Qorti tal-Magistrati (Malta)
Bhala Qorti ta' Gudikatura Kriminali

Magistrat Dr. Donatella M. Frendo Dimech LL.D., Mag. Jur. (Int. Law)

Illum, 25 ta' Lulju, 2016

Il- Pulizija
(Supt. Dennis Theuma)
Vs
Kurt Buttigieg detentur tal-Karta ta' l-Identita` Nru.559081(M).

Kumpilazzjoni Nru. 416/2004

Il-Qorti,

Rat l-akkużi miġjuba fil-konfront tal-imputat Kurt Buttigieg u ċioè talli:

F'dawn il-Gzejjer fix-xahar t' Awissu 2004-

a. **forna jew ipprokura jew offra li jforni jew li jipprokura id-droga erojina**, specifikata fl-ewwel skeda ta l-ordinanza dwar il-medicini perikoluzi, Kap 101 tal-ligijiet ta' Malta lill-persuna/i jew ghall-persuna/i minghajr ma kellu licenzja mill-President ta' Malta minghajr ma kien awtorizzat bir-regoli tal-1939 ghall-kontroll intern tad-drogi perikoluzi (G.N. 292/1939) jew minn xi awtorita moghtija mill-President ta' Malta li jforni id-droga u minghajr ma kien fil-pussess ta' awtorizzazjoni ghall-importazzjoni jew ghall-esportazzjoni mahrug mit-Tabib Principali tal-Gvern skond id-dispozizzjonijiet tas-sitt taqsima ta' l-ordinanza imsemmija u minghajr ma kellu licenzja jew xorta ohra awtorizzat li jimmanifattura jew iforni d-droga msemmija u minghajr ma kellu licenzja li jipprokura l-istess droga u dan bi ksur tar-regolament 4 tar-regoli ta' l-1939 ghall-kontroll intern tad-drogi perikoluzi (G.N. 292/1939) kif sussegwentament emendati u bi ksur ta' l-ordinanza dwar il-Medicini Perikoluzi Kap 101 tal-ligijiet ta' Malta;

b. **Kellu fil-pussess tieghu id-droga eroina**, specifikata fl-ewwel skeda ta' l-Ordinanza dwar il-medicini perikoluzi Kap 101 tal-ligijiet ta' Malta meta ma kienx fil-pussess ta' awtorizzazjoni ghall-importazzjoni jew ghall-esportazzjoni mahrug mit-Tabib Principali tal-Gvern skond id-dispozizzjonijiet tar-4 u s-6 Taqsima ta l-Ordinanza u meta ma kienx bil-licenzja jew xort' ohra awtorizzat li jimmanifattura, jew li jforni d-droga msemmija u meta ma kienx 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 skond ir-ricetta kif provdut fir-regolamenti msemmija u dan bi ksur tar-regolament 8 tar-regoli ta' l-1939 dwar il-kontroll intern tad-drogi perikoluzi (G.N. 292/1939) kif sussegwentament emmendati u bi ksur ta' l-Ordinanza dwar il-Medicini Perikoluzi Kap 101 tal-Ligijiet ta' Malta.

Il-Qorti giet wkoll mitluba sabiex barra milli tapplika l-piena skond il-ligi, tordna lill-imputat sabiex ihallas l-ispejjez li gahndhom x'jaqsmu mal-hatra ta' esperti skond l-Artikolu 533 tal-Kapitlu 9 tal-Ligijiet ta' Malta.

Rat id-dokumenti esebiti.

Semghet il-provi.

Rat l-ordni moghtija mill-Avukat Generali ai termini tal-Kapitolu 101 tal-Ligijiet ta' Malta tad-29 ta' Settembru, 2004, sabiex dana il-kaz jigi trattat u deciz quddiem dina l-Qorti bhala Qorti tal-Gudikatura Kriminali.[1]

Semghet trattazjoni.

Rat il-fedina penali aggornata tal-imputat esebita mill-prosekuzzjoni fuq ordni tal-Qorti.

Ikkunsidrat,

Illi qabel xejn irid jinghad illi ghalkemm din il-kawza tirrigwarda reati li allegatament sehhew f' Awissu, 2004, l-istess kawza giet mismugha minn din il-Qorti, kif diversament presjeduta, u l-ewwel udjenza quddiem din il-Qorti, kif preseduta, giet mizmuma fl-10 ta' Marzu, 2016.

Illi l-imputat jinsab akkuzat bir-reat tat-traffikar u pussess tad-droga erojina u bil-pussess aggravat ta'l-istess droga.

Il-ligi taghna taghti definizzjoni mill-iktar wiesgha ta' dak li jammonta ghal "traffikar". Kif stqarret il-Qorti ta'l-Appell Kriminali fis-sentenza **Ir-Repubblika ta' Malta vs Simon Xuereb**[2]:

[1] Fol.74
[2] Qorti ta'l-Appell Kriminali 23/01/2001

"*It-traffikar ghandu definizzjoni wiesgha u din tinkludi mhux tfisser kwalsiasi moviment ta' droga minn id ghal id kemm versu korrispettiv kif ukoll b'mod gratwitu. U ma hemmx ghalfejn elementi ohra bhal per ezempju prova li d-droga tkun efettivament ghaddiet minn id ghal id jew li giet importata, ghax anki semplici offerta hija bizzejjed.*"

Il-Prosekuzzjoni ghalhekk jinhtieglha tipprova l-*animus* ta' l-imputat u cioe' l-intenzjoni tieghu ta' l-ispacc minghajr ma effettivament tipprova li sehh dak l-ispacc. Dana jista' jirrizulta minn xhieda indipendenti u minn provi ohra cirkostanzjali li jistghu iwasslu ghal prova ta' dina l-intenzjoni.

Illi jigi rilevat illi l-ebda droga ma instabet fil-pussess ta' l-imputat.

Illi fl-ewwel lok ghandu jigi sottolinejat li din il-Qorti qed tiskarta ghal kollox l-istqarrija tal-imputat u dan fid-dawl ta' gurisprudenza ricenti. Dan minkejja li ma saret ebda ammissjoni minnu. Kif irriteniet l-Qorti tal-Appell Kriminali (Sede Inferjuri) fil-kaz **Il-Pulizija vs Joseph Camilleri**[3]:

"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......

Issir riferenza ukoll ghal dak dikjarat mill-Qorti Kriminali[4]:

"........din il-Qorti ma tistax tinjora principju ormai stabbilit mill-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem illi id-dritt ghal smiegh xieraq kif sancit fl-artikolu 6(1) u l-artikolu 6(3)(c) tal-Konvenzjoni Ewropeja ghandu japplika mhux biss tul l-*iter* tal-proceduri penali fil-qorti, izda fuq kollox ghandu isib applikazzjoni u ghalhekk jigi estiz ghal hekk imsejjah *pre-trial stage* u cioe' ghall-istadju meta persuna tkun giet arrestata u ser tigi interrogata. 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 fejn 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-mistoqsijiet 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. Dan il-hsieb izda gie mibdul mill-Qorti Kostituzzjonali f'sentenza recenti fl-ismijiet **Daniel Alexander Holmes vs Avukat Generali et** deciza fit-03 ta' Mejju 2016 fejn inghad hekk:

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[3] Seduta tal-25 ta' Frar 2016, Appell numru 405/2014. Onor Imhallef Dr Edwina Grima

[4] Decizjoni fuq Eccezzjonijiet Preliminari. Att t'Akkuza 17/2014 fl-ismijiet Ir-Repubbika ta' Malta vs Ramon Fenech. 02.06.2016

Fic-cirkostanzi din il-Qorti hi tal-fehma li ma jkunx għaqli li tinsisti fuq l-interpretazzjoni tagħha, għalkemm ittenni li għadha tal-fehma illi hija interpretazzjoni sostenibbli u ta' buon sens.

U ghalhekk wasslet ghad-decizjoni illi fid-dawl tal-gurisprudenza recenti koncernanti s-sitwazzjoni legali f'Malta qabel l-emendi li dahhlu fis-sehh fl-10 ta' Frar 2010:
"…. il-Qorti ssib li kien hemm ksur tal-Artikolu 6(1) tal-Konvenzjoni abbinat mal-Artikolu 6(3)(c) tal-istess Konvenzjoni fis-sens li ma nghatatx l-assistenza legali qabel jew waqt l-interrogazzjoni tal-appellant mill-pulizija."

Issa xi ighidu dawn id-decizjoni recenti[5] moghtija mill- Qorti Ewropeja Dwar id-Drittijiet tal-Bniedem?

Illi f'decizjoni recenti[6] 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. 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

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

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[7] 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."

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).

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

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)[8] 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 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[9] 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 smiegh xieraq tal-persuna akkuzata. Fil-fatt dan il-jedd gie indikat fid-decizjoni tal-Qorti Ewropeja fil-kaz Dimech vs Malta[10] fejn f'dak il-kaz ghalkemm il-Qorti ma setatx tasal biex tistabbilixxi jekk kienx

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

[9] 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

[10] 02/07/2015 – 34373/13

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.""

Ghalhekk fid-dawl tad-decizjonijiet hawn fuq iccitati din il-Qorti ser tiskarta l-istqarrija ta'l-appellanti rilaxxjata fl-24 t' Awissu, 2004.

Fost il-provi li ghandha fl-pulizija f'idejha hija x-xhieda ta' persuni li jghidu li akkwistaw d-droga minn ghand l-imputat. Illi l-provi migjuba mill-Prosekuzzjoni f'dina l-kawza jikkonsistu essenzjalment fix-xhieda ta' Mahmoud Mohamed Hosni Mohammed Mustafa u Amr Abd Elmeguid Mohamed Mustafa, kif ukoll tal-ufficjali tal-pulizija li kienu involuti fl-investigazzjonijiet ta' dana il-kaz. Dawn offrew ix-xhieda taghhom bil-gurament quddiem il-Magistrat Inkwirenti Dr. Consuelo Scerri Herrera u l-processi verbali kontenenti l-istess xhieda huma esebieit fl-atti. Apparti dana kollu gew elevati ukoll it-telepones cellulari tal-imputat kif ukoll ta' Mahmoud, u saru analizi taghhom mill-espert nominat, liema rapport tal-istess espert jinsab ukoll esebit in atti.[11]

Mahmoud Mohamed Hosni Mohammed Mustafa, Egizzjan, xehed li kien ilu Malta disat ijiem fuq btala ma kuginuh, Amr Mustafa. Ammetta li kien xtara droga erojina u haxixa flimkien ma Amra, u li kien instab hati ta' dan ir-reat. Xehed kif hu kien mar biex jixtri blokka haxixa minghand certu Marc, li irrizulta kien Marc Borg, minn kiosk quddiem Marks and Spencers f'Tas-Sliema. Jzid li hu ried jixtri l-erojina izda din kienet ghal kuginuh. Kien infurmat li din setghet tinxtara minn x'imkien vicin l-Isptar [San Luqa]. Marru hemm u sabu Libjan, Abdu Sallam, li kkonferma li kien jista jaqdihom u ghalhekk segwewh sa Hal-Qormi minn fejn biehlhom l-*smack* ghal LM12. Peress li jidher li Absalam kien ha LM2 ghalih, iddecidew li d-darba li jmiss imorru jixtru direttament huma mill-istess dar faccata ta' pompa tal-petrol, fil-vicinanzi tal-Ghassa tal-Pulizija tal-lokal. Kienu ftehmu ma xi zaghazah li kienu f'dik id-dar li kellhu jigi *id-dealer* biex jaqdihom. Fil-fatt kienu ttiehdu jiltaqaw mieghu f'post iehor hdejn kiosk. Wara xi 5 jew 10 minuti gie id-dealer <u>b'Toyota Tercel bajda u kien jismu Kurt li anke tahom in-</u>

[11] Dokument MB a fol.110

numru tal-mobile tieghu li Mahmoud issavja, u minghandu xtraw "nofs" ghal LM12. Mahmoud identifika lill-imputat bhala l-istess persuna.

Amr Abd Elmeguid Mohamed Mustafa[12] xehed li kien gie Malta ma kuginuh. Kien jaghmel uzu mill-haxixa u mill-erojina, u kien instab hati quddiem il-Qrati Maltin fuq pussess. Jikkonferma dak li qal kuginuh dwar kif ittiehdu Hal-Qormi minn Libjan bl-isem ta' Abdu Sallam, li kienu ltaqaw mieghu hdejn l-Isptar, u li kien mar jixtri d-droga,*"nofs",* erojina ghalihom. Jikkonferma ukoll li darba ohra marru wehidhom ifittxu il-post izda meta sabuh kienu ittiehdu post iehor fejn iltaqghu ma persuna b'Toyota Tercel bajda li tieghu hadu in-numru li gie registrat fil-mobile ta' kuginuh. Iddentifika lill-imputat bhala dik il-persuna u ippreciza li kien xtara darbtejn fit-18 u fit-22 t' Awissu, 2004. Ix-xhud qal ukoll li kien mar ma kuginuh jixtri l-haxixa minn kiosk f'tas-Sliema. In kontro-ezami[13] jaghti rakkont dettaljat dwar dak li sehh l-ewwel darba, 18 t'Awissu, 2004, meta kienu akkumpanjati Hal-Qorti mill-Libja Abdusallam li kien ha hsieb jinnegozja ix-xiri tal-erojina hu wara li kien tkellem ma xi zaghzagh li kienu joqghodu qrib l-Ghassa tal-Pulizija tal-lokal. Dwar it-tieni okkazzjoni, fit-22 t'Awissu, 2004, jispjega kif wara li kuginuh kien saq lejn Hal-Qormi u waqaf fejn kienu waqfu l-ewwel darba mal-Libjan, hu mar fuq xi persuni li kienu bilqeghda fejn rahom originarjament. Kien resaq fuhom u saqsihom biex jixtri *"nofs"* izda wiehed minnhom qallhom li min seta' jaqdihom ma kienx hemm filwaqt li iehor qallhom biex imorru warajh sabiex jehodhom hu ghand min seta' jaqdihom.[14] Fil-fatt waqfu vicin il-petrol station minn fejn ftit wara giet persuna li baqghet gol-vettura Toyota Tercel bajda; ghalkemm baqa bilqeghda fil-vettura xorta seta` jikkonstata li kien twil.[15] Ghalkemm kienu intenzjonati jitilqu minn Malta dakinhar xorta hadu n-numru tal-mobile tieghu. Jikkonferma li n-numru nzamm fuq ic-cellulari ta' kuginuh kif ukoll li kien ha lill-Pulizija hdejn l-Isptar il-Pieta` fejn identifika lil Abdusallam.[16]

L-Ufficjal Investigattiv, l-ex Spettur Nadia Lanzon, tat rendikont tal-investigazzjonijiet li kienu zvolgew anke b' *controlled delivery* awtorizzata mill-Magistrat Dr Michael Mallia. Dan sehh wara l-arrest ta' Mahmoud u Amr li kienu nstabu fil-pussess ta' raza tal-cannabis u erojina. Sussegwenetement Mahmoud kien ghamel kuntatt mal-imputat bil-mobile tieghu (numru egizzjan) 0020101712205 billi cempillu fuq 99205125. Kien informa lill-Pulizija li kien xtara l-erojina minghand l-imputat u ddiskriva kif saru t-transazzjonijiet li gja gew deskritti aktar il-fuq. Mahmoud informa lill-Pulizija li ghalkemm kienu qalu

[12] Fol.40 et seq
[13] Fol.47 et seq
[14] Fol.55
[15] Fol.56
[16] Fol.60

lill-imputat li kienu ser issiefru dakinhar stess hu kien insista li jtihom in-numru tieghu. Il-kuntatt minn Mahmoud lill-imputat sar taht is-sorvelljanza diretta tal-Ufficjal Investiggativ u ftehmu sabiex jiltaqaw tas-Sliema fis-2pm quddiem il-Preluna fejn gew stazzjonati xi pulizija. Meta kienu saru is-2.10pm u l-imputat kien ghadu ma tfattax, Mahmoud rega' cempillu izda l-imputat kien ghadu kemm wasal u infurmah b'dan. Lanzon tiddeskrivi kif fil-fatt hi, li kienet qed takkumpanja lil Mahmud, rat persuna ta' madwar 18-20 sena li kien qed issuq izda kien fuq il-mobile, li ghaddiet minn quddiem il-Preluna bi slow speed f'Toyota Tercel bajda. Gie indikat minn Mahmoud li din kienet il-persuna li xtara l-erojina minghandha.[17]

Lanzon tiddeskrivi kif is-sewwieq kif ra lil Mahmoud ghamillu sinjal b'rasu u tefa' l-mobile filwaqt li mar biex jippparkja fuq in-naha l-ohra tat-triq izda hekk kif resqu fuqu l-pulizija pprova jahrab ghalkemm ma rnexxilux. Saru tfittxija fuq l-imputat, fi-residenza tieghu u fil-vettura li rrizultat fin-negattiv ghad-droga.

PC1213 Carlos Axisa jixhed kif kien ra lill-imputat jasal b'vettura Toyota bajda bin-numru RAN-021, li kellhu mobile f'idejh u rah issellem lill-Egizzjan li ukoll kien bil-mobile f'idu. Jghid li hekk kif induna bil-pulizija l-imputat ipprova jahrab minn fuq il-post; *"...u kienu qed jikkuntatjaw lil xulxin, u sellmu lil xulxin, bhal speci rajtek...bhala speed kienet gejja bil-mod, bhal meta bniedem qed ifittex xi haga, umbaghad x'hin sellmu lil xulxin waqaf".*[18] PC396 Saviour Baldacchino li kien qed issegwi kollox mill-qrib, ukoll jiddeskrivi kif l-imputat talvolta mwaqqaf pprova jkompli sejjer, prova jirrezisti lill-Pulizija.[19] Jkompli *"Kien qed icempel dak il-hin, meta kien qed iccempillu l-persuna li qabbadna ahna kien qiefhed mieghu fuq it-telephone jigifieri, ghax meta pruvajna l-mobile last person dialled hareg in-number tieghu."*[20] Jikkonferma n-numru tal-vettura bhala RAN 021 u li kienet Toyota bajda. Xhieda ohra li kkonfermaw l-istess dettalji kienu WPC12 Andrea Grech[21] u PS368 Stephen Monreal.[22]

Mir-relazzjoni tal-espert tekniku Martin Bajada a fol. 128 jirrizulta li fuq il-mobile ta' Mahmoud, Nokia bis-sim egizzjana, kien registrat numru "35699205125" taht l-isem "Kert". Fl-istess rapport a fol.138 jirrizulta li giet ricevuta telefonata fuq il-mobile tal-ghamla Samsung bin-numru 99205125 misjub fuq l-imputat bin-numru 20101712205, gja identifikat bhala dak ta' Mahmoud, li dahhlet fil-**14:11 tat-23 t'Awissu, 2004.** Dan il-hin jaqbel perfettament ma dak indikat mill-Ufficjal

[17] Fol. 70-71
[18] Fol.89-90
[19] Fol.93
[20] Fol.94
[21] Fol.97
[22] Fol.99

Investiggativ. Aktar kmieni, ukoll kif indikat minn Lanzon, kienet dahhlet telefonata mill-istess numru fil-12:41.

Il-jum tat-**23 t'Awissu 2004** hu fil-fatt il-jum li sehhet fih il-*controlled delivery* u dan skond ma jirrizulta mill-Proces Verbal No. 1174/2006.[23] Fil-fatt kif jirrizulta mill-Proces Verbal No. 1184/2004, iz-zewg Egizzjani kienu gew arrestati nhar it-22 t'Awissu, 2004, u dakinhar stess filghaxija ittiehditilhom stqarrija li sussegwentement giet konfermata bil-gurament quddiem il-Magistrat Dr Consuelo Scerri Herrera nhar l-24 ta' Awissu, 2004, wara li saret il-*controlled delivery*. Ghalkemm ir-rapport tal-Ispettur Investigattiv fl-inkjesta 1174/2006, prezentat bil-miktub xahar wara r-rapport verbali jindika li iz-zewg Egizzjani gew arrestati fil-21 ta' Awissu, 2004, mill-istqarrijiet tax-xhieda jidher cjar li l-arrest sehh fit-22 t'Awissu 2004 u l-*controlled delivery* sehhet l-ghada fit-**23 t' Awissu, 2004**. Dan hu komfortat anke mid-dokument a fol 182 tal-istess process verbal.

Illi minn ezami akkurat ta' l-atti processwali, l-provi li hemm kontra l-imputat huma ix-xhieda ta' Mahmoud Mohamed Hosni Mohammed Mustafa, Amr Abd Elmeguid Mohamed Mustafa kif ukoll tal-Ufficjali tal-Pulizija li assistew ghal dak li sehh nhar it-23 t'Awissu, 2004, wara li kien gie identifikat u arrestat l-imputat wara *controlled delivery*. Droga ghand l-imputat ma instabitx filwaqt li nstabu LM264 fuq persuntu.[24] Fuq l-imputat instabu ukoll zewg telefon cellulari li minn ezaminazzjoni taghhom jirrizulta li wara li rcieva telefonata minghand Mahmoud, li kellu n-numru tieghu, l-imputat kien pprosegwa sabiex jiltaqa' mieghu skond il-ftehim minn taghhom

Il-Qorti ghalhekk tistaqsi, kemm hi *safe and satisfactory* ix-xhieda taz-zewg Egizzjani? Tista' dina ix-xhieda flimkien mal-provi l-ohra twassal ghal kundanna fil-konfront ta' l-imputat? Illi l-Qorti mhux biss tqis ix-xhieda tal-Egizzjani bhala wahda attendibbli u kkoroborata kif gja inghad, izda meta il-Qorti tgharbel u taghsar il-provi li hemm fl-atti, ma tistax hlief tasal biex issib htija fl-imputat ghall-akkuzi migjuba fil-konfront tieghu.

Illi dwar il-piena l-Qorti hadet in konsiderazzjoni n-natura tar-reati li qieghed jinstab hati dwarhom l-imputat, tal-fedina penali aggornata tieghu li turi li l-imputat ftit ghandu rispett ghall-ligi fejn diga xellef duffrejh mal-gustizzja filwaqt li ma sfruttax l-opportunitajiet moghtija lilu sabiex jirriforma ruhu. Ma tistax il-Qorti ma tiehux konsiderazzjoni ukoll tal-fatt li dawn l-akkuzi jirrisalu ghal tnax il-sena ilu.

[23] Fol.182
[24] Fol.9

Ghaldaqstant il-Qorti wara li rat Taqsima IV u VI, 22(1)(a), 22(2)(b)(i)(ii) tal-Kapitolu 101 tal-Ligijiet ta' Malta, ir-regolamenti 4 u 9 tal-Legislazzjoni Sussidjara 101.02, l-artikolu 17(h) tal-Kap.IX Ligijiet ta' Malta, issib lill-imputat hati ta' l-akkuzi migjuba fil-konfront tiehu u tikkundannah ghal perijodu ta' erbatax il-xahar prigunerija u ghal hlas ta' multa ta' €800.

Dr. Donatella M. Frendo Dimech LL.D., Mag. Jur. (Int. Law)

Magistrat