

**QORTI TAL-MAGISTRATI (MALTA)
BHALA QORTI TA' GUDIKATURA KRIMINALI**

MAGISTRAT DR. JOSETTE DEMICOLI LL.D

**Il-Pulizija
(Spettur Keith Arnaud)**

Vs

Kenneth Ellul

Illum 9 ta' Mejju 2016

Il-Qorti,

Rat l-imputazzjonijiet migjuba kontra l-imputat Kenneth Ellul ta' 38 sena, bin Joseph u Iris nee' Caruana, imwieded Pieta', nhar il-15 ta' Settembru 1974 prezentement residenti l-Facilita' Korrettiva ta' Kordin, detentur tal-karta tal-identita' Maltija bin-numru 444374M:

Talli:

Nhar id-19 ta' Frar 2009, f'xi hin bejn is-07:30 hrs u l-16:00 hrs, minn gewwa residenza bl-isem Agape, li tinsab fi Triq B Bontadini, Birkirkara,

ikkommetta serq ta' diversi oggetti u flus kontanti, liema serq huwa aggravat bil-valur, li l-valur tal-haga misruqa huwa izjed minn elfejn tliet mija u disgha u ghoxrin ewro u sebgha u tletin centezmu (€2,329.37), bil-mezz u bil-lok u dan ghad-detriment ta' Patrick Vella u/jew persuni ohra;

U aktar talli fl-istess data, hin, lok u cirkostanzi, volontarjament hassar, ghamel hsara jew gharraq hwejjeg haddiehor, mobbli jew immobbli billi ghamel hsara fuq il-bieb ta' barra tar-residenza bl-isem Agape, Triq B Bontadini, Birkirkara liema ammont tal-hsara ma tiskorrix l-elf mija u erbgha u sittin ewro u sebgha u erbghin centezmu (€116.47), u dan ghad-detriment ta' Patrick Vella u/jew persuni ohra;

U aktar talli f'xi hin bejn in-12:30 ta' wara nofs inhar ta' nhar l-1 ta' Marzu 2009, minn gewwa r-residenza numru 19, Trejjet il-Beatu Dun Gorg Preca, Pembroke, ikkommetta serq ta' diversi oggetti, liema serq huwa aggravat bil-valur, li l-valur tal-haga misruqa jeccedi l-elfejn tliet mija u disgha u ghoxrin ewro u sebgha u tletin centezmu (€2,329.37), bil-mezz u bil-lok u dan ghad-detriment ta' Omar Micallef u/jew persuni ohra;

Il-Qorti hija gentilment mitluba titratta ma' l-imsemmi Kenneth Ellul bhala ricediv ai termini ta' l-artikoli 49, 50 u 289 tal-Kapitolu 9 tal-Ligijiet ta' Malta wara li huwa kien gie misjub hati permezz ta' diversi sentenzi moghtija mill-Qrati ta' Malta, liema sentenzi saru definittivi u ma jistghux jigu mibdula.

Il-Qorti hija gentilment mitluba sabiex f'kaz ta' htija tikkundanna lill-akkuzat ghall-hlas ta' spejjes li jkollhom x'jaqsmu mal-hatra ta' esperti jew periti hekk kif ikkontemplat fl-Artikolu 533 tal-Kapitlu 9 tal-Ligijiet ta' Malta.

Rat in-nota tar-rinviju għall-gudizzju mibghuta mill-Avukat Generali li permezz tagħha bagħat lill-imputat biex jigi gudikat minn din il-Qorti bhala Qorti ta' Gudikatura Kriminali kif mahsub:

- (a) Fl-artikoli 261(b)(c)(e), 263, 267, 269, 278(1)(2)(3), 279(b) u 280(2) tal-Kapitolu 9 tal-Ligijiet ta' Malta;
- (b) Fl-artikoli 325(1)(b) tal-Kapitolu 9 tal-Ligijiet ta' Malta;
- (c) Fl-artikoli 261(b)(c)(e), 263, 267, 269, 278(1)(2)(3), 279(b) u 280(2) tal-Kapitolu 9 tal-Ligijiet ta' Malta;
- (d) Fl-artikoli 325(1)(c) tal-Kapitolu 9 tal-Ligijiet ta' Malta;
- (e) Fl-artikoli 49, 50 u 289 tal-Kapitolu 9 tal-Ligijiet ta' Malta;
- (f) Fl-artikoli 17, 20, 31 u 533 tal-Kapitolu 9 tal-Ligijiet ta' Malta.

Rat li l-imputat iddikjara li ma kellux oggezzjoni li l-kaz tieghu jigi trattat bi procedura sommarja.

Semghet ix-xhieda.

Semghet it-trattazzjoni finali.

Rat l-atti u d-dokumenti kollha.

Kunsiderazzjonijiet:

L-imputat qieghed jigi akkuzat b'zewg serqiet aggravati t-tnejn bil-valur li jeccedi l-€2,329.37, bil-mezz u bil-lok, kif ukoll bi hsara volontarja u li huwa recediv.

Illi serqa minnhom twettqet fid-19 ta' Frar 2009 f'xi hin bejn 07:30hrs u 16:00hrs fi Triq Bontadini, B'Kara, u l-ohra f'xi hin bejn in-12.30pm tal-1 ta'

Marzu 2009 u 00:30am tat-2 ta' Marzu 2009 fi Trejjet il-Beatu Dun Gorg Preca, Pembroke.

Illi inkwantu ghas-serqa li sehhet Birkirkara, l-Ispettur Keith Arnaud jixhed li kienu nsterqu, fost ohrajn, deheb b'valur li jeccedi €2,300 u mowbajl Samsung E900 IMEI no 353845018841479. Minn ricerki li saru mal-GO plc irrizultalhom li l-mowbajl kien qieghed jintuza' minn certu Jocelyn Sammut¹ u din l-informazzjoni waslet lill-pulizija permezz ta' ittra datata 10 ta' Marzu 2009. Fl-14 ta' Marzu 2009 l-ispettur mar flimkien ma' surgent u kuntistabbli ghand Sammut u sabu li l-mowbajl kien ghand bintha li qalet li Amanda Camilleri kienet tatulha. Din Amanda Camilleri kienet it-tfajla tal-imputat. Ingieb mandat ta' arrest fil-konfront ta' Amanda Camilleri u l-imputat sabiex jigu investigati. Camilleri kienet qaltlu li sabet il-mowbajl fil-glove compartment tal-vettura ta' certu Mark Anthony Ellul li kien ikun magghom.

Dwar din is-serqa kien tressaq ukoll Christopher Shepard li kien ammetta l-imputazzjonijiet migjuba fil-konfront tieghu.

Patrick Ellul, id-derubat, xehed li meta mar lura d-dar mix-xoghol sab il-lock tal-bieb ta' barra sgassat. Huwa kien ghalaq il-bieb meta filghodu kien mar ix-xoghol. Sab it-taqlib u nduna li kien insteraq. Huwa hejja elenku tal-oggetti² li nsterqulu minn liema jirrizulta li nsteraq ammont ta' deheb, mowbajl, arlogg, kollezzjoni ta' muniti tal-euro li b'kollox iwasslu ghall-ammont ta' ffit aktar minn €5,000.

Illi inkwantu ghal din is-serqa fuq il-post gew elevati lifters mill-ufficjali tal-forensika u fil-kors tas-smiegh tal-kaz gie nominat l-espert Joseph Mallia. Mir-rapport ta' dan l-espert jirrizulta li huwa ezamina d-dokument 09AJV305 u rrelata li dan il-lifter jigbor fih zewg impronti digitali u marka ta' pedata. Huwa wettaq komparazzjoni mal-impronti digitali u palmari tal-imputat. L-ewwel impronta kienet nieqsa mill-punti karatteristici li jwasslu ghall-komparazzjoni u identifikazzjoni. L-ezami dwar l-impronta l-ohra rrizulta li hija identika mal-marka tas-saba' l-kbir tal-id il-leminja tal-

¹ Dok KA1

² Dok PV2 a fol 101 tal-process

imputat. Dan il-lifter gie elevat minn fuq ghatu ta' landa tal-gallettini li kienet tinstab gewwa d-dar derubata.

F'dan l-istadju l-Qorti tirreferi ghas-sentenza fl-ismijiet **Il-Pulizija vs Paul Spagnol**³. F'din is-sentenza l-Qorti rreferiet ghas-sentenzja fl-ismijiet **Il-Pulizija vs Vincent Calleja**⁴ fejn inghad

"L-impronti digitali (u daww palmari) huma forma ta' prova indizzjarja - "circumstantial evidence" - li kif qal Lord Salmon fil-kaz DPP v. Kilbourne [1973] AC 729, p. 758 "...works by cumulatively, in geometrical progression, eliminating other possibilities." Il-kwistjoni kollha hi mhux jekk l-impronta instabitx f'post pubbliku jew f'post privat jew anqas pubbliku - il-kwistjoni kollha hi jekk, fid-dawl ta' cirkostanzi kollha, il-post fejn instabet l-impronta tikkonvincix lill-gudikant lil hinn minn kull dubbju dettat mir-raguni li dik l-impronta saret mill-persuna li lilha tappartjeni fil-kors tal-kommissjoni minn dik l-istess persuna tar-reat li bih tkun akkuzata jew fil-kors ta' xi atti li jammontaw ghall-anqas ghal tentattiv ta' dak ir-reat." (Il-Pulizija vs Noel Frendo deciza 30 ta' Novembru 2004 - Appelli Kriminali Inferjuri)".

Imbaghad il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali komplet hekk:

"Illi ghalhekk wiehed jistaqsi, dina l-prova wahedha hija sufficjenti sabiex wiehed jikkonkludi illi l-imputat kien involut f'dina is-serqa? Illi huwa principju rassodat illi l-provi fil-kamp kriminali jistghu ikunu kemm diretti kif ukoll indizzjali, izda dawn ta' l-ahhar iridu ikunu univoci, iwasslu ghal konkluzjoni wahda u iridu ikunu sufficjenti tali biex inisslu konvinciment morali f'mohh il-gudikant lil hinn minn kull dubbju ragjonevoli mir-reita' ta' l-imputat."

Id-difiza waqt it-trattazzjoni tenniet li l-fatt li nstabet din l-impronta ma twassalx ghal-sejbien ta' htija u dan billi jista' jkun li l-imputat mess l-ghatu

³ Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali deciza 15 ta' Mejju 2013

⁴ Deciza 7 ta' Marzu 2002 mill-Qorti ta' l-Appell Kriminali

ta' din l-landa tal-gallettini band'ohra u mhux fid-dar. Dan l-ghatu tal-landa jirrizulta mir-ritratti li nstab fil-kamra tas-sodda tar-residenza mal-art fost id-diversi taqlib li kien hemm fl-istess karma. Ma tezisti l-ebda prova in atti li twassal sabiex tigi gustifikata l-presenza tal-imputat fid-dar inkwistjoni. Huwa evidenti li l-imputat waqt li kien qieghed iqalleb fl-istess residenza sabiex ifittex oggetti biex jinsterqu mess din il-landa. Ghalhekk din il-Qorti m'ghandha l-ebda dubju li l-imputat dahal biex jisraq f'din ir-residenza. Abbinat ma' dan ingabet ukoll prova in atti li l-mowbajl li nsteraq minn din ir-residenza instab fil-pussess ta' Josline Sammut f'it gimghat wara li saret is-serqa, liema tfajla ghandha parentela ma' Amanda Camilleri li dak iz-zmien kienet it-tfajla tal-imputat. Din Amanda Camilleri xehdet waqt dawn il-proceduri⁵ li jidhrilha li gabitu minghand l-imputat izda b'liema mod gie f'idejh hija ma setghetx tispjega. Gie kkonfermat ukoll li l-mowbajl gie f'idejn Sammut billi nghatalha zgur minn Amanda Camilleri.

Illi allegatament din is-serqa giet aggravata bil-valur, bil-mezz u bil-lok. Inkwantu ghall-aggravji tal-mezz u lok dawn gew ippruvati billi nstab li l-bieb ta' barra gie sgassat. Inkwantu ghal-lok irrizulta li din hija residenza tal-familja Ellul. Inkwantu ghall-aggravju tal-valur id-difiza argumentat waqt it-trattazzjoni li ma ngabux ircevuti tal-oggetti misruqa u kwindi l-aggravju tal-valur mhux ippruvat. Tali sottomissjoni ma tistax tigi milqugha u dan billi l-istess derubat elenka wiehed wiehed l-oggetti misruqa u kull hdejn oggett gie indikat il-valur. Dan l-elenku gie ezebit mid-derubat innifsu waqt li kien qieghed taht gurament. Inoltre l-oggetti u l-valuri indikati huma verosimili.

Permezz tat-tieni imputazzjoni, l-imputat qieghed jigi akkuzat li kkommetta hsara volontarja. Gie ippruvat li l-bieb ta' barra tar-residenza gie sgassat. Patrick Ellul xehed li l-ammont ta' hsara sofferta kienet fl-ammont ta' €292. Ghalhekk din l-imputazzjoni giet ippruvata. Dan ir-reat sar bhala mezz ai fini tal-ewwel imputazzjoni.

⁵ Seduta tal-5 ta' Marzu 2014

Illi inkwantu ghas-serqa fir-residenza gewwa Pembroke jirrizulta li kienu nsterqu diversi oggetti u flus kontanti. L-imputat kien irilaxxa stqarrija fit-8 ta' April 2009 fejn kien ammetta l-involviment tieghu. Id-difiza ssollewat li din l-istqarrija ghandha tigi skartata billi ttiehdet minghajr l-assistenza tal-avukat. Referenza ssir ghas-sentenza fl-ismijiet **Il-Pulizija vs Joseph Camilleri**⁶ fejn inghad:

“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 jipprovi dwar l-assistenza 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.

⁶ Qorti tal-Appell Kriminali deciz fil-25 ta' Frar 2016

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 recenti⁷ 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,

⁷ 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 għall-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-qradi ma kellhomx jaghtu interpretazzjoni stretta tad-decizjoni Salduz vs Turkey kif sehh fil-kaz ta' Charles Steven Muscat fost ohrajn. L-Imhallef Pinto De Albuquerque⁸ 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."

⁸ 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 mal-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 similmment 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 lila maghmula. Il-Qorti xortwahda sabet li kien hemm vjolazzjoni ta' l-artikolu 6(3)⁹ 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

⁹ Dayanan vs Turkey – 7377/03 deciza 13/10/2009

fairness of the proceedings requires that an 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, notwithstanding the fact that the applicant remained silent when questioned in police custody.” (sottolinjar tal-Qorti)

Fil-fatt fid-decizjoni Brusco vs Franza⁴ gie deciz¹⁰:

“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.”

¹⁰ 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

Illi allura hija fis-setgha ta' din il-Qorti u dan qabel ma jigi determinat il-process gudzizzjarju 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 smiegh xieraq tal-persuna akkuzata. Fil-fatt dan il-jedd gie indikat fid-decizjoni tal-Qorti Ewropeja fil-kaz Dimech vs Malta⁵ fejn f'dak il-kaz ghalkemm il-Qorti ma setatx tasal biex tistabilixxi jekk kienx sehħ lezjoni ta'l-artikolu 6 tal-Konvenzjoni billi l-proceduri penali kienu ghadhom ma intemmux, madanakollu saħħqet:

“... 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 jagħzel li ma iwegibx għal xi mixtoqsijiet li isirulu, madanakollu huwa iwiegeb għal 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 għall-uzu esklussiv. Bla dubbju, il-Prosekuzzjoni rnexxielha tipprova l-pussess per se, imbagħad ressqet provi ta' ammont, mizien u stqarrija li jwasslu għal prova tal-aggravvju. Fil-fatt l-ammont ta' erbgha u erbghin (44) gramma u fuqhom, għal 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 tagħmlu u allura din il-Qorti ser tilqa' dan l-aggravvju imressaq 'il quddiem mill-appellanti u għalhekk ser tiskarta l-istqarrija

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

Din il-Qorti kif presjeduta tqis li ghandha tapplika dawn l-insenjamenti ghall-istqarrija rrilaxxjata mill-imputat u kwindi tali stqarrija se tigi skartata.

Mill-provi akkwiziti jirrizulta li kienu gew innutati xi marki tas-swaba' mat-tieqa ta' barra li evidentement il-malvivalenti dahlu minnha billi r-residenza hija ground floor. Tali impronti digitali gew elevati minn PS 171 Karl Glanville izda ma jirrizultax mill-atti li saru l-ezamijiet komparattivi tagghom.

B'relazzjoni ma' din is-serqa l-Prosekuzzjoni ressqet lil Christopher Shepard¹¹ li kien ammetta l-involviment tieghu fis-serqa li twettqet f'Pembroke. Fix-xhieda tieghu huwa jghid li dakinhar l-imputat u certu Mark Anthony Ellul kienu mieghu. Kien proprju x-xhud li ddecieda li jidhol fir-residenza u li l-imputat ma ha xejn. Waqt l-istess xhieda jghid imbaghad li l-imputat ma marx mieghu hdejn id-dar ghaliex it-tnejn l-ohra baqghu fejn l-ghassa ta' San Giljan. F'parti mix-xhieda imbaghad ighid li l-imputat kien barra u ma jiftakarx dahalx gewwa.

Din il-Qorti tqis li x-xhieda ta' Shephard ma tistax twassal ghal sejbien ta' htija fil-konfront tal-imputat ghaliex din certament ma tkunx *safe and satisfactory* u dan billi hemm hafna inkonsistenzi fl-istess xhieda.

Ghalhekk l-imputat mhux qieghed jinstab hati tat-tielet u r-raba' imputazzjonijiet.

Inkwantu ghall-addebitu tar-recediva gew ezebiti zewg sentenzi datati 31 ta' Ottubru 2006 u 30 ta' Ottubru 2007¹². Ghalkemm dawn is-sentenzi ghandhom it-timbru ta' vera kopja fotostatika tal-original fuqhom dawn ma gewx iffirmati minn deputat registratur kif ghandu jsir. Ghaldaqstant l-imputat mhux se jinstab hati ta' dan l-addebitu.

¹¹ Seduta tat-22 ta' Jannar 2014

¹² Dok KA 8 u 9

Illi inkwantu għall-piena din il-Qorti qeghda tiehu in kunsiderazzjoni n-natura tal-gravita' tar-reati u l-fedina penali tal-imputat minn fejn jirrizulta li l-imputat għandu karattru refrattarju. Minn tali fedina penali jirrizulta li l-imputat instab hati diversi drabi tar-reat ta' serq, apparti reati ohra, izda nonostante dan baqa' għaddej bil-hajja kriminuza tieghu. Kwindi tqis li l-piena li għandha tigi inflitta għandha tkun ta' prigunerija effettiva.

Għal dawn il-motivi din il-Qorti filwaqt li ma ssibx lill-imputat hati tattielet u r-raba' imputazzjonijiet u tal-addebitu tar-recidiva u minnhom tilliberah, wara li rat l-artikoli 17, 31, 261(b)(c)(e), 263, 267, 269(g), 278(1)(3), 279(b), 280(2) u 325(1)(b) il-koll tal-Kapitolu 9 tal-Ligijiet ta' Malta issib lill-imputat hati tal-ewwel u t-tieni imputazzjonijiet u tikkundannah għal sentejn (2) prigunerija.

Inoltre' bl-applikazzjoni tal-artikolu 533 tal-Kapitolu 9 tal-Ligijiet ta' Malta tordna lill-imputat ihallas l-ammont ta' tlett mija sitta u sittin euro u sebgha u ghoxrin centezmu (€366.27)¹³.

Dr Josette Demicoli LL.D

Magistrat

¹³ Inkwantu għall-hlas tal-esperti mahtura fl-inkjesta magisterjali l-hati qieghed jigi kkundannat biss għan-nofs tal-hlas tal-esperti mahtura u dan billi kien hemm il-komplici tieghu Jesmond Cassar li kien instab hati rigwardanti l-istess serqa.