Qorti tal-Appell Kriminali

Onor. Imhallef Dr. Edwina Grima LL.D.

Appell Nru: 405/2014

Il-Pulizja

Assistent Kummissarju Norbert Ciappara

Vs

Joseph Camilleri

Illum 25 ta' Frar, 2016

Il-Qorti,

Rat l-akkuzi dedotti kontra l-appellat Joseph Camilleri, detentur tal-karta tal-identita Maltija bin-numru 434884M, quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali talli:

1. Nhar is-16 ta' April, 2002 u l-granet ta' qabel din id-data, kellu fil-pussess tieghu d-droga eroina specifikata fl-Ewwel Skeda tal-Ordinanza dwar il-Medicini Perikoluzi Kap 101 tal-Ligijiet ta' Malta, meta ma kinx fil-pussess ta' awtorizzazzjoni ghall-importazzjoni jew ghall-esportazzjoni mahrug mit-Tabib Principali tal-Gvern skont id-disposizzjonijiet tar-4 u s-6 Taqsima tal-Ordinanza, u meta ma kinx bil-licenzja jew xort'ohra awtorizzat li jimmanifattura, jew li jforni d-droga msemmija, u meta ma kinx b'xi mod iehor bil-licenzja mill-President ta' Malta li jkollu d-droga msemmija fil-pussess tieghu, u naqas li jipprova li d-droga msemmija giet fornuta lilu ghall-uzu tieghu skont ir-ricetta kif provdut fir-Regolamenti msemmija, u dan bi ksur tar-Regolament 8 tar-Regoli tal-1939 dwar il-Kontroll Intern tad-Drogi Perikoluzi (GN 292/1939) kif sussegwentement emendati u bi ksur tal-Ordinanza dwar il-Medicini Perikoluzi Kap 101 tal-Ligijiet ta' Malta, liema droga nstabet f'tali cirkostanzi li juru li ma kinitx ghall-uzu personali tieghu;

2. U aktar talli nhar is-16 ta' April, 2002 kellu fil-pussess tieghu r-raza mehuda mill-pjanta cannabis jew xi preparazzjonijiet li jkollhom bhala bazi din ir-raza, u dan bi ksur tal-Artikolu 8(a) tal-Kapitolu 101 tal-Ligijiet ta' Malta;

3. U aktar talli fl-istess data, hin u cirkostanzi, kellu fil-pusess tieghu medicina specifikata u psikotropika meta ma kinx awtorizzat li kif imiss bi ksur tar-Regolament 5(1) tal-Avviz Legali 22 tal-1985 kif sussegwentement emendat; u 40(b) u 102A; u t-Tielet Skeda tal-Ordinanza dwar il-Professjoni Medika u l-Professjonijiet li ghandhom x'jaqsmu maghha, Kap 31 tal-Ligijiet ta' Malta; u l-Artikolu 16 tal-Att V tal-1985 kif emendat;

4. U aktar talli fl-istess data, hin u cirkostanzi, kellu minghajr awtorita' legali jew minghajr skuza legittima jew ragonevoli xtara jew ircieva minghand xi persuna, kif ukoll kelu fil-pussess tieghu, biljetti tal-flus Maltin falsifikati, meta kien jaf li l-istess huma falsifikati, dan bi ksur tal-Artikolu 46 tal-Kapitolu 204 tal-Ligijiet ta' Malta.

Rat is-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali, mghotija fid-9 ta' Ottubru, 2014, fejn il-Qorti sabithu hati tal-ewwel akkuza.

Daqstant hati, kemm ex admissis (stqarrija) tal-pussess semplici ta' cannabis u tal-pussess semplici ta' medicina specifikata u psikotropika, u minn dak li rrizulta mit-tfittxija, u dan wara li rat id-Disposizzjonijiet tar-4 u 8 Taqsima tal-Ordinanza, illum Kapitolu 101 tal-Ligijiet ta' Malta; u r-Regolament 8 tar-Regoli tas-sena 1939 dwar il-Kontroll Intern ta' Drogi Perikoluzi (GN 292/1939); LS 10 Regola 9; l-Ewwel Skeda Taqsima I tal-Kap 101 tal-Ligijiet ta' Malta; l-Artikolu 22(1), 22(1B), 22 (2)(b), 8(a) – ilkoll tal-Kapitolu 101 tal-Ligijiet ta' Malta; ukoll ir-Regolament 5 tal-Avviz Legali 22/1985; LS 31.18; ukoll l-Artikolu 40(b) u 120A tal-Kap 31 tal-Ligijiet ta' Malta.

Sabithu hati wkoll talli kellu fil-pussess tieghu minghajr awtorita' legali biljett ta' flus ta' ghaxar liri Maltin (Lm10.00) foloz, u dan bi ksur tal-Artikolu 46 tal-Kapitolu 204 tal-Ligijiet ta' Malta, u anke wara li rat ir-relazzjoni ta' Dr Martin Bajada, u semghet ix-xhud tal-Bank Centrali li xehed kif premess, anke minn kif kienet tinhass l-istess nota tal-flus, illi allura timplika anke xjenza tal-falsita'. Dan jinghad ukoll

wara li l-Qorti nnifisha hasset b'idejha l-istess karta, u tenut kont l-uzu komuni tan-nota tal-Lira Maltija fil-hajja gurnaljiera qabel il-qalba ghall-Ewro.

Dwar il-piena, rat ukoll l-Artikolu 17 tal-Kapitolu 9 tal-Ligijiet ta' Malta;

Rat ukoll il-fedina penali tal-imputat, ukoll dik aggornata;

Ikkunsidrat ukoll il-progress li tant sahhu fuqu tas-Sedqa u l-Ufficjal tal-Probation, u l-progress illi ghamel ghax anke l-ahhar sentenza kontrieh tidher illi tikkoncerna reati tas-sena 2000;

Ikundannatu ghal piena karcerarja ta' sena(1) u tlitt(3) xhur, stante l-progress kbir li jidher li ghamel l-imputat'

Tikkundannatu ukoll ghal multa ta' tliet elef Ewro (€3,000).

Rat ukoll l-Artikolu 533 tal-Kapitolu 9 tal-Ligijiet ta' Malta, u tikkundannatu ihallas l-ispejjez peritali ammontanti ghal erba' mija sitta u erbghin Ewro u tmienja u sebghin centezmu (€446.78).

Ordnat wkoll id-distruzzjoni tad-droga ezebita u mmarkata bhala KB 14.2003.

Ordnat li n-nota tal-ghaxar liri Maltin falza tinghata lil Bank Centrali ta' Malta sabiex jiddisponi mill-istess.

Rat ir-rikors tal-appell ta Joseph Camilleri, pprezentat fir-registru ta' din il-Qorti fl-20 ta' Ottubru, 2014, fejn talab lil din il-Qorti tirriforma s-sentenza appellata billi tikkonfermaha dwar it-tieni akkuza (pussess ta' cannabis), dwar il-pussess tal-ghaxar liri li kienu foloz u tirriformaha dwar it-tielet akkuza, pussess ta' medicinali, billi ssibu mhux hati taghha u tilliberah minnha u tirriformaha dwar l-ewwel akkuza billi tirrevokaha kompletament jew in sub ordine twaqqaghha ghal-pussess semplici ghal uzu personali u ghaldaqstant tibdel il-piena inflitta mill-Ewwel Qorti.

Rat l-atti u d-dokumenti kollha.

Rat il-fedina penali aggornata ta' Joseph Camilleri esebita mill- prosekuzzjoni fuq ordni tal-Qorti.

Rat illi l-aggravji tal-appellanti huma s-segwenti w cioe':-

1. Dwar il-posizzjoni legali dwar l-istqarrijiet:

Bir-rispett kollu lejn il-Qorti Kostituzzjonali u s-sentenzi msemmija mill-istess Qorti tal-Magistrati, u cioe' d-decizjonijiet moghtija fejn ammissjoni titqies ammissibbli mehuda minghajr assistenza legali jekk jigu ezaminati certi kriterji bhal fedina penali, eta ta' interrogat u kollox jiddependi fuq il-vulnerabbilita' tal-investigat, hija totalment zbaljata u tmur kontra l-ahhar gurisprudenza tal-Qorti Ewropea ghad-drittijiet tal-bniedem. Jidher illi l-Qrati taghna wehlu mas-sentenza Salduz fil-parti fejn issemmi l-vulnerabbilita' u hadu dak il-kriterju biex jiddistingwu bejn min hu vulnerabbli u min m'huwiex.

Fil-kaz Navone and others vs Monaco deciza fl-24 ta' Jannar, 2014 il-Qorti Ewropea kienet iddecidiet fuq il-kaz ta' tlieta min-nies illi kellhom tletin sena li kienu akkuzati b'serq u ghamlu dikjarazzjonijiet minghajr l-assistenza ta' avukat. F'dan il-kaz il-Qorti Ewropea (fis-sentenza bil-franciz) bl-ebda mod ma dahlet fuq kriterji ta' vulnerabbilita u ddikjarat li kien hemm vjolazzjoni tal-Artikolu 6(3) tal-Konvenzjoni marbut mal-Artikolu 6(1) tal-Konvenzjoni. Sadanittant il-Qorti Kostituzzjonali naturalment se tkompli fuq il-vulnerabbilita'.

Sentenza ohra illi saret finali fit-13 ta' Gunju, 2014 hija ta' Aleksandr Vladimirovich Smirnov vs Ukraine. L-applikant twieled fl-1981 u kien gie arrestat fis-sena 2002, meta certament ma kienx minuri. Hija l-gurisprudenza l-aktar ricenti bhala sentenza Aleksand Vladimirovich Smirnov vs Ukraine li saret finali fit-13 ta' Gunju, 2014, fejn kien hemm ukoll Imhallef Malti, li ghandha tigi segwita. Fl-ebda parti minn din is-sentenza ma saret xi referenza ghal-vulnerabbilita' imma dak il-principju tad-dritt ta' Avukat japplika ghal kwalunkwe persuna.

Ghalhekk l-istqarrija mehudha minghajr assistenza tal-avukat ma kienitx ammissibli, u jekk tigi kkunsidrata ma jkunx hemm fair trial.

Dwar il-cannabis li kienet fuq il-bank tal-kcina hu ammetta li kienet tieghu. Dwar l-involviment iehor u dwar il-mizien ma ghamel l-ebda stqarrija jew ammissjoni. Ta' min jghid hawnhekk illi dwar il-mizien l-Espert tal-Qorti lanqas sab l-ebda tracca.

Ghalhekk l-istqarrija tieghu ma kienitx kostituzzjonalment ammissibli ghax kienet kolha kemm hi in vjolazzjoni tal-Artikolu 6(3)(c) b'referenza ghal-artikolu 6 tal-Konvenzjoni Ewropeja.

2. Dwar il-pussess aggravat.

Ma hemm l-ebda prova univoka li dik il-landa tal-helu li fiha nstabu boroz li kien hemm fihom l-eroina necessarjament kienu ta' Joseph Camilleri. Fid-dar ma kienx joqghod wahdu. Ma sar l-ebda ezami ta' fingerprints fuq il-boroz li kienu hemmhekk u allura seta' jigi stabbilit li dawk il-boroz kien ibghabas fihom hu jew imisshom hu.

Ma jistax wiehed jghdi illi ghaliex Joseph Camilleri jaccetta li kien jiehu d-droga allura kellu l-pussess ukoll u, in oltre, ma kienx ghal uzu esklussiv tieghu. Bizzejjed jinghad li r-raguni tghidlek li jekk wiehed juza xi haga u jkollu l-pussess taghha dan ghaliex effettivament ikun vittma taghha u mhux ghaliex huwa se jaqbad u jghaddieha lil haddiehor. Hawnhekk hi awla tal-provi bhal ma hija kull awla ohra u jekk ma jkunx hemm provi univoci ma jistax persuna tinstab hatja fuq suppozizzjonijiet jew, aghar, fuq suspetti li jista' jkollha l-prosekuzzjoni.

Lanqas jista' jigi affermat f'dan il-kaz illi kienet tieghu. Diga' sar accenn ghal kwistjoni tal-finger princts kemm fuq il-landa fuq barra u kemm fuq il-boroz tal-plastic. Jekk fl-istess dar ma jkunx joqghod wahdu, allura mhux necessarjament hemm il-prezunzjoni illi hija tieghu. L-ebda persuna ohra li kienet tghix fid-dar ma kienet giet investigata.

Barra minn hekk, ir-raid li kien sar, lanqas kien sar fil-prezenza tieghu. Kien sar meta ntefa' d-dawl fid-daru u dahlu l-Pulizija u hu da parti tieghu ma kienx

hemm u setghu ghalhekk jikkontestawlu fil-prezenza tieghu l-oggetti li gie allegat li sabu hemmhekk.

Il-Pulizija stess jghidu li s-search sar fil-prezenza tal-mara tal-imputat Susan Camilleri.

Illi f'kawza deciza mill-Qorti tal-Appell Kriminali (Imhallef Dr. Victor Caruana Colombo) il-Pulizija vs Paul Fenech, kien hemm allegazzjoni ta' serq u illi hgieg imfarrak kien instab fuq il-qalziet tal-mara u fuq il-qalziet tar-ragel. Kien tqabbad espert, Dr. Anthony Abela Medici, li kien qal li l-hgieg kien jaqbel mal-hgieg tal-post fejn saret is-serqa u l-hgieg waqa' minn fuq il-qalziet tar-raghel ghal fuq il jeans tal-mara. Konsegwentement l-ewwel Qorti kienet illiberat lil mara. Meta sar l-appell, illi fi zmien qasir l-Avukat sottoskritt ma rnexxilux isibha pero' jiftakarha, l-Imhallef Caruana Colombo kien fis-sentenza ghamel il-mistoqsija u 'ghala bl-istess argument ma jistax ikun illi l-hgieg minn fuq il-qalziet tal-mara gie fuq il-qalziet tar-ragel?'

Mhux presunt li certu reati jkunu tal-irgiel biss.

Bla pregudizzju ghal dak li ntqall dwar il-prova jekk kienitx tieghu jew le, hija mportanti wkoll li x-xhieda tal-Ispizjar Mario Mifsud illi qal li ma sabx tracci ta' sustanzi llegali fuq il-mizien. Dan kellu relevanza enormi ghaliex min ikollu l-hsieb li jghaddi d-droga lil haddiehor stante l-prezzijiet taghha mhuwiex se jbieghha jew jghaddieha bl-uzin fuq ghajnejh. Jekk tqum aktar mid-deheb w allura jkun hemm attenzjoni ghal kull nitfa ta' gramma illi se tkun tinghata, is-soluzzjoni kien il-mizien.

Lanqas l-ammont ta' erbgha w erbghin gramma ka kien xi ammonta eccessiv ghaliex skond ir-relazzjoni li ghamel l-istess spizjar kienu jqumu mitejn u disgha u erbghin Liri Maltin u hamsa w ghoxrin centezmu u din kienet biss ta' purita ta' 35%.

Ta min isemmi wkoll illi din id-droga nstabet taht is-saqaf, ma nstabitx f'xi karozza ta' Joseph Camilleri qed isur biha l'hawn u l'hemm.

Ma ngiebet l-ebda prova li kien hemm xi nies dehlin u hergin. Gie allegat li kien hemm pitazz bin-numri tat-telefon u dan il-pitazz qatt ma gie esebit u lanqas hemm fotografija tieghu l-Qorti skartatu. Bhal dan il-pitazz wara kollox wiehed

jista' jisb fi kwalunkwe dar illi jzommu certu numri ta' nies li jkunu jafu u li jkollhom bzonn icemplu ta' spiss.

Ghaldaqstant, kemm legalment u kemm bhala provi ma jirrizultax sodisfacentement illi d-droga eroina kienet (1) fl-ewel lok fil-pussess tieghu kienet tieghu u (2) ma kienitx intiza esklussivament ghal uzu tieghu. Jekk ma kienitx univokament tieghu lanqas jista' jinghad li ma kienitx ghall-uzu tieghu. Dawn il-problemi ta' logika u ligi trid issolvihom il-prosekuzzjoni u mhux id-difiza.

Il-fatt ukoll tas-sorpriza tal-bidla mill-istat ta' abbuz li kien hemm fl-imputat, huwa kollu argument illi jekk il-qorti tkun sodisfatta li dik id-droga kienet fil-pussess univoku tieghu biss, allura kienet kompatibbli wkoll mal-uzu personali tieghu. Ghax jekk wiehed ikun qieghed b'certu vizzju, huwiex tax-xorb, hiwex tat-tipjip jew tad-droga, jekk ikun qieghed mghobbi b'xi wiehed minn dawn il-vizzji mhux se joqghod jixtri bil-ftit imma jkollu kwantita' storjata, imma xorta wahda tibqa' ghal uzu personali tieghu.

3. Dwar il-pilloli

Dwar il-pilloli li nstabu dawk kien medicinali li dwarhom kellu r-ricetta u kien gabhom effettivament mill-Isptar.

4. Dwar il-piena

Telghu diversi xhieda fosthom Marietta Lanzon, Victoria Scicluna, Ray Grech u sahansitra l-Assistent Kummissarju Norbert Ciappara illi kollha ddikjaraw x'bidla ghamel Joseph Camilleri li kienu jafuh bil-problema kbira li kellu.

Il-bidla illi saret fih itteihdet in konsiderazzjoni pero' bir-rispett kollu ma kienx bizzejjed li wara dan iz-zmien kollu l-esponenti wara tnax il-sena jsib ruh f'sitwazzjoni li eventwalment se jkollu kundanna.

Ikkunsidrat,

Illi din id-decizjoni hija wahda limitata ghall-ewwel impunjattiva imtressaq 'il quddiem mill-appellanti li tikkoncerna l-kwistjoni dwar l-ammissibbilita' o meno tal-istqarrija rilaxxjata minnu lill-pulizija meta kien gie arrestat u interrogat lura fis-17 ta' April 2002 u dan billi huwa ma giex moghti il-jedd ghal parir legali qabel gie interrogat. Illi l-Ewwel Qorti fid-decizjoni taghha qieset illi tali stqarrija kienet

wahda ammissibbli billi l-appellanti ma kienx persuna vulnerabbli, kellu tletin sena, u li din ma kenitx l-ewwel darba li huwa xellef difrejgh mal-gustizzja u ghalhekk kellu esperjenzi precedenti ta' arrest u interrogazzjoni. Huwa kien gie moghti is-solita twissija vigenti f'dak iz-zmien fejn il-persuna arrestata ma kellhiex il-jedd la li tiehu parir legali qabel l-interrogazzjoni u wisq inqas li tkun assistita minn avukat fil-waqt tal-interrogazzjoni innifisha. Illi fid-decizjoni taghha, l-Ewwel Qorti strahet fuq il-gwida kostituzzjonali li kienet giet moghtija mill-Qorti Kostituzzjonali permezz ta' decizjonijiet Charles Steven Muscat vs Avukat Generali (08/10/2012), il-Pulizija vs Robert Busuttil (20/02/2014) u il-Pulizija vs Omar Psaila (20/06/2014). Illi l-appellanti madanakollu jaghmel referenza ghad-decizjonijiet moghtija mill-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem li huma kollha konsoni fil-konkluzjoni taghhom illi ikun hemm vjolazzjoni ta'l-artikolu 6(3)(c) tal-Konvenzjoni kull meta persuna arrestata u interrogata ma tkunx inghatat assistenza legali qabel ma tigi assoggettata ghall-interrogazzjoni fejn tista' tinkrimina ruhha.

Ikkunsidrat,

Illi id-dritt ghal smiegh xieraq kif sancit fl-artikolu 6(1) u l-artikolu 6(3)(c) tal-Konvenzjoni Ewropeja gie estiz mill-gurisprudenza ewropeja mhux biss ghal jedd li ghalih hija intitolata l-persuna akkuzata matul il-proceduri penali fil-qorti izda ukoll ghal hekk imsejjah *pre-trial stage* u cioe' ghall-istadju meta persuna tkun giet arrestata u ser tigi interrogata. Dina l-fehma ghalhekk tfisser illi l-artikolu 6(3)(c) li jipprovdi dwar l-assientenza legali ghandu isib applikazzjoni anke fl-istadju ta'l-interrogazzjoni tal-persuna suspettata. Dana ghaliex huwa principju stabbilit fis-sistema penali taghna illi persuna ghandha titqies li hija innocenti sakemm ma tigix misjuba hatja minn qorti gudizzjarja. Kwindi hija ghandha dritt illi ma tinkriminax ruhha bl-ebda mod u dana sa mill-istadju inizjali ta'l-interrogazzjoni. Sabiex dana id-dritt jigi salvagwardjat ghalhekk kull persuna ghandha d-dritt li tikseb l-assistenza legali u dana sabiex tkun fl-ahjar pozizzjoni illi thejji id-difiza taghha. Dana huwa vitali billi fis-sistema penali taghna il-konfessjoni tal-persuna akkuzata hija prova ewlenija fil-process gudizzjarju istitwit kontra taghha.

Il-Qorti Kostituzzjonali, madanakollu kienet recentement ziedet linji gwida ohra ghal gudikant li ikollu f'idejh id-decizjoni dwar jekk ghandux jiehu kont ta' stqarrija tal-interrogat bhala prova in atti sabiex jasal ghal gudizzju tieghu. Gie deciz illi fuq kollox ghandu jittiehed kont tal-fattispecje ta' kull kaz fost ohrajn il-vulnerabbilita tal-persuna li tkun qed tigi interrogata (fosthom l-eta, il-precedenti penali) l-jedd li l-persuna interrogata kellha biex tibqa' siekta u ma twegibx ghal dawk il-mitoqsijiet li jistghu jinkriminawh, l-inattivita da parti ta'l-akkuzat milli jipprova jattakka l-validita ta'l-istqarrija tieghu mill-bidunett tal-proceduri, l-provi l-ohra li hemm fl-atti, fost ohrajn.

Illi f'decizjoni recenti[1] moghtija mill- Qorti Ewropeja Dwar id-Drittijiet tal-Bniedem gew affermati il-principji generali li ghandhom jigu sewgieti mill-qrati meta inghad:

"Early access to a lawyer is one of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies.

The Court reiterates that in order for the right to a fair trial to remain sufficiently "practical and effective" Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction,

[1] Mario Borg vs Malta 37537/13 12/01/2016

Denying the applicant access to a lawyer because this was provided for on a systematic basis by the relevant legal provisions already falls short of the requirements of Article 6."

Il-Qorti iddecidiet illi l-fatt wahdu illi l-ligi domestika ma kenitx tipprevedi d-dritt ghall-assistenza legali meta l-persuna suspettata kienet tinsab fil-kustodja tal-pulizija hija bizzejjed sabiex ikun hemm vjolazzjoni ta'l-artikolu 6:

"60. The Court notes that it has found a number of violations of the provisions at issue, in different jurisdictions, arising from the fact that an applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see, for example, *Salduz*, cited above, § 56; *Navone and Others v. Monaco,* 24 October 2013; *Brusco v. France*, October 2010; and *Stojkovic v. France and Belgium*, 27 October 2011). A systemic restriction of this kind, based on the relevant statutory provisions, was sufficient in itself for the Court to find a violation of Article 6 (see, for example, *Dayanan v. Turkey*, no. 7377/03 §§ 31-33, 13 October 2009; *Yeşilkaya v. Turkey*, no. 59780/00, 8 December 2009; and *Fazli Kaya v. Turkey*, no. 24820/05, 17 September 2013).

61. In respect of the present case, the Court observes that no reliance can be placed on the assertion that the applicant had been reminded of his right to remain silent (see *Salduz*, cited above, § 59); indeed, it is not disputed that the applicant did not waive the right to be assisted by a lawyer at that stage of the proceedings, a right which was not available in domestic law. In this connection, the Court notes that the Government have not contested that there existed a general ban in the domestic system on all accused persons seeking the assistance of a lawyer at the pre-trial stage (in the Maltese context, the stage before arraignment).

62. It follows that, also in the present case, the applicant was denied the right to legal assistance at the pre-trial stage as a result of a systemic restriction applicable to all accused persons. This already falls short of the requirements of Article 6 namely that the right to assistance of a lawyer at the initial stages of police interrogation may only be subject to restrictions if there are compelling reasons (see *Salduz*, cited above, §§ 52, 55 and 56).

63. There has accordingly been a violation of Article 6 § 3 (c) taken in conjunction with Article 6 § 1 of the Convention.”

Illi gie deciz illi l-qrati ma kellhomx jaghtu interpretazzjoni stretta tad-decizjoni Salduz vs Turkey kif sehh fil-kaz ta' Charles Steven Muscat fost ohrajn. L-Imhallef Pinto De Albuquerque[2] ighid hekk fl-opinjoni tieghu:

“the interpretation of *Salduz* by the Constitutional Court of Malta is in breach of the “constitutional instrument of European public order” and its “peremptory character”. …. Be that as it may, in the light of the repetitive findings of violations of Article 6 § 3 (c) of the Convention by this Court, the Maltese Constitutional Court should correct its trajectory and return to its initial Convention-friendly interpretation of *Salduz*.”

Imbaghad fil-kawza Aleksandr Vladimirovich Smirnov vs Ukraine (13.06.2014) gie deciz: **–**

“The Court reiterates the principles developed in its case-law, according to which the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, although not absolute, is one of the fundamental features of the notion of a fair trial. As a rule, access to a lawyer should be provided from the first time a suspect is questioned by the police, unless it can be demonstrated in the light of the particular circumstances of each case that there were compelling reasons to restrict this right (see *Salduz v. Turkey* [GC], no. 36391/02, § 55, 27 November 2008). The right to mount a defence will in principle be irretrievably prejudiced when incriminating statements made during police questioning without access to a lawyer are used for a conviction (ibid.). While a defendant in criminal proceedings may, under various circumstances, waive his right to legal representation, such a waiver may not run counter to any important public interest, must be unequivocally established, and must be attended by minimum safeguards commensurate with the waiver's importance.”

---

[2] Ara partly concurring and partly dissenting opinion of Judge Pinto De Albuquerque fid-decizjoni Mario Borg vs Malta

Maghdud dan allura jidher illi r-regola hi li l-Artikolu 6(1) abbinat ma'l-artikolu 6(3)(c) jitlob li jkun hemm dritt ta' avukat fl-istadju tal-investigazzjoni tal-pulizija, sakemm ma jigix ippruvat li hemm ragunijiet impellenti ghaliex dan id-dritt ghandu jigi ristrett. Illi allura meta l-ligi domestika teskludi dan il-jedd u dan b'mod sistematiku billi ma ikunx hemm disposizzjoni *ad hoc* li taghti dan il-jedd lil persuna arrestata, ikun hemm il-periklu li isehh lezjoni tad-dritt tal-persuna akkuzata ghal smiegh xieraq anke f'dawk il-kazijiet estremi fejn ma ikun hemm l-ebda dikjarazzjoni inkriminanti f'dawn l-istqarrijiet. Illi fil-kaz deciz quddiem il-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem fl-ismijiet Navone vs Monaco, nstab li kien hemm lezjoni billi l-akkuzat ma kellux jedd ghall-assistenza ta'l-avukat matul l-interrogazzjoni similment billi l-ligi tal-pajjiz ma kenitx tippermettieha. (ara ukoll Yesilkaya vs Turkey – 59780/00 08/12/2009, Fazli Kaya vs Turkey – 24820/05 17/09/2015).

Dan il-jedd gie anke estiz fil-kaz fejn l-akkuzat kien gie moghti il-jeddijiet kollha vigenti skont il-ligi ta' pajjizu inkluz allura il-jedd tieghu ghas-silenzju u fil-fatt huwa kien ezercita dan il-jedd u ma wiegeb ghall-ebda mistoqsija lilu maghmula. Il-Qorti xortwahda sabet li kien hemm vjolazzjoni ta'l-artikolu 6(3)[3] u dan ghaliex ma kienx ikkonsulta ma avukat biex ifissirlu il-jeddijiet tieghu skont il-ligi dwar id-dritt tieghu ghas-silenzju u id-dritt li ma jinkriminax ruhu b'dan ghalhekk illi l-Qorti implikat illi t-twissija moghtija mill-ufficjali investigattiv ma hijiex bizzejjed.

"31. The Court is of the view that the fairness of criminal proceedings under Article 6 of the Convention requires that, as a rule, a suspect should be granted access to legal assistance from the moment he is taken into police custody or pre-trial detention.

32. In accordance with the generally recognised international norms, which the Court accepts and which form the framework for its case-law, an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned (for the relevant international legal materials see *Salduz*, cited above, §§ 37-44). Indeed, the fairness of proceedings requires that an

[3] Dayanan vs Turkey – 7377/03 deciza 13/10/2009

accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.

33. In the present case it is not disputed that the applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see *Salduz*, cited above, §§ 27 and 28). A systematic restriction of this kind, on the basis of the relevant statutory provisions, is sufficient in itself for a violation of Article 6 to be found, <u>notwithstanding the fact that the applicant remained silent when questioned in police custody</u>." (sottolinjar tal-Qorti)

Fil-fatt fid-decizjoni Brusco vs Franza[4] gie deciz:

"La Cour constate également qu'il ne ressort ni du dossier ni des procès-verbaux des dépositions que le requérant ait été informé au début de son interrogatoire du droit de se taire, de ne pas répondre aux questions posées, ou encore de ne répondre qu'aux questions qu'il souhaitait. Elle relève en outre que le requérant n'a pu être assisté d'un avocat que vingt heures après le début de la garde à vue, délai prévu à l'article 63-4 du code de procédure pénale (paragraphe 28 ci-dessus). L'avocat n'a donc été en mesure ni de l'informer sur son droit à garder le silence et de ne pas s'auto-incriminer avant son premier interrogatoire ni de l'assister lors de cette déposition et lors de celles qui suivirent, comme l'exige l'article 6 de la Convention."

Illi allura hija fis-setgha ta' din il-Qorti u dan qabel ma jigi determinat il-process gudizzjarju kontra l-appellanti illi twarrab dik l-evidenza illi tmur kontra il-garanziji moghtija kemm fil-Kostituzzjoni kif ukoll il-Konvenzjoni ghal harsien tal-jedd ghal

[4] 1466/07 – 14/10/2010 The Court also notes that it does not follow either the file or the minutes of evidence that the applicant had been informed at the beginning of his examination of the right to remain silent, not to respond to questions, or to not answer the'questions he wanted. It further notes that the applicant had been assisted by a lawyer twenty hours after the start of the custody period provided for in Article 63-4 of the Code of Criminal Procedure (see paragraph 28 above) . The lawyer was therefore unable either to provide information on his right to remain silent and not to incriminate before his first interrogation or assist during the deposition and during those which followed, as required by Article 6 of the Convention

smiegh xieraq tal-persuna akkuzata. Fil-fatt dan il-jedd gie indikat fid-decizjoni tal-Qorti Ewropeja fil-kaz Dimech vs Malta[5] fejn f'dak il-kaz ghalkemm il-Qorti ma setatx tasal biex tistabbilixxi jekk kienx sehh lezjoni ta'l-artikolu 6 tal-Konvenzjoni billi l-proceduri penali kienu ghadhom ma intemmux, madanakollu sahhqet:

"…. it cannot be entirely excluded that the courts of criminal jurisdiction, before which the case is heard, hear the case in the same circumstances that would have existed had the right to legal-assistance during pre-trial stage not been disregarded, namely by expunging from the records the relevant statements. The Court notes that, if, because of the limitations of the applicable criminal procedural law, it is not possible given the stage reached in the pending proceedings, to expunge from the records the relevant statements (whether at the request of the applicant or by the courts of criminal jurisdiction of their own motion), it cannot be excluded that the legislature take action to ensure that a procedure is made available at the earliest opportunity for this purpose."

Illi mill-ezami tal-atti probatorji u minn qari tad-decizjoni impunjata huwa bil-wisq evidenti illi ghalkemm fl-istqarrija rilaxxjata minnu, l-appellanti jaghzel li ma iwegibx ghal xi mixtoqsijiet li isirulu, madanakollu huwa iwiegeb ghal ohrajn u l-Ewwel Qorti hadet in konsiderazzjoni dawn id-dikjarazzjonijiet meta giet biex tistabilixxi r-reijta fl-appellanti u dan meta stqarret testwalment:

"**Illi l-akkuza migjuba fil-konfront tad-droga eroina hija dik tal-pussess mhux ghall-uzu esklussiv. Bla dubbju, il-Prosekuzzjoni rnexxielha tipprova l-pussess per se, imbaghad ressqet provi ta' ammont, mizien u stqarrija li jwasslu ghal prova tal-aggravvju. Fil-fatt l-ammont ta' erbgha u erbghin (44) gramma u fuqhom, ghal bniedem li fil-fatt kien aktar ivvizzjat bil-cannabis u kokaina (ara stqarrija u xhieda ta' rapprezentant tal-agenzija Sedqa), huwa ammont kbir u xejn negligibbli**."

Illi dan l-Ewwel Qorti ma setatx taghmlu u allura din il-Qorti ser tilqa' dan l-aggravvju imressaq 'il quddiem mill-appellanti u ghalhekk ser tiskarta l-istqarrija

[5] 02/07/2015 – 34373/13

ta'l-appellanti rilaxxjata fis-17 ta' April 2002 bhala prova u dan fid-dawl tad-decizjonijiet hawn fuq iccitati.

Ghal dawn il-motivi l-Qorti qed tilqa' dan l-ewwel aggravvju ta'l-appellanti u tordna il-prosegwiment tas-smiegh ta'l-appell skont il-ligi fuq l-aggravvji l-ohra.

(ft) Edwina Grima

Imhallef

VERA KOPJA

Franklin Calleja

Deputat Registratur