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

MAGISTRAT DR. JOSEPH MIFSUD
B.A. (LEG. & INT. REL.), B.A. (HONS.), M.A. (EUROPEAN), LL.D.

Il-Pulizija
(Spettur Keith Arnaud)
(Spettur Jeffrey Scicluna)

vs

Deniro Magri

Seduta tad-Distrett

Illum, 31 ta' Lulju, 2018

Il-Qorti,

Rat l-imputazzjonijiet migjuba kontra l-imputat **Deniro Magri** detentur tal-karta tal-identita' bin-numru 75890 (M) billi huwa akkuzat talli:

Fit-8 ta' Jannar 2018, ghall-habta tal-hdax u nofs ta' filghodu (11:30), gewwa Triq ir-Repubblika, il-Belt Valletta, u/jew f'inhawi ohra f'dawn il-Gzejjer;

1. Ikkaguna offiza ta' natura hafifa fuq il-persuna ta' Aaron Cassar, persuna li huwa meqjus bhala persuna xhud f'kawza fil-Qorti;

2. U aktar talli fl-istess data, hin, lok u cirkostanzi, volontarjament kiser il-bon ordni jew il-kwiet pubbliku;
3. U aktar talli fl-istess data, hin, lok u cirkostanzi, naqas milli jhares xi wahda mill-kondizzjonijiet imposti fuqu mill-Qorti tal-Magistrati (Malta), Magistrat Dottor Aaron M Bugeja LLD, b'digriet datat it-03 ta' Marzu 2017, li permezz tieghu huwa kien inghata l-helsien mill-arrest taht diversi kondizzjonijiet.

Il-Qorti giet mitluba li titratta ma' l-imputat bhala recidiv ai termini tal-artikolu 49 u 50 tal-Kapitolu 9 tal-Ligijiet ta' Malta, wara li gie misjub hati b'sentenzi moghtija mill-Qrati ta' Malta, liema sentenzi saru definittivi u ma jistghux jigu mibdula.

Il-Qorti giet wkoll mitluba li tirrevoka l-helsien mill-arrest ta' l-imsemmi Deniro Magri u tordna l-arrest mill-gdid ta' l-imsemmi imputat, kif ukoll ordnat li s-somma depozitata' ta' €20,000 u s-somma ta' garanzija personali ta' €30,000 jigu kkonfiskati u jghaddu favur il-Gvern ta' Malta.

Ikkunsidrat :

Rat l-imputazzjonijiet;

Rat id-dokumenti;

Semghet il-provi;

XHIEDA

F'dan il-process xehdu erbatax (14) – il xhud kif gej:

Spettur Keith Arnaud (*a fol* 19 et. seq.); Margaret De Battista (*a fol* 47 et. seq.); PC 234 Ryan Muliette (*a fol* 53 et. seq.); RPC 3020 Domenic Pace (*a fol* 55 et. seq.); PS 710 Stephen Gulia (*a fol* 58 et. seq.); Maggur 645 Jerry Attard (*a fol* 64 et. seq.); Spettur Jeffrey Scicluna (*a fol* 66 et. seq.); Christianne Borg (*a fol* 87 et. seq.); Aaron Cassar (*a fol* 92 et. seq.); Dr Anna Micallef (*a fol* 93 et. seq.); Nicholette Muscat Terribile (*a fol* 96 et. seq.); Spettur Keith Arnaud (*a fol* 100 et. seq.); Claire Magri (*a fol* 102 et. seq.); Spettur Keith Arnaud (*a fol* 113 et. seq.).

KUNSIDERAZZJONIJIET LEGALI GENERALI

Illi qabel il-Qorti tghaddi biex taghmel il-kunsiderazzjonijiet taghha rigward l-imputazzjonijiet, il-Qorti ser tghaddi biex taghmel numru ta' konsiderazzjonijiet generali qabel tara x'gara fit-8 ta' Jannar 2018, ghall-habta tal-hdax u nofs ta' filghodu (11:30), gewwa Triq ir-Repubblika, il-Belt Valletta li waslu biex il-pulizija takkuza lill-imputat quddiem din il-Qorti.

<u>Livell ta' prova</u>

Huwa principju baziku prattikat mill-Qrati taghna fil-procediment kriminali, li sabiex l-akkuzat jigi misjub hati l-akkuzi migjuba fil-konfront tieghu 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 vs 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' dubju. Id-dubji ombra ma jistghux jitqiesu bhala dubji dettati mir-raguni. Fi kliem iehor, dak li l-gudikant irid jasal ghalih hu, li wara li jqis ic-cirkustanzi 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'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 ghall-piena jew ghal xi provvediment iehor.

<u>Apprezzament tal-provi fl-assjem</u>

Il-Qorti tissottolinea li huwa ben risaput li l-apprezzament tal-provi ghandu jsir mhux biss b'mod spezzettat u individwali izda l-provi ghandhom jigu analizzati flimkien fl-assjem taghhom sabiex wiehed jara x'inferenzi jew interpretazzjoni ragjonevoli u legali jista' jaghti lil dawk il-provi hekk interpretati. Ma tistax tinstab htija jew nuqqas ta' htija semplicement fuq analizi individwali jew separata tal-provi. Dawn ghandhom jigu kkunsidrati kemm individwalment kif ukoll komplessivament. Dan hu appuntu l-ezercizzju li sejra taghmel din il-Qorti, u cioe' li tezamina bir-reqqa kollha l-provi prodotti f'dan il-kaz.

Illi ghalhekk m'hemmx dubju li kollox jiddependi fuq il-kredibilita` tax-xhieda u dan billi bhala Gudikant, il-Qorti sejra taghti qies l-imgieba, il-kondotta u l-karattru tax-xhieda, tal-fatt jekk ix-xhieda ghandiex mis-sewwa jew hix kostanti, u ta' fatturi ohra tax-xhieda u jekk ix-xhieda hix imsahha minn xhieda ohra, u tac-cirkostanzi kollha tal-kaz, u dan ai termini tal-Artikolu 637 tal-Kap 9 tal-Ligijiet ta' Malta.

Huwa principju baziku prattikat mill-Qrati taghna fil-procediment kriminali, li biex l-akkuzat jigi ddikjarat hati, l-akkuzi dedotti, ghandhom jigu ppruvati oltre kull dubju ragjonevoli, cioe' oltre kull dubju dettat mir-raguni.

Hawnhekk il-Qorti taghmel referenza ghal sentenza moghtija mill-Qorti tal-Appell Kriminali nhar s-sebgha (7) ta' Settembru, 1994 fl-ismijiet '**Il-Pulizija v Philip Zammit et**' u tghid pero' li mhux kull l-icken dubju huwa bizzejjed sabiex l-imputat jigi ddikjarat liberat, hemm bzonn li '*dubbju jkun dak dettat mir-raguni.*'

<u>L-ghodda biex tiddeciedi</u>

Il-Gudikant li jkun se jiddeciedi kif ser jaghzel is-sikkrana mill-qamh? It-twegiba nsibuha f'decizjonijiet li taw il-Qrati taghna:

> *Il-Gudikant għandu jezamina bir-reqqa l-provi rilevanti li jkollu quddiemu u mbagħad jiddeciedi l-kawza abbazi tal-ligi applikabbli, tal-*

gurisprudenza, u tal-provi li fl-opinjoni tiegħu huma konsistenti, konvincenti u korroboranti.[1]

F'decizjoni tal-Qorti tal-Appell Kriminali moghtija fit-23 ta' Jannar, 2007 fil-kaz **Il-Pulizija *vs* Charles Bianco**[2] l-Imhallef Giannino Caruana Demajo kkummenta dwar meta jkun hemm deskrepanzi fix-xhieda:

> Din il-Qorti kellha okkazjoni tisma' x-xhieda u – ħlief forsi għal ftit ecitament li jħossu xi xhieda meta jsibu ruħhom fl-ambjent ta' awla tal-Qorti, ukoll jekk ikunu familjari ma' dak l-ambjent iżda jkunu qegħdin jixhdu *in rebus suis*, u aktar meta jkunu qegħdin jirrakkontaw episodju li għalihom kien trawmatiku – ma rat xejn "nevrasteniku" jew isteriku fix-xhieda ta' John Bonello. Id-diskrepanzi żgħar bejn ix-xhieda ta' John Bonello u dik tal-Avukat Irene Bonello, li baqgħu għalkemm, kif jgħid l-appellant fir-rikors tiegħu, "żgur kellhom ħafna opportunitajiet li jitkellmu bejniethom dwar il-każ u jfakkru lil xulxin x'gara dakinhar tal-allegat incident", aktar milli sinjal illi x-xhieda ma tistax toqgħod fuqha huma sinjal illi x-xhieda ma kinitx orkestrata, u illi t-tnejn xehdu dak li ftakru u kienu onesti biżżejjed biex ma "jikkorregux" il-verżjonijiet biex igibuhom jaqblu ma' xulxin, għalkemm kellhom okkazjoni jagħmlu hekk u għalkemm setgħu jobsru illi d-diskrepanzi x'aktarx kien sejjer jaqbad magħhom l-appellant biex joħloq argument. Differenzi ta' dettal fil-mod kif xhud jara episodju trawmatiku huma ħaga normali u, sakemm fis-sostanza x-xhieda tkun taqbel, ma jfissrux illi dik ix-xhieda għandha tigi skartata.

[1] Appell Civili Numru. 140/1991/2 - **Norbert Agius v. Anthony Vella et., deciz** fil-25 ta' April, 2008 mill-Prim Imhallef Vincent De Gaetano u l-Imhallfin Joseph D. Camilleri u Joseph A. Filletti.
[2] Appell Kriminali Numru. 115/2006

Artikolu 637 tal-Kapitolu 9 jipprovdi gwida cara lill-Gudikant kif ghandu japprezza xhieda ta' xhud:

> *Id-deċiżjoni titħalla fid-diskrezzjoni ta' min għandu jiġġudika l-fatti, billi jittieħed qies tal-imġieba, kondotta u karattru tax-xhud, tal-fatt jekk ix-xiehda għandhiex mis-sewwa jew hix konsistenti, u ta' fattizzi oħra tax-xiehda tiegħu, u jekk ix-xiehda hix imsaħħa minn xiehda oħra, u taċ-ċirkostanzi kollha tal- każ.*

***Presumption of facts* u provi cirkostanzjali**

Il-Qorti qabel tghaddi biex tanalizza l-imputazzjonijiet thoss li ghandha taghmel espozizzjoni dwar il-*presumption of facts* u l-provi cirkostanzjali.

Fi kliem Sir Rupert Cross,

> *Presumptions of fact* (praesumptiones hominis) *are merely frequently recurring examples of circumstancial evidence, and instances which have already been mentioned are the presumption of continuance, the presumption of guilty knowledge arising from the possession of recently stolen goods and the presumption of unseaworthiness in the case of a vessel which founders shortly after leaving port. These are all inferences which may be drawn by the tribunal of fact.*[3]

[3] Cross, R., Cross on Evidence Butterworths (London), 1979, p. 124. Ikkwotat mill-Prim Imhallef Vicent Degaetano fl-Appell Kriminali Inferjuri Il-Pulizija vs Louis Gauci Borda deciz 24 ta' April, 2002: Appell Nru 228/2001

Bhala ezempju ta' prova indizzjarja li minnha wiehed jista' jigbed konkluzzjoni partikolari, l-istess awtur jaghti l-ezempju tad-drawwa (*habit*):

> *The fact that someone was in the habit of acting in a given way is relevant to the question whether he acted in that way on the occasion into which the court is inquiring.*[4]

U fl-edizzjoni tal-2018 ta' **Archbold** jinghad hekk dwar presunzjonijiet ta' fatt:

> These are inferences which the court may draw from the facts which are established, but it is not obliged to draw.
>
> For example where a defendant charged with handling stolen goods is found to be in possession of those goods without any explanation, this circumstantial evidence may give rise to a provisional conclusion that the defendant is the handler of those goods.
>
> In some cases a rebuttable presumption of law imposes a legal burden of proof which must be satisfied to the requisite standard of proof in order to rebut the presumption, whereas some presumptions merely impose an evidential burden. For example, the presumption that a machine was working properly may be rebutted by merely adducing evidence to the contrary: *Tingle, Jacobs and Co v. Kennedy* [1964] 1 W.L.R. 638. In contrast, in order to rebut the presumption, created by section

[4] ibid. p. 40.

74(3) of the Police and Criminal Evidence Act 1984, that the defendant committed an offence of which he was convicted, the Court of Appeal has held that the defence must prove on the balance of probabilities that the defendant did not commit the offence: *Watson* [2006] EWCA Crim. 2308. Similarly, in *Miell* [2008] 1 Cr.App.R. 23, the Court of Appeal treated s.74(3) as shifting the burden of proof onto the accused. In *C*[2011] 1 Cr.App.R. 17, however, the Court of Appeal, without reference to *Watson*, referred, at p.225, to s.74(3) as creating an "evidential presumption" and indicated that "if the defendant does adduce evidence to demonstrate that he is not guilty of the offence, it remains open to the Crown then to call evidence to rebut the denial". In *Clift* [2012] EWCA Crim. 2750 the Court of Appeal indicated that s.74(3) shifts the burden of proof to the defendant and that the prosecution is not required to prove to the criminal standard the matters covered by s.74(3). Equally, in *R. v. O'Leary* [2013] EWCA Crim 1371 the Court of Appeal held at para.19 that, "The effect of section 74(3) is that the defendant bears the burden of proving that he did not commit the offence".

In *Zawadzka* [2016] EWCA Crim 1712, where evidence of a theft conviction committed in Poland by the defendant was admitted in a murder trial, the Court of Appeal accepted that the judge should have directed the jury that if the defendant proved on the balance of probabilities that she had not committed the offence then the jury should 'dismiss it from their minds'.

> Even where a presumption imposes a legal burden of proof, if the imposition of a legal burden of proof upon the defence would give rise to a violation of art. 6(2) of the ECHR it may be necessary to read down the relevant statutory provision under section 3(1) of the Human Rights Act 1998, in line with the principles that were considered at §§ 10-11 and 10-12, *ante*, such that it merely imposes an evidential burden. Indeed, statute may expressly impose the evidential burden of rebutting a presumption upon the defendant. For example, in relation to the evidential presumptions about consent which section 75 of the Sexual Offences Act 2003 created, s.75(1) provides that:
>
> "… the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it."
>
> It appears that the effect of this provision is that the burden of disproving the relevant issue remains on the prosecution provided that evidence that is not merely "fanciful or speculative" has been adduced to raise the issue: *Ciccarelli*[2011] EWCA Crim. 266.[5]

Huwa minnu li fl-**Artikolu 638(2) tal-Kap. 9** ix-xhieda ta' xhud wiehed biss, jekk emnut minn min ghandu jiggudika fuq il-fatt hija bizzejjed biex

[5] Archbold: Criminal Pleading, Evidence and Practice – 2018 Sweet & Maxwell (London), para. 10-15, p. 617-618.

taghmel prova shiha u kompluta minn kollox, daqs kemm kieku l-fatt gie ppruvat minn zewg xhieda jew aktar. Ghalhekk jispetta lill-Qorti tara liema hija l-aktar xhieda kredibbli u vero simili fic-cirkostanzi u dan a bazi tal-possibilita'. Huwa veru wkoll li l-Qorti ghandha tqis provi cirkostanzjali jew indizzjarji sabiex tara jekk hemmx irbit bejn l-imputat u l-allegati reati. Dan qed jinghad ghaliex ghalkemm huwa veru li fil-kamp penali l-provi indizzjarji hafna drabi huma aktar importanti mill-provi diretti, pero' hu veru wkoll li provi indizzjarji jridu jigu ezaminati b'aktar attenzjoni sabiex il-gudikant jaccerta ruhu li huma univoci.

Fil-fatt il-Qorti hawnhekk taghmel referenza ghal-sentenza moghtija mill-Qorti tal-Appell Kriminali fil-hmistax (15) ta' Gunju, 1998 fil-kawza fl-ismijiet '**Il-Pulizija vs Jason Lee Borg'**, fejn kien gie ritenut li provi jew indizzji cirkostanzjali ghandhom ikunu univoci, cioe' mhux ambigwi. Ghandhom ikunu indizzji evidenti li jorbtu lill-akkuzat mar-reati u hadd iktar, anzi l-akkuzat biss, li huma l-hati u l-provi li jigu mressqa, ikunu kompatibbli mal-presunzjoni tal-innocenza tieghu. Illi ghalhekk huwa importanti fl-isfond ta' dan il-kaz li jigi ppruvat li kien l-imputat biss li ghamel dak li gie akkuzat bih u ghalhekk il-Qorti sejra tikkunsidra kwalunkwe prova possibilment cirkostanzjali li tista' torbot lill-imputat b'mod univoku bir-reati addebitati lilu. Fil-fatt kif gie ritenut fis-sentenza moghtija mill-Qorti tal-Appell Kriminali fis-sitta (6) ta' Mejju, 1961 fil-kawza fl-ismijiet '**Il-Pulizija vs Carmelo Busuttil'**,

> "*Il-prova ndizzjarja ta' spiss hija l-ahjar prova talvolta hija tali li ipprova fatt bi precizjoni matematika.*"

Illi huwa veru li fil-kamp penali, il-provi indizzjarji hafna drabi huma aktar importanti mill-provi diretti. Hu veru wkoll li l-provi indizzjarji jridu jigu ezaminati b'aktar attenzjoni sabiex wiehed jaccerta ruhu li huma univoci.

Archbold jghid:

> *"Where reliance has been placed by the prosecution on circumstantial evidence the proper approach is to determine whether a reasonable jury properly directed would be entitled to draw an adverse inference from the combination of factual circumstances by dismissing other possible explanations in relation to that evidence: Jabber [2006] EWCA Crim. 2694; G [2012] EWCA Crim. 1756. In London Borough of Haringey v. Tshilumbe, 174 J.P. 41, a senior environmental health practitioner for the local authority had affixed a hygiene emergency prohibition notice to T's premises. After the notice was affixed he returned to the premises and found a group of individuals sitting at a table eating food from plates and drinking from cans. It was alleged that T had failed to comply with the notice as he had continued to operate the premises as a food business. The magistrates held that T had no case to answer as the local authority had produced no evidence that the food and drink that were on the table had been provided to the occupants of the premises by T in the course of a food business. It was held that justices had been wrong to find that there was no case to answer; it could be inferred from the circumstances that the premises were being used for a food business and the defendant should have explained himself at trial.*

Strong circumstantial evidence may be sufficient for the court to find a case to answer: Danells [2006] EWCA Crim. 628.[6]

Illi din hija ezattament il-posizzjoni hawn Malta, kif fil-fatt giet konfermata b'sentenza moghtija mill-Qorti tal-Appell Kriminali nhar id-disgha ta' Jannar, 1998 fil-kawza fl-ismijiet '**Il-Pulizija vs Emanuel Seisun'**.

Din il-Qorti thoss u tghid li provi cirkostanzjali huma bhal katina li tintrabat minn tarf ghal tarf, b'sensiela ta' ghoqiedi li jaqblu ma' xulxin u li flimkien iwasslu fl-istess direzzjoni[7].

Prezunzjoni tal-innocenza

Ir-rizultat huwa li fi proceduri penali l-onus ta' prova tistrieh fuq il-Prosekuzzjoni matul il-kumpilazzjoni kollha, bhala regola generali u hija l-eccezzjoni li d-difiza trid tipprova xi haga, bhal perezempju d-difiza tal-insanita'.

Huwa principju fundamentali fi proceduri penali li persuna akkuzata hija prezunta innocenti sakemm ippruvata hatja, u dan ai termini tal-Artikolu 40 Subinciz 5 tal-Kostituzzjoni ta' Malta, li jiddisponi is-segwenti:

"*every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty...*"

[6] Ibid. Pg. 533 para 8-119

[7] Il-Qorti fliet fid-dettal l-argumenti migjuba fis-sentenza fl-ismijiet Il-**Pulizija vs Abdellah Berrard et** moghtija mill-Magistrat Consuelo Scerri Herrera fid-19 ta' Mejju 2014

Dan il-principju gie wkoll sanat fis-sentenza moghtija minn Sir Augustus Bartolo fl-ismijiet '**Il-Pulizija v Michele Borg et'** (deciza mill-Qorti tal-Appell Kriminali nhar it-13 ta' Mejju, 1936) fejn intqal:

> "*illi skont il-principju u s-sistema tal-ligi u procedura penali taghna mfassla fuq dak tal-Ingilterra u li huma strettament d'ordine pubblico;* '*the accused is presumed innocent until proved guilty.*' "

U issa ghalhekk wiehed jistaqsi: xi tfisser verament prezunzjoni tal-innocenza? Din tfisser li l-akkuzat ma jrid jipprova xejn dwar l-innocenza tieghu - hija l-Prosekuzzjoni li trid tipprova l-htija tieghu. Ghalhekk peress li hija l-Prosekuzzjoni li allegat il-htija tal-imputat, l-onus generali tal-prova, u cioe' tal-prova tal-htija, tistrieh fuq il-Prosekuzzjoni, li ghandha ghalhekk tipprova kull element tar-reati partikolari sabiex tasal ghal din l-istess konkluzjoni.

Il-Prosekuzzjoni trid tipprova l-kaz taghha *beyond a reasonable doubt*, li tipprova kaz dettat bla dubju dettat mir-raguni, li tfisser li l-grad ta' buon sens jew ghaqal li jwassal gudikant sabiex jaqbel mat-tezi taghha u cioe' tal-Prosekuzzjoni.

L-obbligu li tipprova l-htija tal-akkuzat irid ikun assolut, oltre kull dubju dettat mir-raguni u f'kaz li jkun hemm xi dubju ragjonevoli, il-Prosekuzzjoni tigi kunsidrata li ma ppruvatx il-kaz taghha ta' htija u ghalhekk il-Qorti hija obbligata li tillibera.

Il-filmat esebit

Fil-ktieb *Electronic Evidence*[8], Stephen Mason jispjega li:

> *"Surveillance cameras are very much part of life in the twenty-first century, the foundations of which began in the latter decades of the twentieth century. Evidence of images from security cameras can be very helpful in identifying the perpetrators of crime, and the enhancement of the images, together with the use of more advanced techniques such as facial mapping, can help to identify parties to an offence."*

Il-Qorti taghmel referenza ghal dak li jghid il-**Blackstone** fl-edizzjoni tal-2016 fejn meta jitkellem dwar ritratti, video recordings u films jghid li:

> *"A photograph (or film) the relevance of which can be established by the testimony of someone with personal knowledge of the circumstances in which it was taken (or made), may also be admitted to prove the commission of an offence and the identity of the offender."*[9]

Il-Qorti se tghaddi biex tanalizza l-prova il-filmat esbiet in atti. Illi fir-regoli illi tfasslu f'kawza **R vs Turnbull** fl-Ingilterra, li ghalkemm ma jikkostitwixxu l-ebda regola taht il-ligi Maltija, huma linji gwida fil-kaz ta' l-identifikazzjoni tal-persuna akkuzata. Illi dana gie ukoll sottolinjat f'sentenza moghtija mill-Qorti ta'l-Appelli Kriminali fl-ismijiet Il-**Pulizija vs**

[8] Ippubblikat minn LexisNexis U.K. t-tieni edizzjoni ppubblikata fl-2010 pg. 345 para. 10.91
[9] Pg. 2545 f'*Real Evidence* F8.58

Stephen Zammit (deciza 16 ta' Lulju 1998) fejn il-Qorti tat esposizzjoni tar-regoli Turnbull fid-decizjoni taghha:

> ***"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.***
>
> ***Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to***

believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger.

Illi fil-ktieb tieghu Cross, **On Evidence** (6th edition) huwa jaghti definizzjoni ta' dak imsejjah bhala real evidence:

'Things are an independent species of evidence as their production calls upon the court to reach conclusions on the basis of its own perception and not on that of witnesses directly or indirectly reported to it ...

Although it was devised by Bentham and adopted by Best, 'Real evidence' is not a term which had received the blessing of common judicial usage. There is general agreement that it

covers the production of material objects for inspection by the judge or jury in court, but it is debatable how much further the term should be extended'.

Cross imbaghad ighaddi sabiex jaghti diversi ezempji ta' dak illi jikkostitwixxi "real evidence" u fost dawn l-ezempji huwa jinkludi automatic recordings u ighid:

'Most discussion has hitherto centred on the admissibility of tape-recordings, but this has now been supplemented by a thin trickle of authority on the admissibility of other media such as film, video-tape and computer output. In all of these cases the evidence is real evidence when it is tendered to show what it was that was recorded'.

L-awtur Murphy, imbaghad fil-ktieb tieghu 'A Practical Approach to Evidence' (3rd Ed) jaghti dina id-definizzjoni ta' 'Real evidence' (fol. 7):

'A term employed to denote any material from which the court may draw conclusions or inferences by using its own senses. The genus includes material objects produced to the court for its inspection, the presentation of the physical characteristics of any person or animal, the demeanour of witnesses (which may or may not be offered or presented to the court by design), views of the locus in quo or of any object incapable of being brought to court without undue difficulty and such items as tapes, films and photographs, the physical appearance of which may be significant over and above the sum total of their contents as such ... What is of importance in each case is the visual, aural or other sensory impression which the evidence,

by its own characteristics produces on the court, and on which the court may act to find the truth or probability of any fact which seems to follow from it'. ...

'The court may look at and draw any proper conclusions from its visual observation of any relevant material object produced before it ... The tribunal of fact is entitled to act on the results of its own perception, even where it conflicts with other evidence given about the object ...'.

Ikompli:

'The court must, before admitting recordings as evidence be satisfied that the evidence which may be yielded is relevant and that the recording produced is authentic and original ... The above principles apply to the use of film produced by hidden, automatic security cameras installed in banks and elsewhere for the purpose of recording robberies and other incidents. The jury are entitled to consider the film as identification evidence of the persons recorded on it, subject to the foundational requirements stated above" see eg 'R v Dodson; R v Williams [1984] Crim LR 489; see "Taylor v Chief Constable of Cheshire [1986] 1 WLR 1979'.

Fil-kawza **Taylor vs Chief Constable of Cheshire** (1986), Ralph Gibson LJ ighid:

'Where there is a recording, a witness has the opportunity to study again and again what may be a fleeting glimpse of a short incident, and the study may affect greatly both his ability

to describe what he saw and his confidence in an identification. When the film or recording is shown to the court, his evidence and the validity of his increased confidence, if he has any, can be assessed in the light of what the court itself can see'"

Illi fil- kaz fl-Ingilterra **R vs Murphy and Maguire** (1990) l-Qorti stqarret:

"We consider that the Turnbull guidelines should be applied and adopted as far as appropriate by a judge in a Diplock court to his assessment of the weight to be given to visual identification made from a video film, whether that identification purports to be made by a witness or witnesses, or by the judge himself. We see nothing in principle to justify a distinction between the consideration of the identification evidence of a bystander and that of a witness or judge who identifies from a video film screen. The imperfections of human observation, the dangers of suggestibility and the possibilities of honest mistake even by a plurality of witnesses still arise and justify the need for special caution before convicting."

Illi fil-kaz in dizamina ma tqumx il-kwistjoni dwar l-identifikazzjoni tal-persuna ta' l-akkuzat u ta' Aaron Cassar fil-filmat esebit (li d-difiza ma ikkontestatx il-validita tieghu). L-imputat stess ma jinnegax illi huwa il-persuna li tidher f'dana il-filmat. Illi l-Qorti ezaminat dana il-filmat bir-reqqa biex tara dan jistax jghinha fid-deliberazzjoni taghha biex tiddeciedi dan il-kaz.

KONSIDERAZZJONIJIET LEGALI DWAR L-IMPUTAZZJONIJIET

L-ewwel (1) imputazzjoni
(Art. 221 tal-Kapitolu 9 tal-Ligijiet ta' Malta – ferita ta' natura hafifa fuq xhud)

Din il-Qorti taghmel referenza ghas-sentenza fl-ismijiet **Il-Pulizija vs Joseph Azzopardi** moghtija fit-30 ta' Lulju 2004 fejn intqal:

> **"Il-kwistjoni ta' jekk offiza hix wahda hafifa u ta' importanza zghira, hafifa, gravi jew gravissima hi wahda ta' fatt u ghalhekk rimessa ghall-gudikant tal-fatt (fil-kaz ta' guri, ghalhekk, rimessa f'idejn il-gurati; fil-kaz odjern rimessa f'idejn il-gudikant tal-ewwel grad – il-magistrat – u issa f'idejn l-imhallef sedenti). Ma hix, ghalhekk, kwistjoni, li tiddependi necessarjament jew esklussivament fuq "opinjoni medika". It-tabib jew tobba jispjegaw x'irriskontraw bhala fatt; u, jekk il-qorti tippermettilhom, jistghu joffru l-opinjoni taghhom dwar, fost affarijiet ohra, kif setghet giet ikkagunata dik l-offiza, jew ma' xhiex huma kompatibbli s-sintomi li jkunu gew klinikament riskontrati. Ikun jispetta imbaghad ghall-gudikant tal-fatt li, fid-dawl mhux biss ta' dak li jkun xehed it-tabib izda fid-dawl tal-provi kollha, jiddetermina n-natura ta' l-offiza."**

Il-prosekuzzjoni pprezentat certifikat mediku tal-process fejn Dr. Anna Micallef iccertifikat li Aaron Cassar kien qieghed isofri minn griehi hfief.

Tajjeb li jigi mfakkar li fis-sentenza il-**Pulizija vs Emanuel Zammit** (30.03.1998), intqal li ghall-fini tar-reat ta' offiza volontarja fuq il-persuna, hi mehtiega l-intenzjoni generika li wiehed jaghmel hsara.

Din il-Qorti thoss li l-aqwa prova li giet prodotta mill-prosekuzzjoni – is-CCTV *footage* li juri l-incident kollu in kwistjoni, mill-wasla ta' l-imputat u ftit wara l-wasla Aaron Cassar. Din il-Qorti ezaminat dan il-*footage* u effettivament hin minnhom jidhru b'kuntatt ma' xulxin. Dan jikkombacja ma' dak li qal l-imputat lill-pulizija fl-istqarrija tieghu[10]. Aaron Cassar ghazel illi ma jixhidx f'dawn il-proceduri ghax seta' jinkrimina lilu nnifsu, kif kellu dritt li jaghmel. L-imputat meta tkellem mal-pulizija spjega li Cassar wasal hdejh u qallu li kien ghadu ma helisiex u l-imputat wiegbu li: "sahha gejt tahraqli l-bieb tad-dar u tfajtni f'dan l-inkwiet kollu, ghidtlu ghadni ma hlistiex u rega' qalli ghadek ma hlistiex". Din hi l-prova li ghandha quddiemha l-Qorti f'dawn l-atti.

[10] Illi wiehed ma jridx jinsa dak illi fil-kamp penali dejjem gie ritenut li l-konfessjoni – popolarment maghrufa bhala l-istqarrija tal-imputat jew l-akkuzat – hija l-prova regina li tista' tressaq il-Prosekuzzjoni biex tipprova l-htija tal-persuna akkuzata, dment li din tkun saret volontarjament u ma gietx imgieghla, jew mehuda b'theddid, jew b'biza', jew b'weghdiet jew twebbil ta' vantaggi (Artikolu 658 tal-Kodici Kriminali). Illi, fil-kawza fl-ismijiet Il-Pulizija vs. Robert Attard, deciza mill-Qorti tal-Appell Kriminali fis-26 ta' Marzu 2009, il-Qorti qalet hekk:

"Illi l-aggravju bazat fuq il-fatt li ma nstabet ebda droga ghand l-appellant ma jannjentax id-dikjarazzjoni tal-appellant li ma gietx retratta minnu lanqas fix-xhieda tieghu li hu kien jixtri r-raza tal-cannabis ghalih kif ukoll ghal haddiehor, sija pure fix-xhieda tieghu emfasizza kemm felah li dan kien jaghmlu biex ipejjpuha flimkien. Din id-dikjarazzjoni tieghu, ladarba giet maghmula volontarjament tikkostitwixxi l-prova regina w ma hemmx ghalfejn tkun akkompanjata minn xi prova ohra bhal ma hi s-sejbien fiziku tad-droga fil-pussess tieghu".

Illi meta jitkellem dwar il-konfessjoni, l-artikolu 658 tal-Kodici Kriminali (Kap.9) jiddisponi li kull haga li l-imputat jistqarr, sew bil-miktub kemm ukoll bil-fomm , tista' tittiehed bi prova kontra min ikun stqarrha, kemm il-darba jinsab li din il-konfessjoni giet maghmula minnu volontarjament u ma gietx imgieghla jew mehuda b'theddid, jew b'biza jew b'weghdiet jew bi twebbil ta' vantaggi .

Illi f'dan il-kaz Aaron Cassar ma tax ix-xhieda tieghu u ghalhekk ghalkemm fl-atti hawn certifikat mediku li jindika li jghid li kellu certu hmura, ma ngabitx il-prova, n-nexus illi jekk kellu hmura dik il-hmura saret minhabba xi haga li ghamillu l-imputat Deniro Magri. L-unika persuna illi seta' rabat dik il-hmura, tista' tghidilha ferita, ma azzjoni positiva tal-imputat kien Aaron Cassar, li ma wegibx id-domandi quddiem din il-Qorti.

Il-Qorti mhux qieghda ssib lill-imputat hati ta' din l-imputazzjoni.

It-tieni imputazzjoni
Artikolu 338(dd) – Ksur tal-ordni pubbliku

Rigward din l-imputazzjoni, fis-sentenza mohtija mill-Qorti tal-Appell Kriminali fid-19 ta' Novembru, 1999, fl-ismijiet Il-**Pulizija versus Maria Concetta Green**[11] inghad:

> *"L-artikolu 338(dd) tal-Kodici Kriminali jikkontempla r-reat komunement imsejjaħ 'breach of the peace'. L-elementi ta' dan ir-reat gew ezaminati funditus f'diversi sentenzi u gie ritenut li, bhala regola, ikun hemm din il-kontravenzjoni meta jkun hemm ghemil volontarju li minnu nnifsu jew minhabba c- cirkostanzi li fihom dak l-ghamil isehh inissel imqar minimu ta' nkwiet jew thassib f'mohh persuna (li ma tkunx l-akkuzat jew l-imputat) dwar l-inkolumita' ta' persuna jew dwar l-inkolumita' ta' proprjeta', kemm b'rizultat dirett ta' dak l-ghamil jew minhabba l-possibilita' ta' reazzjoni ghal dak l-ghemil.*

[11] Volum LXXXIII Part IV pagina 441

L-iskambju ta' kliem, anke jekk ingurjuz jew minaccjuz fih innifsu u minghajr ma jkun hemm xejn aktar x'jindika li dak l-argument jista' jizviluppa fih, jew iwassal ghal, xi haga ohra u aktar serja (bhal glied bl-idejn jew hsara fil-propjeta') ma jammontax ghall-breach of the peace fis-sens tal-artikolu 338(dd) tal- Kodici Kriminali."

Issa, kif gie spjegat fl-Appell Kriminali fl-ismijiet **Il-Pulizija v. Paul Busuttil** deciz fit-23 ta' Gunju 1994 dwar ir-reat ta' ksur ta' bon ordni[12]:

"Skond gurisprudenza kostanti tal-Qrati taghna, dan ir-reat javvera ruhhu meta jkun hemm dak li fil-*common law* Ingliza kien jissejjah *'a breach of the peace'*. Din l-ekwiparazzjoni ta' dana r-reat mal-kuncett Ingliz ta' *'a breach of the peace'* tirrisali ghal zmien Sir Adriano Dingli li proprju f'kawza deciza minnu fl-10 ta' Gunju, 1890, fl-ismijiet <u>Ispettore Raffaele Calleja v. Paolo Bugeja et.</u>, kien qal hekk:

'Che il buon ordine e la tranquillita` pubblica sta nella sicurezza, o nella opinione ferma della sicurezza sociale, - nel rispetto dei diritti e dei doveri sia degli individui in faccia all'autorita` pubblica, sia degli individui stessi fra loro, e ogni atto che toglie o diminuisce la opinione della sicurezza pubblica, o della sicurezza individuale, e`

[12] Vol. LXXVIII.v.277.

violazione dell'ordine pubblico, indipendentemente dalla perpetrazione di altro reato' **(Kollez. Vol. XII, p. 472, 475).**

A skans ta' hafna repetizzjoni, din il-Qorti taghmel referenza ghall-gurisprudenza migbura fl-artikolu intitolat *'Calleja v. Balzan: Reflections on Public Order'* **pubblikat fil-Vol. X ta'** *The Law Journal - Id-Dritt (University of Malta, Autumn 1983)* **pagna 13** *et seq.*, **u specjalment pagni 28 sa 31. B'zieda ma' dak li hemm f'dak l-artikolu wiehed jista' jghid li r-reat ta'** *'breach of the peace'* **fil-ligi Skocciza jirrikjedi ukoll certu element, imqar f'ammont zghir hafna, ta' allarm. Fi kliem McCall Smith u Sheldon, fil-ktieb taghhom** *'Scots Criminal Law', Edinburgh, Butterworths, 1992)*:

'The essence of the offence is the causing of alarm in the minds of the lieges. This alarm has been variously defined by courts. In Ferguson v. Carnochan (1889) it was said not necessarily to be 'alarm in the sense of personal fear, but alarm lest if what is going on is allowed to continue it will lead to the breaking of the social peace'. Alarm may now be too strong a term: in Macmillan v. Normand (1989) the offence was committed when abusive language caused 'concern' on the part of policemen at whom it was directed' (p. 192).

Naturalment huwa kwazi impossibbli li wiehed jiddeciedi aprioristikament x'jammonta jew x'ma jammontax f'kull kaz ghar-reat ta' ksur volontarju tal-bon ordni u l-kwiet tal-pubbliku. Kif jghid awtur iehor Skocciz, Gerald H. Gordon, fit-*test* awtorevoli tieghu *'The Criminal Law of Scotland'* (*Edinburgh, 1978*):

***'Whether or not any particular acts amount to such a disturbance is a question of fact depending on the circumstances of each case, and strictly speaking probably no case on breach of the peace can be regarded as an authority of general application'* (*p. 985, para. 41-01*).**

U aktar 'il quddiem l-istess awtur jghid:

***'.... Although it has been held not to be a breach of the peace merely to annoy someone, such annoyance could amount to a criminal breach of the peace if the circumstances were such that it was calculated to lead to actual disturbance'* (*p. 986, para. 41-01*).**

Fl-Appell Kriminali fl-ismijiet **Il-Pulizija v. Joseph Spiteri** deciz fl-24 ta' Mejju 1996, il-Qorti ziedet tghid hekk:

"Il-Qorti hawnhekk tixtieq tippreciza a skans ta' ekwivoci li l-kuncett ta' *'breach of the peace'* kif abbraccjat fl-Iskozja huwa aktar wiesa' minn kif gie interpretat mill-qrati

Inglizi. Fi kliem Jones u Christie fil-ktieb taghhom *'Criminal Law' (Edinburgh, Sweet & Maxwell, 1992)*, b'referenza ghal-ligi Skocciza in materja:

'While the major part of the criminal law of Scotland could indeed be expressed in some facile, breach-of-the-peace-type phrase, such as 'doing things (or refraining from doing things) which cause, or could reasonably cause alarm or disturbance', this would lead inevitably to complete uncertainty as to what exactly the law did prohibit. At present there is considerable uncertainty as to what breach of the peace itself properly covers; and it would thus be most unwelcome to extend that uncertainty by enlarging the scope of breach of the peace at the expense of other, fairly well defined offences. But this is, of course, something of a vicious circle. It is precisely because breach of the peace has become so ill-defined that it has proved possible for it to stray into fields occupied by other offences. The only way to halt this process is for breach of the peace to be defined in a clearer and more limited fashion than is currently the case. Regrettably, however, there is little indication that this is likely to be so' (p. 295).

Il-kuncett Ingliz ta' *'breach of the peace'* li, kif inghad, il-Qrati taghna jidher li fil-massima segwew, gie spjegat mill-Professur A.T.H. Smith fil-ktieb tieghu *'Offences*

Against Public Order' (London, Sweet & Maxwell, 1987) **hekk:**

'Because of the association between 'peace' and 'quiet', there is a natural tendency to suppose that a breach of the peace is 'any behaviour that disturbed or tended to disturb the tranquillity of the citizenry'. But if any legal expression is a term of art, breach of the peace is one of them. Recently the courts have refined the concept, and established very clearly that it is allied to harm, actual or prospective, against persons or property. The leading modern authority is undoubtedly the decision of the Court of Appeal in Howell .... Watkins L.J. said: '.... Even in these days when affrays, riotous behaviour and other disturbances happen all too frequently, we cannot accept that there can be a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done' (p.182).

Minn dana kollu din il-Qorti tara li, bhala regola, ikun hemm il-kontravvenzjoni kontemplata fil-paragrafu (dd) ta' l-art. 338 tal-Kap. 9 meta jkun hemm ghemil volontarju li minnu nnifsu jew minhabba c-cirkostanzi li fihom dak l-ghemil isehh inissel imqar minimu ta' inkwiet jew thassib f'mohh persuna (li ma tkunx l-akkuzat jew imputat) dwar l-inkolumita` fizika ta' persuna jew dwar l-inkolumita` ta'

> **proprjeta`, kemm b'rizultat dirett ta' dak l-ghemil jew minhabba l-possibilita` ta' reazzjoni ghal dak l-ghemil. Naturalment dawn ic-cirkostanzi jridu jkunu tali li <u>oggettivament</u> inisslu l-imsemmi inkwiet jew thassib."**[13]

Fil-fatt fis-sentenza, **Il-Pulizija v. Marianne Abela et** moghtija fil-25 ta' Lulju 1984, intqal:

> **"... dan l-artikolu 352(bb) gie kostantement interpretat minn din il-Qorti (ara *Pulizija vs Donald Zahra*, 19 ta' April 1950 Kollez. Dec. Vol. XXXIV.iv.968 u s-sentenzi hemm citati) li jikkontempla fatti li jnehhu jew inaqqsu lic-cittadin l-opinjoni tas-sikurezza pubblika jew individwali u ghalhekk fatti ta' natura ftit u xejn vjolenta, kommessi taht cirkostanzi tali li direttament jew indirettament jistghu jikkonducu ghal reati ohrajn kontra l-persuni u s-semplici argumentar b'lehen gholi u xi ftit b'eccitazzjoni, ma jiksirx il-ligi."**

Il-Qorti temmen li l-grad tal-prova milhuq mill-Prosekuzzjoni ma hijiex sufficjenti fil-kamp penali biex twassal ghall-htija tieghu dwar din l-imputazzjoni.

[13] Ara wkoll Appelli Kriminali: **Il-Pulizija v. Alfred Pisani**, 5 ta' Mejju 1995; **Il-Pulizija v. Pio Galea**, 17 ta' Ottubru 1997; **Il-Pulizija v. Andrea Galea et**, 30 ta' Gunju 1998

It-tielet imputazzjoni

Ksur tal-kundizzjonijiet ghal-liberta' provizorja

Permezz ta' din l-imputazzjoni l-Prosekuzzjoni qeghda ssostni li nkisru l-kundizzjonijiet imposti mill-Qorti meta tat il-liberta' provizorja lill-imputat f'kaz iehor. Il-Prosekuzzjoni bbazzat l-argumenti taghha fuq l-inkontru li sehh bejn l-imputat u Aaron Cassar fi Triq ir-Repubblika u l-incident li sehh bejniethom fejn il-Qorti diga' analizzat u ddecidiet dwar l-ewwel zewg akkuzi marbuta ma' dan l-inkontru fejn l-imputat spicca bi griehi gravi f'saqajh u Cassar b'certifikat mediku li soffra griehi hfief minhabba hmura li kellu.

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 dwar din l-imputazzjoni ppruvatx il-kaz taghha skont il-ligi.

Il-Qorti taghmel referenza ghad-digriet moghti mil-Qorti tal-Appell Kriminali fl-14 ta' Lulju, 2006 fl-ismijiet '**The Police vs Steven John Lewis Marsden**' fejn inghad li:-

> *'The granting of, or the refusal to grant bail is a very important and delicate matter: it concerns both the fundamental right to liberty of an individual and the concomitant fundamental right to be presumed innocent until proven guilty and also the right and duty of the State to protect itself and its citizens primarily by ensuring the integrity of any criminal proceedings which it may deem appropriate to undertake against a person in pursuance of that right*

to protect itself and its citizens (paragraphs (a) to (d) of sub section (1 of Section 575). Bail proceedings cannot be dealt with by a Court, whether inferior or superior, in a cavalier manner, but must determine, albeit prima facie, all the relevant circumstances of the case, and must ultimately always be determined by the appropriate Court with the application of common sense and sound judgment on the part of the presiding magistrate or Judge.'

Hawnhekk il-Prosekuzzjoni qieghda takkuza lill-imputat b'delitt allura japplikaw ir-regoli kollha tad-delitt. Ghal kull delitt (mhux kontravenzjoni fejn ghandek l-att volontarju), l-Prosekuzzjoni hija obbligata illi tipprova kemm l-element materjali kif ukoll l-element formali. Issa x' inhu l-element formali? X'ried jissalvagwardja l-legizlatur permezz tal- Artiklu 575?

L-Artikolu 575 (1) tal-Kapitolu 9 tal-Ligijiet ta' Malta jipprovdi linja gwida fejn helsien mill-arrest li mhuwiex dritt awtomatiku ghandu jinghata.

Dan l-Artikolu jipprovdi illi:-

"(1) Bla ħsara tad-dispożizzjonijiet tal-artikolu 574(2), fil-każ ta' -
(i) imputat ta' delitt kontra s-sigurtà tal-Gvern, jew
(ii) imputat ta' delitt suġġett għall-piena ta' priġunerija għal għomru,

il-qorti tista' tagħti ħelsien mill-arrest, biss jekk, wara li tikkunsidra iċ-ċirkostanzi kollha tal-każ, in-natura u l-gravità tar-reat, il-

karattru, antećedenti, assoċjazzjonijiet u rabtiet fil-kommunità tal-imputat, kif ukoll kull ħaġa oħra li tkun tidher li hi rilevanti, tkun sodisfatta illi ma hemmx perikolu illi l-imputat jekk jiġi meħlus mill-arrest -

(a) jonqos li jidher għall-ordni tal-awtorità msemmija fl-obbligazzjoni tal-garanzija; jew
(b) jinħeba jew jitlaq minn Malta; jew
(ċ) ma josservax xi kondizzjoni li l-qorti jkun jidhrilha xieraq li timponi fid-digriet tagħha li bih jingħata l-ħelsien; jew
(d) jinterferixxi jew jipprova jinterferixxi max-xhieda jew b'xi mod ieħor jintralċja jew jipprova jintralċja l-kors tal-ġustizzja fir-rigward tiegħu jew xi persuna oħra;
jew
(e) jikkommetti xi reat ieħor."

Dan l-artikolu l-ewwel jghidlek il-kriterji illi l-Qorti ghandha tiehu nkonsiderazzjoni qabel ma taghti l-bail, imbaghad jaghtik hames paragrafi fejn jghidlek f'kull wiehed minnhom il-Qorti minn xiex trid tkun sodisfatta qabel ma taghti l-bail. Wahda minnhom hija l-paragrafu D illi "***jinterferixxi jew jipprova jinterferixxi max-xhieda jew b'xi mod ieħor jintralċja jew jipprova jintralċja l-kors tal-ġustizzja fir-rigward tiegħu jew xi persuna oħra".*** Mela l-kundizzjoni illi wiehed ma javvicinax ix-xhieda hija bilfors marbuta fl-istess titolu ma dak illi qieghed jittutela l-legizlatur, illi wiehed bl-ebda mod jintracca x-xhieda.

Il-Qorti tinnota illi l-Prosekuzzjoni mhux qieghda tghid illi l-imputat Deniro Magri mar biex jintracca x-xhieda ta' Aaron Cassar.

Il-Qorti thoss li d-dikjarazzjoni li ghamel l-imputat Magri hi importanti hafna: "*Wasal hdejja u qalli li ghadni ma hlistiex u jiena bqajt nghidlu sahha ma hlistiex, hraqtli l-bieb tad-dar u tfajtni f'dan l-inkwiet, u rega qalli ghadek ma hlistiex*."

Fejn hu l-element formali tad-delitt? X'element formali hemm illi inti b'mod volontarju trid tikser il-kundizzjoni tal-helsien mill- arrest, ghax huwa dan li riedet tipprova l- prosekuzzjoni illi volontarjament trid tikser il- helsien mill-arrest u bl-ebda mod ma jirrizulta dana. L-imputat ma ikkommetta l-ebda delitt ghax l-imputazzjonijiet migjuba kontrih ma rrizultawx, lanqas ma hemm prova illi effettivament l-imputat Deniro Magri mar fuq Aaron Cassar bl-intenzjoni u bil-konsapevolezza illi sejjer jikser il-kundizzjoni tal-helsien mill-arrest, anzi jirrizulta fl-oppost.

Din il-Qorti fliet il-process bir-reqqa u wara tali analizi tinsab f'qaghda li tiddikjara illi f'dan il-kaz, mehud kollox flimkien, din il-Qorti ma tpoggietx f'pozizzjoni li fiha tista' legittimament tiddikjara l-htija tal-imputat skont il-ligi.

Skond l-awtur Blackstone fil-ktieb "**Criminal Procedure**" (2001 para. D 22.15 pagna 1622) jiddefenixxi kif decizjoni tkun **unsafe or unsatisfactory**:

"..... means that in cases of this kind, the Court must in the end ask itself a subjective question whether we are content to let the matter stand as it is or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence, as it is a reaction which can be produced by the general feel of the case as the Court experiences it."

Dan gie spjegat ukoll mill-Qorti tal-Appell (Sede Superjuri) fil-kawza fl-ismijiet "**Repubblika ta' Malta vs Ivan Gatt**" [1.12.1994] fejn intqal:

"fi kliem iehor, l-ezercizzju ta' din il-Qorti fil-kaz prezenti w f'kull kaz iehor fejn l-appell ikun bazat fuq apprezzament tal-provi, huwa li tezamina l-provi dedotti, tara jekk, anki jekk kien hemm verzjonijiet kontradditorji – kif normalment ikun hemm – xi wahda minnhom setghetx illiberament u senament tigi emnuta minghajr ma jigi vjolat il-principju li d-dubju ghandu jmur favur l-akkuzat u jekk tali verzjoni setghet tigi emnuta w evidentement giet emnuta l-funzjoni anzi d-dover ta' din il-Qorti hu li tirrispetta dik id-deskrizzjoni w dak l-apprezzament. Ghalhekk huwa l-kompitu ta' din il-Qorti li tezamina b'mod profond li l-provi kollha migjuba w migbura w in partikolari t-traskrizzjonijiet tax-xhieda w l-istqarrija illi l-appellant ghamel mal-Pulizija jwasslu ghal dik il-konkluzzjoni. Fi kliem iehor, il-kaz mhux wiehed azzardat legalment u kontra kull principju legali li wiehed jasal ghal konkluzzjoni ta' rejeta', imma hu kaz fejn l-appellant jista' ma jitwemminx f'dak li qal u l-Ewwel Qorti setghet ghalhekk

legittimament u ragjonevolment tikkonkludi kif ikkonkludiet fuq il-provi[14].

Il-Qorti wara li rat l-istqarrija tal-imputat u analizzatha bl-ghodda li provdielha l-legislatur u dan kif jipprovdi l-**Artikolu 638(2) tal-Kap. 9** li xhud wiehed biss, 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.
Il-Qorti ikkonfrontat din ix-xhieda, max-xhieda tal-prosekuzzjoni inkluz il-filmat tas-*cctv footage*.

Fid-dawl ta' dan kollu jibqa' f'mohh il-Qorti "*lurking doubt*" dwar il-htija ta' l-imputat u hija ghalhekk tal-fehma li ghandu jinghata l-beneficcju tad-dubju fir-rigward ta' dak li allegatament kien gara. Ma tistax din il-Qorti tasal biex tikkundanna lill-imputat ghaliex fis-*cctv footage* jidher qighed b'subghajh il-barra meta kien qieghed jirrejagixxi meta Aaron Cassar meta qed jghidlu *ghaliex ghadni ma hlistiex, jigifieri gejt tahraqli l-bieb, tfajtni f'xebgha nkwiet*, tista' tghid wasalt ghal xi prova sal-grad tac-certezza morali ghax kellu subghajh il-barra, assolutament le.

[14] Ara wkoll : **Pulizija vs Wahid Elawami** Qorti tal-Appell Inferjuri 1.09.2004

DEICDE:

Ghal dawn il-mottivi l-Qorti ma ssibx lill-imputat Deniro Magri hati tal-imputazzjonijiet migjuba kontra tieghu u minnhom tilliberah.

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Dr. Joseph Mifsud

Magistrat