of such abuse, would seem to suggest that sexual abuse by women is uncommon: according to Criminal Statistics, less than 1% of all sex offences are committed by women. Of the 1,031 allegations or suspicions of child abuse in Greater Manchester in 1992 (Rogers and Roberts, 1995), only 3.5% of perpetrators were female. In a survey of all cautioned and convicted sexual abuse cases between 1988 and 1994 in the West Midlands found that just 10 cases (2.5%) involved female offenders (Morris et al., 1997). In our survey of five force areas described earlier, just 1% of recorded sex crimes against children was attributed to females in the one force for which we had this information[3].

L-istess dokument jghid li:

"Although it is important not to deny the reality of the sexual abuse of children by females, nor to minimise the impact this has on victims, in both public health and policing terms it is dwarfed by the problem of the sexual abuse of children by men. Thus, while it is essential to deal with cases of sexual offending by females when they arise, it is hard to justify a shift of emphasis and resources away from the much larger picture of male offenders.[4]*"*

[3] Pg 23
[4] Pg 25

Ikkunsidrat:

Illi l-Qorti sejra issa tghaddi sabiex tara kif il-fatti ta' dan il-kaz jinkwadraw ruhhom fl-Artikoli tal-ligi ndikati mill-Avukat Generali fin-Nota ta' Rinviju ghall-Gudizzju tat-23 ta' Ottubru 2012.

Reat ta' Korruzzjoni ta' minorenni taht l-Artikolu 203(1)

Illi l-Avukat Generali ndika li tista' tinstab htija jew htijiet fil-konfront tal-imputata taht dak li hemm mahsub fl-Artikoli 18 u 203(1)(a)(c) tal-Kodici Kriminali.

Ir-reat ta' korruzzjoni ta' minorenni huwa ipotizzat fl- Artikolu 203 li jipprovdi hekk:

> *"kull min, b'egħmil zieni, jikkorrompi persuna ta' taħt l-eta, tas-sess il-wieħed jew l-ieħor, jeħel, meta jinsab ħati ...*

Is-sub-artikolu (1) jelenka c-cirkostanzi aggravanti ghal dan r-reat u cioe':

a. jekk d-delitt isir bi hsara ta' persuna li m'ghalqitx l-eta ta' tnax il-sena, inkella bi vjolenza;
b. jekk d-delitt isir b'theddid jew b'qerq;
c. jekk d-delitt isir minn axxendent mid-demm jew bi zwieg jew mill-missier jew l-omm addottivi, jew mit-tutur tal-minuri, jew minn haddiehor li lilu imqar jekk ghal xi zmien, ikun gie fdat il-minuri sabiex jiehu hsiebu, jedukah, jindukrah jew izommu.

Il-Professur Mamo fin-Noti tieghu **Notes on Criminal Law**, jelenka t-tlett elementi ta' dan r-reat u cioe:

1. l-eta' tal-vittma li ghandha tkun inqas minn tmintax-il sena;

2. l-element materjali tar-reat u cioe' l-atti impudici maghmula jew fuq il-vittma jew fil-presenza tal-vittma;

3. il-korruzzjoni tal-minorenni.

Il-Professur Mamo jirrittjeni li:

"For the subsistence of the crime it is not necessary that the defilement shall be immediate. The very young age of the person with whom the lewd acts have been committed, does not rule out the crime, if the remembrance of such acts is calculated to cause the defilement. Indeed according to our law, if the victim is under twelve years of age, that is reason for aggravating the crime... In other words if the acts in question are lewd acts, that is apt to bring about a lesion of the moral integrity of the passive subject in respect of sexual matters, then in the absence of any indication that the said passive subject has not been affected by these acts, for example because he or she was to some degree already depraved-whoever has to judge the facts may reasonably conclude that there was actual or effective defilement."

Fis-sentenza moghtija mill-Qorti tal-Appell Kriminali fl-20 ta' Frar 1975 fl-ismijiet Il-**Pulizija v George Portelli** gie ritenut li l-gudikant ghandu jaghmel l-apprezzament tieghu tac-cirkostanzi partikolari tal-kaz u jqabbel in-natura tal-att mal-grad ta' korruzzjoni gia' milhuq mill-minuri biex jara jekk dak l-att kommess fuq il-persuna jew anke fil-presenza biss tal-minuri, jista' attwalment jinghad li bih il-persuna giet korrotta.

Fis-sentenza **Pulizija vs Andrew Bonnici**, deciza fit- 23 ta' Jannar 1998, il-Qorti tal-Appell Kriminali qalet illi:

"Tifel ta' appena tlettax-il sena li jigi espost ghall-eghmil li jaghmel l-appellant, kemm fuqu nnifsu, kif ukoll fuq il-persuna tal-istess tifel, ma jistax ma jigix korrott anke jekk forsi dak it-tifel ikun diga' jaf certi fatti tal-hajja, jew ikollu xi esperjenza sesswali. Altru esperjenza sesswali fil-kors normali tal-izvillup fizjologiku ta' dak li jkun, u altru impozizzjoni ta' sitwazzjonijiet determinati minn eghmil zieni, li manifestament jipproducu lezjoni f'integrita morali tal-minorenni."

In kwantu jirrigwarda dan ir-reat il-Qorti taghmel referenza ghal dak li qalet il-Qorti tal-Appell Kriminali (Sede Inferjuri) f'sentenza tat-8 ta' Jannar 1996 fil-kawza fl-ismijiet '**Pulizija vs Thomas Wiffen**' dwar l-element materjali tar-reat ta' korruzzjoni ta' minorenni u cioe' s-segwenti:-

"For the completed offence, and apart from the formal element of the offence, there must be the lewd act ("atto di libidine") and the actual defilement. The lewd act may be committed either on the person or in the presence of the minor. All acts which either of their very nature or of the circumstances in which they are performed are directed to the indulgence of the sexual appetite either of the agent or of the victim and are capable of arousing the sexual interest of the victim, are lewd acts for the purposes of the offence in question. Francesco Carfora, writing in the Digesto Italiano in connection with Section 335 of the Zanardelli Code (which provision, as far as the elements of the offence are concerned, was identical to our Section 203) has this to say as regards the notion of "lewd acts":

"Atti di libidine debbono ritenersi tutti quei contatti e quelle manovre, che possono eccitare i sensi, anche se non giungono allo sfogo completo della libidine). Senza poi entrare nelle varie questioni sorte nella pratica e nella giurisprudenza circa alla valutazione di singoli atti per vedere se debbasi o no attribuir loro il carattere di atti di libidine, specie in ordine al bacio, del quale lungamente si occupa il Carrara, noi rileveremo come norma generale che gli atti, a cui si riferisce la legge, debbono essere materiali e di una certa entita' e tali da aver rapporto prossimo e diretto colle funzioni sessuali" (Vol. VIII, parte 3, p.967).

Lewd acts are therefore all those acts "diretti ad eccitare la propia concupiscenza verso piaceri carnali turpi per se stessi o per le cirostanze in cui si cerca di provocarli, ovvero diretti a sodisfare siffatta concupiscenza" (Manzini, V., op. cit., p. 359). The duration of these acts is immaterial for the notion of a lewd act. There is no doubt in the mind of this Court that the touching of the breasts or of the private parts of a young girl -- in the case under examination appellant's daughter was not yet twelve years old when the first acts were performed -- with the intention either of gratifying one's libidinous tendencies or of arousing the sexual interest of the said girl, are lewd acts."

Dwar ir-rekwizit tal-korruzzjoni per se l-istess Qorti tal-Appell fl-imsemmija sentenza qalet hekk:-

"As to the requirement of actual defilement, this is obviously not something that can be measured with any known scientific

instrument, but is something which has to be assessed by the prudent judge -- the lay judge in the case of a trial by jury, the professional magistrate or judge in all other cases -- taking into account all the circumstances of the case including in particular the age of the victim and the nature of the act or acts. Appellant, in his application, states that in order that one can speak of actual defilement "at least the curiosity or the interest of the minor should have been aroused", so that "if the minor is already strong-willed enough and rejects even the least advance by the offender" then, always according to appellant, there is no actual defilement. Now, whereas the minor's reaction is a fact to be taken into account, it is not the sole criterion, nor indeed the most important criterion, of whether or not there has been actual defilement. The defilement may be actual but its effects delayed. As Sir Anthony Mamo points out in his Notes on Criminal Law:

"For the subsistence of the crime it is not necessary that the defilement shall be immediate. The very young age of the person with whom the lewd acts have been committed does not rule out the crime, if the remembrance of such acts is calculated to cause the defilement. Indeed, according to our law, if the victim is under twelve years of age, that is a reason for aggravating the crime" (p. 226).

[..] In other words if the acts in question are lewd acts in the sense above defined, that is are apt to bring about a lesion of the moral integrity of the passive subject in respect of sexual matters, then, in the absence of any indication that the said passive subject has not been affected by those acts -- forexample, because he or she was, to some degree, already depraved -- whoever has to judge the facts may reasonable conclude that there was actual or effective defilement."

L-imputazzjoni abbazi tal-Artikolu 209 tal-Kap 9 tal-Ligijiet ta' Malta

Ir-reat taht l-artikolu 209 tal-Kap 9 tal-Ligijiet ta' Malta jaghmel referenza ghall-agir fejn persuna toffendi l-pudur u l-morali b'eghmil li jsir fil-pubbliku.

Illi mix-xhieda moghtija jirrizulta li l-kaz jekk jirrizulta sar fi skola li zgur jista' jitqies bhal post accessibli ghall-pubbliku.

Ikkunsidrat:

L-abbli avukat ghall-*parte civile* fis-sottomissjoni finali taghha gibdet l-attenzjoni tal-Qorti ghar-regola tal-*hearsay evidence*.

Fit-trattazzjoni finali ntqal hekk:

> "… ħa nagħmel riferenza għal dak li qalu x-xhieda tal-Appoġġ. Ix-xhieda tal-Appoġġ qalu x'ġara u ma ġarax fl-inkontri, l-ewwel wieħed u t-tieni inkontru, huwa minnu li forsi dak li jkun jista' jgħid imma din hija hearsay, però Sur Maġistrat nagħmel riferenza għall-kawża li kienet telgħet ġuri[5], għandi l-isem miktub, però iżjed tard nista' ngħaddih lill-Qorti ukoll. Dan kien hemm eċċezzjonijiet preliminari fejn id-Difiża kienet qalet, isma', imma dawn il-ħafna psychologist u social workers dawn huma kollha hearsay u kien talab li jiġu dikjarati inammessibbli, però l-eċċezzjonijiet ma kinux intlaqgħu għax il-Qorti kienet qalet le, qalet dawk xorta huma ammissibbli bħala xhieda biex wieħed effettivament jivverifika u jara x-xhieda tal-minuri fid-dawl ta' dak li qalu dawn ix-xhieda sia tal-Appoġġ, sia psychologist, sia social workers, huma x'inhuma."

Il-*Hearsay Rule*

Li l-artikoli relevanti dwar il-*Hearsay* Rule huma l-artikoli 598 u 599 tal-Kap 12 rezi applikabbli għall-Kap 9 bl-artikolu 645 tal-Kap 9.

> *598. (1) Bħala regola, il-qorti ma tiħux qies ta' xiehda dwar fatti li x-xhud igħid li gie jafhom mingħand ħaddieħor jew li qalhom ħaddieħor li jista' jingieb biex jagħti xiehda fuq dawk il-fatti.*
>
> *(2) Il-qorti tista', ex officio, jew fuq oppozizzjoni tal-parti, ma tħallix jew tichad li jsiru mistoqsijiet bi skop li jittieħdu xiehda bħal dawk.*
>
> *(3) Izda l-qorti tista' ggiegħel lix-xhud li jsemmi l-persuna li mingħandha jkun sar jaf il-fatti li għalihom jirriferixxu dawk il-mistoqsijiet.*

[5] Il-kawza indikata hi dik **Repubblika ta' Malta vs Mario Azzopardi**

Meta xiehda fuq kliem ħaddieħor hija ammessa.

> *599. Il-qorti tista', skont ic-cirkostanzi, tippermetti xiehda fuq kliem ħaddieħor u tieħu qies tagħha, meta dan l-istess kliem ħaddieħor ikollu, fih innifsu, importanza sostanzjali, fuq il-meritu tal-kawza jew ikun jagħmel parti mill-meritu; inkella meta dan ħaddieħor ma jkunx jistax jingieb biex jixhed, u l-fatti jkunu tali li ma jkunux jistgħu jigu ppruvati sewwa xort'oħra, l-aktar f'kazijiet ta' twelid, taz-żwieg, tal-mewt, tal-assenza, ta' servitu', ta' rjieħ ta' immobbli, ta' pussess, ta' drawwiet, ta' grajjiet storici pubblici, ta' reputazzjoni jew ta' fama, ta' kliem jew fatti ta' nies li mietu jew li jkunu assenti u li ma kellhom ebda interess li jgħidu jew jiktbu l-falz, u ta' fatti oħra ta' interess generali jew pubbliku jew li jkunu magħrufa minn kulħadd.'*

Il-każ li mhux l-ewwel darba li gie citat b'approvazzjoni dwar il-*hearsay rule* f'kawzi ta' natura kriminali huwa **Subramaniam v. Public Prosecutor** fejn insibu dan il-kliem:

> *'Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.'*

Jekk wieħed jimxi mal-principji ta' dan il-kaz allura certi persuni li magħhom tkun tkellmet l-allegat vittma jistgħu jkunu prodotti (per ezempju, psikologu, għalliem jew social worker, il-genituri jew qraba fil-qrib tal-allegat vittma).

Dawn jistgħu jixhdu li l-allegat vittma tassew qalet hekk. Tali xhieda hija biss prova li l-allegat vittma tassew qalet hekk, izda mhux li dak li qed tghid l-allegat vittma huwa tassew minnu.

Jekk wieħed jezamina l-ewwel sentenza tal-artikolu 599 tal-Kap 12, wieħed jista' jikkonkludi li l-*hearsay rule* fil-Ligi tagħna mhix daqshekk

assoluta. U fil-fatt hekk qalet il-Qorti Kostituzzjonali hija u tiddeciedi l- kaz '**Joseph Mary Vella et versus Il-Kummissarju tal-Pulizija**' (13 ta' Jannar 1988) fejn il-Qorti kkonfermat digriet tal-Prim'Awla biex jitħalla jixhed Prokuratur Legali li kien marbut bis-sigriet professjonali. Dan tħalla jixhed mingħajr ma kellu jikxef isem it-terza persuna li kienet qaltlu biex il-fatti li fuqhom kellu jixhed il-Prokuratur Legali.

F'dak li huma decizjonijiet kriminali, il-Qrati tagħna issa ilhom sew isegwu il-prattika dwar il-*hearsay rule*. (Ara dwar dan il-punt: Ir-Repubblika versus Meinrad Calleja). Il-Qorti tal-Appell Kriminali fl-1 t'April 2011 'Il-**Pulizija versus Fabio Schembri'** preseduta mil-Prim Imħallef Dr Silvio Camilleri qalet hekk:

> *"Fil-limitu tal-uzu li għamlet l-ewwel Qorti tal-okkorenza msemmija, ma hemm xejn irregolari. Hu ben stabbilit li waqt li prova hearsay ma hix prova tal-kontenut ta' dak li jigi rapportat li ntqal, hi prova li dak rapportat li ntqal fil-fatt intqal fic-cirkostanzi, data, post u ħin li ntqal u in kwantu tali hi cirkostanza li meħuda ma' provi u cirkostanza oħra tista' wkoll tikkontribwixxi għall-apprezzament li tagħmel il-Qorti."*

Il-Qorti tirrileva wkoll dak li kien sostnut fid-decizjoni moghtija mill-Qorti Suprema tal-Istati Uniti tal-Amerika fid-decizjoni **Idaho v. Wright[6].**

> *Idaho v. Wright provides an example of an abuse allegation that surfaced only after the child had been questioned by a professional (in this case, a paediatrician). The original statement about sexual abuse had come from Wright's older daughter who said that the younger child had been abused. The paediatrician interviewed the younger child after she had been taken from her home and had spent the previous night in police custody. After being asked a series of highly leading questions, the child's only statements about abuse was one "yes" answer and an ambiguous statement concerning abuse. At trial, the paediatrician stated that "[s]he would not elucidate.., what kind of touching was taking place, or how it was happening." This is obviously not a situation in which a child has spontaneously told*

[6] 110 S. Ct. 3139 (1990)

a story of having been abused. Therefore, the trial court made a grave error in admitting the testimony without first determining if the paediatrician conducted the interview in a way that was not unduly suggestive. Because of that error, the Supreme Court over-ruled the trial verdict[7].

Konflitt fil-provi

Illi minn ezami akkurat tal-provi prodotti mill-partijiet fil-kaz odjern jirrizulta pjuttost evidenti li din il-Qorti tinsab rinfaccjata b'zewg verzjonijiet tal-fatti ghal kollox kunfliggenti fejn min-naha l-wahda l-minuri kkonfermat b'certu diffikulta' anke forsi meghjuna bil-mistoqsijiet li sarulha rigward dak minnha allegat dwar l-abbuz sesswali li sar fuqha mill-imputata u fejn l-imputata min-naha l-ohra qed tichad dak kollu allegat mill-minuri.

Fis-sottomissjonijiet finali tal-abbli avukat difensur jelenka dawn id-diskrepanzi jew kontradizzjonijiet fix-xiehda tal-minuri:

> "Jiġifieri jiena kważi kważi hawnhekk fuq ix-xhieda ta' din il-persuna biss, il-Qorti għandha tillibera. Għaliex? Ħa nagħmel daqsxejn ta' summary. Mela one ma tafx x'inhu ġurament. Two illi l-ewwel qalet illi kienet fil-klassi waħedha u mbagħad qalet illi kien hemm, jista' jkun illi kien hemm, jew ma tiftakarx jekk kienx hemm żewġ subien magħha. Qalet illi kienet liebsa qalziet. Qalet illi kienet liebsa dublett. Qalet illi kienet liebsa libsa. Qalet illi t-tokkamenti saru fuq il-panty. Imbagħad qalet illi t-tokkamenti saru taħt il-panty. Dana f'xhieda waħda ta! f'xhieda waħda dan. Qalet illi qalet lil Karen Mercieca biex tieqaf. Skont zijitha din ma qaltilha xejn għax kienet tistħi. Xehdet illi neżgħet il-panty, però skont ir-rapporti u l-allegazzjoni illi saret fil-konfront ta' Karen Mercieca kienet Karen Mercieca illi neżżgħetilha l-panty. Innegat illi Karen Mercieca kienet qaltilha biex ma tgħid lil ħadd. Effettivament is-social worker Romina Vella qalet illi kienet eħe qaltilhom f'xi waħda minn dawn is-sessions fejn aħna ma konniex preżenti, qaltilhom hekk. Qalet illi l-problema illi kellha kienet fid-division u mbagħad qalet ma kienetx fid-division imma kienet fl-addition u fis-subtraction. Tgħid illi l-ewwel il-bieb kien magħluq u imbagħad kien miftuħ. Tbiddel il-verżjoni fl-istess xhieda. Għamlet ħames (5)

[7] Younts Diana, **Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions**, Duke Law Journal, Vol 41:691

> breaks in u mbagħad tgħid illi kienu tnejn (2). Tgħid illi ħadd ma għamlilha stikk u mbagħad tiftakar illi xi ħadd għamlilha stikk. Tgħid illi l-ferita kienet ħarqa mal-forn imma mbagħad tgħid illi kienet gidma ta' nemusa. Imbagħad tgħid illi ma tiftakarx jekk qattx ħarqet idejha mal-forn.

Huwa principju baziku prattikat mill-Qrati taghna fil-procediment kriminali, li sabiex l-akkuzata tigi misjuba hatja l-akkuzi migjuba fil-konfront taghha dawn ghandhom jigu pruvati oltre kull dubju dettat mir-raguni.

F'dan ir-rigward issir referenza ghas-sentenza moghtija mill-**Qorti tal-Appell Kriminali fil-5 ta' Dicembru, 1997** fil-kawza fl-ismijiet **Il-Pulizija v Peter Ebejer**, fejn il-Qorti fakkret li l-grad ta' prova li trid tilhaq il-Prosekuzzjoni hu dak il-grad li ma jhalli ebda dubju dettat mir-raguni u mhux xi grad ta' prova li ma jhalli ebda ombra ta' dubbju. Id-dubbji ombra ma jistghux jitqiesu bhala dubbji dettati mir-raguni. Fi kliem iehor, dak li l-gudikant irid jasal ghalih hu, li wara li jqis ic-cirkostanzi u l-provi kollha, u b'applikazzjoni tal-buon sens tieghu, ikun moralment konvint minn dak il-fatt li trid tipprova l-Prosekuzzjoni. Fil-fatt dik il-Qorti ccitat l-ispjegazzjoni moghtija minn **Lord Denning** fil-kaz ***Miller v Minister of Pension*** - 1974 - ALL Er 372 tal-espressjoni 'proof beyond a reasonable doubt.'

> *"Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing shall of that will suffice."*

Fil-kawza fl-ismijiet **Il-Pulizija vs Graham Charles Ducker (*Qorti tal-Appell Kriminali-deciza fid-19 ta' Mejju, 1997*)** gie ritenut illi:

> *"it is true that conflicting evidence per se does not necessarily mean that whoever has to judge may not come to a conclusion of guilt. Whoever has to judge may, after consideration of all circumstances*

of the case, dismiss one version and accept as true the opposing one."

Din il-Qorti taghmel ukoll referenza ghas-sentenza moghtija mill-***Qorti tal-Appell Kriminali fid-9 ta' Settembru 2002*** fil-kawza fl-ismijiet **Il-Pulizija v Martin Mark Ciappara** fejn spjegat x' jigri meta gudikant ikun rinfaccjat b'zewg verzjonijiet konfliggenti u cioe' jistghu jigru zewg affarijiet u cioe jew il-gudikant ikun tal-fehma li l-kaz tal-Prosekuzzjoni ma jkunx gie sodisfacentement ippruvat, u allura l-Qorti ghandha tillibera, jew jekk ikun moralment konvint li l-verzjoni korretta hija wahda u mhux l-ohra, jimxi fuq dik il-verzjoni li jaccetta u jekk dik il-verzjoni tkun timporta l-htija tal-imputat jew akkuzat, allura jiddikjara tali htija u jghaddi ghal piena jew ghal xi provvediment iehor.

Versjonijiet differenti

Illi fis-sentenza fl-ismijiet Il-**Pulizija vs. Jonathan Micallef** moghtija fit-2 ta' Frar 2012, il-Qorti tal-Appell Kriminali qalet hekk:

"Huwa minnu illi jista' jkollok sitwazzjoni fejn numru ta' xhieda qeghdin jaghtu verzjoni differenti minn ohrajn illi xehdu qabel. B'daqshekk ma jfissirx illi ghax hemm xhieda differenti bil-fors hemm konflitt li ghandha twassal ghal liberatorja. Fil-kawza ***Pulizija vs. Joseph Thorn*** *deciza mill-Qorti ta' l-Appell Kriminali fid-9 ta' Lulju 2003, il-Qorti qalet '... mhux kull konflitt fil-provi ghandu awtomatikament iwassal ghal liberazzjoni tal-persuna akkuzata. Imma l-Qorti f'kaz ta' konflitt ta' provi, trid tevalwa il-provi skond il-kriterji annuncjati fl-Artikolu 637 tal-Kap. 9 u tasal ghal konkluzzjoni dwar lil min trid temmen u f'hiex trid temmen jew ma temminx' (ara wkoll* ***Repubblika ta' Malta vs. Dennis Pandolfino*** *19 t' Ottubru 2006)."*

Illi l-Qorti tinnota li fis-sentenza fl-ismijiet Il-**Pulizija vs. John Pace** deciza fil-31 ta' Ottubru 2013, il-Qorti tal-Appell Kriminali rriteniet is-segwenti:

"Ma hemm xejn hazin illi l-Qorti tistrih fuq xhud wiehed biss kif del resto hija ntitolata li taghmel permezz tal-Artikolu 638(2) tal-Kapitolu 9. Dan l-Artikolu jghid illi xhud wiehed jekk emmnut

minn min ghandu jiggudika fuq il-fatt hija bizzejjed biex taghmel prova shiha u kompluta minn kollox, daqs kemm kieku l-fatt gie ppruvat minn zewg xhieda jew aktar. Naturalment din ix-xhud tkun trid tigi evalwata fil-kuntest tal-linji gwida moghtija mill-Artikolu 637 tal-Kapitolu 9".

Illi min-naha l-ohra meta l-Qorti ezaminat bir-reqqa kollha dovuta l-istqarrija maghmula mill-imputata u x-xhieda minnha moghtija f' dawn il-proceduri setghet tinnota l-konsistenza assoluta f'dak li dejjem qalet kif ukoll li l-attegjament u l-komportament taghha ma taw ebda indikazzjoni li hija ma setghetx titwemmen.

Illi bhala rikapitulazzjoni din il-Qorti tghid li hadet in konsiderazzjoni l-komportament tal-minuri anke kif b'diffikulta' xehdet waqt dawn il-proceduri ghal saghtejn u sittax-il minuta (2.16hrs) shah u l-hin twil mehud biex hi wiegbet ghal certu mistoqsijiet. Il-Qorti dan kollu flietu bil-lenti ndikata mill-Artikolu 637 tal-Kodici Kriminali, wara li kkonstatat li r-rakkont tal-minuri ma giex korroborat minn hadd hlief dawk li b'xi mod semghu u rrelataw dwar l-allegat kaz, din il-Qorti tista' tasal biss ghal konkluzjoni wahda u cioe' li ma tistax tistrieh fuq dak li qalet il-minuri u kif qalitu biex issib htija fl-imputata.

Il-Qorti nnotat x'qalet ix-xhud **Pauline Grech**[8] li kienet il-Kap tal-Iskola Primarja ta' Ghajnsielem (*a fol.* 358 *et. seq.*) meta OMISSIS bdiet tattendi din l-iskola. Dan ghen lill-Qorti tifhem kif sa minn snin qabel sehh l-allegat incident kienu diga' jezistu problemi u anke kienu saru allegazzjonijiet qabel u dakinhar fil-konfront tal-amministrazzjoni tal-iskola privata li kienet tattendi:

> Jiena l-ewwel nett niftakar li meta ġiet l-iskola din it-tifla partikolari ġiet minn skola oħra u ġiet f'ċirkostanzi mhux sbieħ xejn il għaliex niftakar meta ġiet il-mamà tagħha biex iddaħħalha fl-iskola, hi qabel kienet tattendi fi skola oħra, kienet skola tal-Knisja u l-omm allegat illi fl-iskola l-oħra fejn kienet it-tfal, it-tifla kienet tiġi kważi kważi bullied mill-amministrazzjoni tal-iskola, kienet qed tagħmel pipì taħtha, tibki, ma tridx tmur skola, etc ...

[8] Moghtija fil-11 ta' Marzu 2015

Jiena kont il-kap. Ovvjament jiena ħassejtni fid-dover illi la diġà hemm dan il-pakkett, din it-tifla diġà għandha dan il-pakkett, jiena dejjem nipprova nagħtiha head start biex kemm jista' jkun inġibha ekwivalenti mat-tfal l-oħra. Għal bidu naf illi t-tifla, niftakar ċar, illi fl-ewwel sena kien hemm episodji ripetuti ta' school phobia, it-tifla ma kinitx tkun trid tiġi l-iskola. Niftakar ċarissimu li mhux l-ewwel darba illi iċċempilli l-omm u tgħidli, isma', it-tifla ma tridx tiġi skola, u jiena ngħidilha, Sinjura, ipprova ġibha, noħroġ għaliha jien fit-triq u biex indaħħluha ħalli nfejqu dan il-proċess ta' school phobia ...

Jiġifieri li ma tiffolowjax il-konverżazzjoni, ma tkunx taf eżatt fejn int għax daqqa, ikun hemm inkonsistenza, daqqa tagħmel tbaxxi rasha, daqqa tgħid le bil-mossi, imma kienet challenging ħafna biex tikkomunika magħha, kont insibha challenging jiena ...

Minħabba l-mod kif kont naraha taħdem lil Karen. Lil Karen jiena kont inqisha illi hija waħda mill-iktar LSAs, jekk mhux l-iktar, iddedikati li kelli fl-iskola. Meta qed ngħid iddedikati jiġifieri dak it-tip illi wara l-ħin tal-iskola tiddedika ħafna mill-ħin tagħha biex tipprepara n-notes u r-riżorsi l-oħra li jkun hemm bżonn għat-tifla. Wieħed irid iqis illi t-tfal tipiċi jkollhom it-text book imma tfal bħalma kienet OMISSIS trid bilfors inti tagħmilhulha dak li ngħidulu "multi-sensory". Biex nagħti eżempju, jekk inti għandek exercise tal-matematika, jekk inti għandek 2 + 2, ma tagħmilx 2 + 2 imma tagħmel żewġ frottiet bl-istampa plus żewġ frottiet bl-istampa. Dak it-tip. U hi kienet jiġifieri dawn ir-resources minn dak li kont rajt minn qabel kont nara li għal ma' din it-tifla partikolari Karen kienet il-persuna l-iktar idonea, ħa ngħidu hekk. Inti naturalment taħdem b'dawk li jkollok.

<u>Avukat Dottor Kathleen Grima</u>:
Ara, inti semmejtilna illi għal bidu illi t-tifla bdiet tiġi l-iskola jiġifieri wara ċ-change of school, ħa nsejhulha hekk, kien hemm xi żmien meta t-tifla kellha, inti sejjaħtilha school phobia.
<u>Ix-xhud</u>:
Hekk hu.
<u>Avukat Dottor Kathleen Grima</u>:
Kienet tibża' tiġi l-iskola.
<u>Ix-xhud</u>:
Iva, iva.
<u>Avukat Dottor Kathleen Grima</u>:

Din iċ-ċirkostanza jew is-sitwazzjoni minn dak li allura kont tara int, għax din iċċempillek l-omm jiġifieri tgħidlek, isma', din ma tridx tiġi, inti rajtha illi kienet ġejja mill-omm jew li kienet ġejja mit-tifla, it-tifla ma tridx tiġi l-iskola?

Ix-xhud:
Dejjem baqa' misteru. Dejjem baqa' misteru. Fis-sens illi, eh, illi kien jiġini ġo rasi li hemm, there is something not functioning well u din l-assertion ikkonfermajtha anke meta per eżempju jiena f'holidays partikolari tal-Milied għamilt tibjida l-klassijiet u eżatt wara li dħalna nirċievi telefonata mingħand l-ischool social worker fejn qaltli illi din il-minuri qed tbagħti minħabba allerġija etc, u jiena to be honest kont daqsxejn mistagħġba għaliex l-omm ma ġietx tkellem lili mill-ewwel; qabdet u marret għand is-social worker.

Il-kompitu ta` din il-Qorti hu li taghmel analizi approfondita tal-provi mressqa mill-partijiet. U wara li taghmel tali ezami, trid taghmel id-domanda jekk il-prosekuzzjoni ppruvatx il-kaz taghha skond il-ligi.

Huwa vera li mhux kull kunflitt fil-provi ghandu necessarjament igib il-liberazzjoni ta` dak jew dik li jkunu gew akkuzati b'reat. Anzi, fejn hemm tali kunflitt, il-Qorti trid tkun aktar attenta fl-analizi taghha biex tara jekk hemmx xi fatt iehor rizultanti mill-atti li jista jixhet dawl fuq ir-rizoluzzjoni tal-kawza.

Din il-Qorti hekk ghamlet u wara tali analizi tinsab f'qaghda tiddikjara illi f'dan il-kaz, mehud kollox flimkien, din il-Qorti ma tpoggietx f'pozizzjoni li fiha tista legittimament tiddikjara l-htija tal-imputata skond il-ligi. Qieset kemm qieset ic-cirkostanzi kollha ta` dan il-kaz, din il-Qorti baqghet kolpita minn dubbju. Fi kliem iehor, mehud kollox flimkien, il-prosekuzzjoni ma rnexxilhiex tilhaq il-grad tal-prova rikjest fil-kamp penali sabiex tigi dikjarata l-htija skond il-ligi.

Din il-Qorti waslet ghal din id-decizjoni anke minhabba l-mistoqsijiet li xtaqet issib twegiba ghalihom li fil-process kollu li sar fuq medda ta' erba' snin ma nstabux:

Saret investigazzjoni mill-pulizija dwar il-harqa li kellha t-tifla? Kienet harqa ta' sigarett, harqa mal-forn, jew gidma ta' nemusa? Il-minuri damet xejn inqas minn ghoxrin (20) minuta biex twiegeb ghall-mistoqsijiet li sarulha marbuta ma' din il-harqa. Il-Qorti nnutat li l-minuri kienet skomda hafna biex taghti twegibiet dwar din il-harqa.

Il-missier imkien ma jidher fil-kaz hlief li jinghad li hu flimkien ma' martu marru jaghmlu rapport ghand il-pulizija. Ghaliex il-prosekuzzjoni ma ressqitux xhud f'dan il-kaz? Ghaliex tressqet l-omm u z-zija u l-missier ma tressaqx? F'kaz ta' allegazzjoni bhal din il-missier ma kellux ikun aktar involut biex tkun skoperta l-verita' kollha dwar il-kaz?

X'tip ta' ghajnuna nghatat it-tifla tul il-process kollu? Ghaliex f'dan il-kaz ma nhassitx il-htiega li tinhatar psikoterapista tat-tfal li kienet tkun tista' tirraporta lill-Qorti dwar il-kundizzjoni tat-tifla u jekk tassew kienx hemm abbuz fuqha u minn min?

Ghaliex f'kaz sensittiv bhal dan ma ddahlitx il-pulizija tal-iskwadra kontra l-vizzji fejn ghandhom certu esperjenza biex jinvestigaw kazijiet bhal dawn?

Ghaliex l-akkuza hi iffirmata minn zewg spetturi u wiehed mill-ispetturi ma jidher imkien fl-investigazzjoni u lanqas ta x-xiehda tieghu?

X'gara ezatt bejn il-Gimgha 7 sal-14 ta' Novembru 2011? Kif persuna li allegatament abbuzat mit-tifla tkun milqugha fid-dar taghhom? Ghaliex thalla z-zmien u thalla l-kuntatt mat-tifla sakemm sar rapport tal-allegat abbuz? Ghaliex kien hemm trapass ta' zmien minn meta sar l-allegat abbuz u r-rapport lill-pulizija?

Decide

Wara li aktar 'il fuq saret l-esposizzjoni legali dwar ir-reat ta' korruzzjoni ta' minorenni kontemplat fl-Artikolu 203 tal-Kodici Kriminali l-Qorti jidrilha li fil-kaz odjern ma jirrizultawx l-estremi kollha ta' dan ir-reat.

Ghal dawn il-motivi l-Qorti tiddikjara lill-imputata mhux hatja tal-imputazzjonijiet migjuba fil-konfront taghha u konsegwentement tilliberaha minnhom.

Il-Qorti tordna d-divjet ta′ pubblikazzjoni ta′ isem il-minuri koncernata u tal-familja taghha fi kwalunkwe mezz ta′ komunikazzjoni.

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Dr. Joseph Mifsud
Magistrat