



**Fil-Qorti tal-Magistrati (Malta)
Bhala Qorti ta' Ġudikatura Kriminali**

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

Illum 4 ta' Frar, 2019

**Il-Pulizija
(Spettur Angelo Gafa)**

-vs-

John Borg, detentur tal-karta tal-identita` numru 750662M

Kumpilazzjoni Nru. 949/2010

Il-Qorti,

Rat l-akkużi miġjuba fil-konfront tal-imputat John Borg u cioe talli:

- 1) F'dawn il-Gzejjer, f' April, 2006, u fix-xhur ta' qabel, b' diversi atti magħmulin fi żminijiet differenti li jiksru l-istess disposizzjoni tal-Liġi u li gew magħmula b'risoluzzjoni wahda, ikkorompejt lil Francis sive Frank Fabri, Sindku tal-Kunsill Lokali tar-Rabat (Malta);
- 2) Ukoll talli f'dawn il-Gzejjer bejn it-28 ta' Settembru, 2009, u t-8 ta' Frar, 2010, b' diversi atti magħmulin fi żminijiet differenti li jiksru l-istess dispozzjoni tal-Liġi u li gew magħmula b'risoluzzjoni wahda, wegħedt, tajt jew offretjt,

sew b'mod dirett jew indirett, xi vantagg mhux xieraq lil xi persuna, li asserixxiet jew ikkonfermat li kienet kapaci tagħmel xi influwenza mhux

xierqa fuq il-mod kif tiddeciedi xi persuna li hemm imsemmija fis-Sub-titolu IV tat-Titolu III tal-Kap. 9 tal-Ligijiet ta' Malta, sabiex iggieghel lil dik l-istess persuna teżercita dik l-influwenza.

Il-Qorti giet mitluba sabiex f'kaz ta' htija, barra li tinfliggi l-pieni stabbiliti mil-liġi, tapplika l-provvedimenti tal-Artikolu 119 tal-Kap. 9 tal-Ligijiet ta' Malta.

Rat in-nota tal-Avukat Generali permezz ta' liema baghat lill-imputat biex jigi gudikat minn din il-Qorti bhala Qorti ta' Gudikatura Kriminali kif mahsub fis-segwenti artikoli:

- (a) Fl-Artikoli 18, 115 u 120(1) tal-Kapitolu 9 tal-Ligijiet ta' Malta;
- (b) Fl-Artikolu 18 u 121A(1) tal-Kapitolu 9 tal-Ligijiet ta' Malta;
- (c) Fl-Artikolu 533 tal-Kapitolu 9 tal-Ligijiet ta' Malta.¹

Rat li l-imputat m'kellu l-ebda oggezzjoni biex il-kaz jigi hekk trattat.

Semghet ix-xhieda.

Rat l-atti u d-dokumenti kollha.

Semghet it-trattazzjoni.

Ikkunsidrat

Illi qabel xejn irid jinghad illi ghalkemm din il-kawza tirrigwarda reati li allegatament sehew fl-2006 u bejn l-2009 u l-2010, l-istess kawza giet mismugha minn din il-Qorti, kif diversament preseduta, u l-ewwel udjenza quddiem din il Qorti, kif preseduta, giet mizmuma fl-24 ta' Jannar, 2017.

Illi l-imputat jinsab akkuzat b'korruzzjoni kif ukoll bir-reat hekk maghruf bhala 'trading in influence'.

¹ Fol.285

Illi fuq skorta tad-decizjonijiet moghtiha mill-Qorti Kostituzzjonali fl-ismijiet **Il-Pulizija vs Aldo Pistella**² u **Brian Vella vs l-Avukat Generali**³ kif ukoll dik tal-Qorti tal-Appell Kriminali **Il-Pulizija vs Claire Farrugia**⁴ l-istqarrija rilaxxjata mill-imputat li nghatat minghajr id-dritt li jkun assistit mill-legali tieghu, ma ghandiex aktar valur probatorju.

A. Korruzzjoni: L-Ewwel Imputazzjoni

Permezz tal-ewwel imputazzjoni l-imputat John Borg qed jigi akkużat li kkorompa lil Frank Fabri, fiz-zmien meta dan kien qed isservi bhala Sindku tal-Kunsill Lokali tar-Rabat (Malta).

Illi l-Ispettur **Angelo Gafa**⁵ spjega kif il-Kummissarju tal-Pulizija rcieva informazzjoni kunfidenzjali rigward allegat korruzzjoni konness mas-Sindku tal-Kunsill Lokali ta' San Gwann. Inghata CD li kien jikkontjeni diverzi *audio recordings* liema *recordings* kienu ittiehdu mil-imputat nniffsu. Dan sehh wara li nħareg *tender* ghal ġbir ta skart f' San Gwann u sieheb l-imputat, certu Sammy Borg, li kien wiehed mill-*bidders*, gie mitlub xi flejjes minn Noel Agius, bin is-Sindku ta' San Gwann, biex jigi

² Per S.T.O. Prim Imhalled Joseph Azzopardi, Onor. Imhalled Noel Cuschieri u Onor Imhalled Giannino Caruana Demajo; Rikors numru: 104/2016/1 JZM; Deciza 14.12.2018

³ 14.12.2018; Appell Kostituzzjonali Numru 90/2016/1 MCH

⁴ Per Onor. Imhalled Consuelo Scerri Herrera, Deciza 20.11.2018; Appell Nru: 259/2018

⁵ Fol 8 et seq.

agevolat fl-ghoti tat-tender. Ghalhekk gew *recorded* dawk il-konversazzjonijiet halli jkunu koperti. L-ufficjal Prosekutur kompli li f'parti mir-*recording*⁶ l-imputat jinstema' jghid lil Agius li, fiz-zmien meta hu kien qed jaghmel xoghol mal-Kunsill Lokali, Frank Fabri kien talbu jhallsu mija u hamsin (150)⁷ u li din it talba giet accettata u li zmien wara beda jitlob ghal mitejn u hamsin (250) fix-xahar.

Illi **Franco Azzopardi**, li kien segretarju eżekuttiv tal-Kunsill Lokali tar-Rabat, ikkonferma li l-imputat rebah tender ghal *manual sweeping* izda zmien wara kienu inhargulu *default notices* meta x-xoghol ma bediex isir sew u saħansitra spicca biex il-Kunsill itterminalu l-kuntratt.⁸ **Noel Cini**, Agent Segretarju Eżekuttiv tal-Kunsill Lokali tar-Rabat, spjega li kien ħareg id-*default notices*⁹ fuq ordni tas-Sindku.¹⁰ **Rose Camilleri**¹¹ li serviet bhala Segretarja Eżekuttiva tal-Kunsill Lokali tar-Rabat, ikkonfermat il-kuntratt li kien sar bejn l-imputat u l-Kunsill Lokali.

Illi **Noel Agius** xehed dwar dak li l-imputat kien qallu fuq is-Sindku Fabri, u cioe` li Fabri beda jitolbu LM150 fix-xahar liema flejjes għall-ewwel Borg beda jhallas izda wara, meta Fabri ried bejn LM50-LM100 aktar fix-xahar, Borg irrifjuta u spicca biex il-kuntratt tieghu mal-Kunsill gie terminat. Borg semma' kif kien lest jikkonferma kollox b'gurament

⁶ Numru 35 fuq is-CD bejn l-14 u d-19 il-minuta; CD mmarkat **Dok. AGCD** a fol.35

⁷ Mhemmx indikat f'liema denominazzjoni izda tenut kont li dan sehh fl-2006 u fix-xhur ta' qabel, l-indikazzjoni hi li dawn kienu Liri Maltin. Noel Agius ukoll isemmi li Borg qallu li l-ammont mitlub kien f'Liri Maltin - a fol.47

⁸ A fol 36 et seq

⁹ A fol 23 sa fol 25

¹⁰ A fol 95 et seq

¹¹ A fol 99 et seq

fil-presenza ta' Fabri izda dan ma sehxx wara li gie mgharraf li Fabri kien irrizenja.¹²

Illi dak li stqarr Agius jammonta ghal *hearsay* u ghaldaqstant hu ghal kollox inammissibbli ai termini tal-artikolu 598 tal-Kodici t'Organizzazzjoni u Procedura Civili, kif rez applikabbli bl-artikolu 520(1)(d) tal-Kodici Kriminali.

Illi l-**Professor A.J. Mamo** jghallem kif gej:¹³

There are many reasons assigned for rejecting hearsay, the two principal being first, that the person originally stating the facts does not state them on oath, and secondly, that the person against whom the evidence is offered had not the opportunity of cross-examining that other person as to his recollection, veracity or means of knowledge.

In *Fitzgerald vs Fitzgerald* (1863) it was stated that the foundation of the admissibility of any evidence is that it should be on oath, and that the party against whom it is tendered should have had a reasonable opportunity of cross-examination.

Issir riferenza ghas-sentenza tal-Qorti tal-Appell Kriminali (Sede Superjuri) fl-ismijiet **Ir-Repubblika ta' Malta vs Mario Azzopardi**.¹⁴ Fis-sentenza minn taghha l-Qorti studjat *funditus* ir-regola dwar il-*hearsay evidence*:

“Punt ta' Liġi – il-Hearsay Rule

¹² Ibid.

¹³ Notes on Criminal Procedure, Vth Year

¹⁴ Numru 33/2010; Deciz 28.06.2012 per S.T.O. Dr. Silvio Camilleri, Onor. Imhalled Dr. David Scicluna, Onor. Imhalled Dr. Joseph Zammit Mc Keon.

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

‘598.(1) Bħala regola, il-qorti ma tiħux qies ta’ xiehda dwar fatti li x-xhud igħid li ġie jafhom mingħand haddieħor jew li qalhom haddieħor li jista’ jinġieb biex jagħti xiehda fuq dawk il-fatti.

(2) Il-qorti tista’, ex officio, jew fuq oppożizzjoni tal-parti, ma tħallix jew tichad li jsiru mistoqsijiet bi skop li jittieħdu xiehda bħal dawk.

(3) Iżda l-qorti tista’ ġġiegħel lix-xhud li jsemmi l-persuna li mingħandha jkun sar jaf il-fatti li għalihom jirreferixxu dawk il-mistoqsijiet.

599. Il-qorti tista’, skont iċ-ċirkostanzi, tippermetti xiehda fuq kliem haddieħor u tieġu qies tagħha, meta dan l-istess kliem haddieħor ikollu, fih innifsu, importanza sostanzjali, fuq il-meritu tal-kawża jew ikun jagħmel parti mill-meritu; inkella meta dan haddieħor ma jkunx jistax jinġieb biex jixhed, u l-fatti jkunu tali li ma jkunux jistgħu jiġu ppruvati sewwa xort’oħra, l-aktar f’każijiet ta’ twelid, taż-żwieġ, tal-mewt, tal-assenza, ta’ servitu’, ta’ rjieħ ta’ immobbli, ta’ pussess, ta’ drawwiet, ta’ ġrajjet storiċi pubbliċi, ta’ reputazzjoni jew ta’ fama, ta’ kliem jew fatti ta’ nies li mietu jew li jkunu assenti u li ma kellhom ebda interess li jgħidu jew jiktbu l-falz, u ta’ fatti oħra ta’ interess ġenerali jew pubbliku jew li jkunu magħrufa minn kulhadd.’

“Il-każ li mhux l-ewwel darba li ġie ċitat b’approvazzjoni dwar il-hearsay rule f’kawżi ta’ natura kriminali huwa **Subramaniam v. Public Prosecutor** fejn insibu dan il-kliem:

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

“Jekk wieħed jimxi mal-prinċipji ta’ dan il-każ allura ċerti persuni li magħhom ikun tkellem l-allegat vittma jistgħu jkunu prodotti (per eżempju, psikologu, għalliem jew social worker, il-ġenituri jew qraba fil-qrib

tal-allegat vittma). Dawn jistgħu jixhdu li l-allegat vittma tassew qal hekk. Tali xhieda hija biss prova li l-allegat vittma tassew qal hekk, iżda mhux li dak li qed jgħid l-allegat vittma huwa tassew minnu.

“Jekk wieħed jeżamina l-ewwel sentenza tal-artikolu 599 tal-Kap 12, wieħed jista’ jikkonkludi li l-hearsay rule fil-Liġi tagħna mhix daqshekk assoluta. U fil-fatt hekk qalet il-Qorti Kostituzzjonali hija u tiddeċiedi il-kaz ‘**Joseph Mary Vella et versus Il-Kummissarju tal-Pulizija**’ (13 ta’ Jannar 1988) fejn il-Qorti kkonfermat digriet tal-Prim’Awla biex jithalla jixhed Prokuratur Legali li kien marbut bis-sigriet professjonali. Dan thalla jixhed mingħajr ma kellu jikxef isem it-terza persuna li kienet qaltu biex il-fatti li fuqhom kellhom jixhed il-Prokuratur Legali.

“Peress li d-depożizzjoni, li tista’ tkun hearsay, tista’ tkun prova diretta li ntqal xi haġa, ma tistax tiġi eskluża fl-istadju tal-eċċezzjonijiet preliminari.

“F’dak li huma deċiżjonijiet kriminali, il-Qrati tagħna issa ilhom sew isegwu il-prattika dwar il-hearsay rule. (Ara dwar dan il-punt: **Ir-Repubblika versus Meinrad Calleja**). Reċentement il-Qorti tal-Appell Kriminali diversament preseduta qalet hekk:

“Fil-limit tal-użu li għamlet l-ewwel Qorti tal-okkorenza msemija, ma hemm xejn irregolari. Hu ben stabbilit li waqt li prova hearsay ma hix prova tal-kontenut ta’ dak li jiġi rapportat li ntqal, hi prova li dak rapportat li ntqal fil-fatt intqal fiċ-ċirkostanzi, data, post u ħin li ntqal u in kwantu tali hi ċirkostanza li meħuda ma’ provi u ċirkostanza oħra tista’ wkoll tikkontribwixxi għall-apprezzament li tagħmel il-Qorti.’ (1 t’April 2011 ‘**Il-Pulizija versus Fabio Schembri**’ preseduta mill-S.T.O. il-Prim Imħallef Dr Silvio Camilleri).

“Għaldaqstant, il-Qorti qed tiċhad ir-raba’, il-ħames u s-sitt eċċezzjoni.”

Ikkunsidrat:

17. Tkun problema kbira għall-prosekuzzjoni jekk tkun serrhet il-kaz tagħha fuq provi legalment inammissibbli u tittama li din il-Qorti qatt ma tiġi rinfaccjata bi prosekuzzjoni tali. Din il-Qorti ma hix fi hsiebha tammetti provi inammissibbli semplicement sabiex il-prosekuzzjoni “jkollha kaz”.

18. Ilu ben stabbilit minn din il-Qorti, kif anki rilevat mill-ewwel Qorti fis-sentenza tagħha, li mhux kull relazzjoni ta’ x’qal haddiehor tikkostitwixxi hearsay evidence iżda jekk dak rapportat hux hearsay evidence jew le jiddependi mill-uzu li wieħed jippretendi li jsir minn dak rakkontat. Jekk dak rakkontat jiġi

prezentat bhala prova tal-kontenut tieghu allura dak ikun hearsay evidence u bhala tali inammissibbli izda jekk dak rakkontat jigi prezentat mhux bhala prova tal-kontenut tieghu izda bhala prova li dak li ntqal verament intqal fic-cirkostanzi ta' data, post u hin li fihom intqal allura dan ma jkunx hearsay evidence u huwa ammissibbli ghal certi ghanijiet legali legittimi bhal sabiex tigi kontrollata x-xiehda diretta tax-xhud li l-kliem tieghu ikun qieghed jigi rapportat jew, fic-cirkostanzi idoneji, anki sabiex tigi korroborata xiehda diretta ohra. Huma ghal dawn ir-ragunijiet, kif tajjeb spjegat l-ewwel Qorti, li din it-tip ta' xiehda ma tistax tigi eskluza a priori izda d-decizjoni dwar l-opportunita` o meno li tithalla tinghata dik ix-xiehda u titqieghed quddiem il-gurija trid necessarjament tigi rimessa lill-lmhallef togat li jippresjedi l-guri li jkun tenut jaghti d-decizjoni tieghu skont ic-cirkostanzi li fihom jizvolgi l-guri u skont l-esigenzi evidenzjarji u procedurali tal-process.

19. Hekk, jekk tigi messa in dubbju l-kredibilita` jew il-veridicita` ta' xhud, speċjalment jekk dak ix-xhud ikun persuna minuri, il-prosekuzzjoni ma tistax legalment tigi mcahhda mill-possibilita` li tikkorroborata dik ix-xiehda bil-mezzi li taghtiha l-ligi, inkluz it-tip ta' xiehda li ssemmiet hawn. Daqstant ukoll jekk tinqala` xi kwistjoni dwar jekk ix-xhud ikunx qieghed jiftakar sew dak li jkun qieghed jixhed dwaru jista' jkun mehtieg li jigi ezercitat kontroll ta' dik ix-xiehda bil-mezz tax-xiehda ta' haddiehor dwar dak li jkun qallu l-istess xhud fiz-zmien relevanti. F'dawn l-eventwalitajiet, kif inghad mill-ewwel Qorti fis-sentenza appellata, ikun mistenni li l-ewwel Qorti tispjega lill-gurija il-portata u l-limiti tal-valur tax-xiehda ta' persuna li tixhed dwar x'qal haddiehor. Naturalment, hu ugwalmart mistenni li l-ewwel Qorti ma tammettix ix-xiehda fuq kliem haddiehor jekk mhux unikament ghall-ghanijiet u fil-limiti permessi mil-ligi kif gia` spjegat.....

20. Mill-mod kif gie spjegat l-aggravju tal-akkuzat appellant f'dan ir-rigward jidher li l-akkuzat hu konsapevoli tal-pozizzjoni legali dwar il-hearsay kif spjegata kostantement mill-Qrati taghna u li din hi fis-sens kif spjegat mill-ewwel Qorti izda dak li jidher qieghed ihasseb lill-akkuzat appellant hu l-abbuz li jista' jsir mir-regola msemmija dwar il-hearsay peress li dak li jkun qal haddiehor jista' jigi malizzjozament uzat sabiex minflok biex jikkontrolla dak li jkun xehed haddiehor jew sabiex jikkorroborata provi diretti ohra jintuza sabiex effettivament jissostitwixxi dik ix-xiehda ta' haddiehor jew dawk il-provi diretti l-ohra. [sottolinejar tal-Qorti]

Illi dan l-insenjament gie abbracjat mill-Qorti tal-Appell Kriminali (Sede Superjuri) f'decizjoni fuq eccezzjonijiet preliminari fl-ismijiet **Ir-**

Repubblika ta' Malta vs Eric Tanti¹⁵ kif ukoll fil-kaz Ir-Repubblika ta' Malta vs Daniel Felice.¹⁶

Illi **Frank Fabri** għazel li ma jwegibx għad domandi relatati mal każ, u ma tressaq l-ebda xhud iehor li seta' jitfa' xi dawl dwar l-allegat tixhim ta' Fabri mill-imputat.

Illi l-prosekuzzjoni esebiet l-*audio recording* li gja saret riferenza ghalih. Madanakollu ma ngabet ebda prova li permezz tagħha jirrizulta li l-persuna li tinstema' fuq l-*audio recording* tirrakonta kif kien xahham lil Fabri kien effettivamente l-imputat John Borg.

Ghalhekk fid-dawl ta' dawn ir-rizultanzi l-Qorti tqis illi l-ewwel imputazzjoni ma gietx sodisfacentement ippruvata.

B. Meta persuna tuża l-influwenza li jkollha: It-Tieni Imputazzjoni

Il-Qorti tal-Appell Kriminali fid-decizzjoni tagħha **Il-Pulizija vs Gino Zammit** ikkunsidrat:¹⁷

Illi fir-rigward tat-tieni akkuza, l-appellant instab hati tar-reat gdid introdott recentement bl-Att III tal-2002, bl-artikolu 121A, kif emendat. Illi dan l-artikolu għandu tliet subartikoli. Is-subartikolu (1) jagħmilha reat li wiehed iwiegħed, jagħti jew joffri, sew b' mod dirett sew indirett, xi vantagg mhux xieraq lil xi

¹⁵ Att t' Akkuza Nru. 06/2016; Deciza id-9 ta' April 2018; S.T.O. Prim Imħallef Silvio Camilleri, Onor. Imħallef Joseph Zammit McKeon u Onor. Imħallef Edwina Grima

¹⁶ Per Onor. Imħallef Dr. Edwina Grima, Att t' Akkuza Nru.5/2014, Dec: 22 ta' Settembru, 2016.

¹⁷ Onor Imħallef Joseph Galea Debono, Deciza 17.09.2008; Appell Nru.51/2008

persuna ohra li tasserixxi jew tikkonferma li tkun kapaci li taghmel xi influwenza mhux xierqa fuq il-mod kif tiddeciedi xi persuna imsemmija fl-artikoli precedenti, bhal ufficjali pubblici, membri tal-Kamra tad-Deputati, gurati, eccetera, sabiex igieghel lil dik il-persuna l-ohra tezercita dik l-influwenza, sew jekk dak il-vantagg mhux xieraq ikun ghal dik il-persuna ohra jew ghal xi hadd iehor.

Is-subartikolu (2) umbaghad jaghmlha reat li xi had jircievi jew jaccetta xi offerta jew weghda ta' vantagg mhux xieraq ghalih innifsu jew ghal xi hadd iehor bil-ghan li jezercita xi influwenza mhux xierqa imsemmija fis-subartikolu (1).

Is-subartikolu (3) jghid li r-reati imsemmija fiz-zewg subartikoli precedenti, jkunu kunsmati sew jekk il-kapacita' allegata li ssir influwenza mhux xierqa kienet jew ma kienetx tezisti, sew jekk l-influwenza tkun jew ma tkunx saret u sew jekk l-influwenza pretiza twassal jew ma twassalx ghar-rizultat intiz.

Fis-sentenza tal-Qorti Kriminali tat-13 ta' Lulju, 2006 fil-kawza **"Ir-Repubblika ta' Malta vs. Dr. Noel Arrigo"** gie ritenut li :-

"li minn ezami tal-artikolu gdid 121A jemergu zewg reati separati. Dak kontemplat fis-subartikolu (1) huwa dak ta' persuna li twieghed, taghti jew toffri, xi vantagg mhux xieraq lil xi persuna ohra li tasserixxi jew tikkonferma li huwa jew hija jkunu kapaci li jaghmlu xi influwenza mhux xierqa fuq il-mod kif tiddeciedi xi persuna li hemm imsemmija fl-artikoli precedenti. Mela hawn ghandha l-kaz fejn A is-soggett attiv, qed iwieghed, joffri jew jaghti lil B xi vantagg mhux xieraq, biex B jinfluwenza kif jiddeciedi C., sija jekk dak il-vantagg mhux xieraq ikun ghal C jew ghal xi hadd iehor, prezumibbilmment D.

"Is-subartikolu (2) invece johloq ir-reat ta' min jircevi jew jaccetta xi offerta jew weghda ta' xi vantagg mhux xieraq ghalih innifsu jew ghal xi hadd iehor bil-ghan li jezercita xi influwenza mhux xierqa bhal ma hemm imsemmija fis-subartikolu (1). Mela hawn is-suggett attiv huwa A li qed jaccetta jew jircevi minnghan B xi vantagg mhux xieraq ghalih innifsu jew ghal xi hadd iehor, bil-ghan li jezercita influwenza mhux xierqa fuq C. (sottolinear tal-Qorti)."

"Is-subartikolu (3) mbaghad jiddisponi li r-reati msemija fis-subartikoli (1) u (2) ikunu saru ghal kollox sew jekk il-kapacita' allegata li ssir influwenza mhux xierqa kienet jew ma kienetx tezisti, sew jekk l-influwenza tkun jew ma tkunx saret u sew jekk l-influwenza pretiza twassal jew ma twassalx ghar-rizultat intiz."

"Illi ghalhekk jidher car li biex jissussisti r-reat imsemmi fl-art.121A (2) ikun hemm bżonn li s-soggett attiv A ikun accetta jew irceva l-vantagg mhux xieraq, bil-ghan li jezercita influwenza fuq kif jiddeciedi C, ossia terza persuna, u mhux semplicement ikun accetta vantagg biexjinfluwenza lilu nnifsu."Ta' l-ewwel hu r-reat ta' min **iwieghed jew joffri**. It-tieni hu r-reat ta' min **jircievi jew jaccetta** xi offerta jew wegħda ta' vantagg mhux xieraq. Fiz-zewg kazijiet is-suggett attiv hu differenti. Ir-reati differenti mħumiex komprizi jew involuti f' xulxin.

L-istess Qorti qalet dan fis-sentenza tagħha **Il-Pulizija vs Godfrey Formosa**:¹⁸

Dak li ma jsegwix huwa r-reat fl-ewwel imputazzjoni li tagħmel riferenza għall-artikolu 121 A (1) tal-Kap. 9 li huwa mod wiehed ta' kif jigi konsumat ir-reat ta' trading in influence, jew ahjar att li permezz tiegħu l-awtur (A) iwieghed jew ihallas lil haddiehor (B) sabiex dan ta' l-ahhar (B) jinfluwixxi b' mod mhux xieraq fuq terz (C).

.....

Dan l-agir zgur ma jammontax għal trading in influence..... Allora dan ifisser li għal trading in influence irid ikun hemm is-soggett attiv (A) li jwiehed lil (B) sabiex (B) jinfluwixxi fuq (C) għal beneficju ta' xi hadd anke terz (D).

Issa fil-kaz in dezamina il-prosekuzzjoni qed takkuza lill-imputat li hu wieghed, ta jew offra xi vantagg mhux xieraq lil Noel Agius sabiex jinfluwenza d-decizjoni ta' missieru, allegatament is-Sindku ta' San Gwann, rigward għoti ta' *tender* fuq għbir ta' skart li kien qed jitfa' offerta għaliha Sammy Borg.

¹⁸ Per Onor. Imhalled Edwina Grima, Deciza 26.10.2017, Appell Krim. Nru. 99/2017

Izda jirrizulta ampjament ppruvat li Agius qatt ma kellu l-intenzjoni li jipprova jinfluwenza lill-missieru. Fis-sentenza mogħtija fil-kawza **II-Pulizija vs Lourdes Castillo**, il-Qorti tal-Appell Kriminali kkunsidrat:¹⁹

Dan l-artikolu huwa msejjes fuq l-artikolu 12 tal-Konvenzjoni tal-Kunsill tal-Ewropa dwar il-Korruzzjoni.

Dan l-artikolu jgħid hekk:

Article 12 – Trading in influence

*‘Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, **in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.***

U l-ispejja tiegħu fl-Explanatory Report hija din li ġejja:

‘Article 12 – Trading in influence

64. This offence is somewhat different from the other – bribery-based – offences defined by the Convention, though the protected legal interests are the same: transparency and impartiality in the decision-making process of public administrations. Its inclusion in the present Convention illustrates the comprehensive approach of the Programme of Action against Corruption, which views corruption, in its various forms, as a threat to the rule of law and the stability of democratic institutions. Criminalising trading in influence seeks to reach the close circle of the official or the political party to which he belongs and to tackle the corrupt behaviour of those persons who are in the neighbourhood of power and try to obtain advantages from their situation, contributing to the atmosphere of corruption. It permits

¹⁹ Per Onor. Imhalled Lawrence Quintano LL.D., Deciza 10 ta’ Jannar 2014

Contracting Parties to tackle the so-called "background corruption", which undermines the trust placed by citizens on the fairness of public administration. The purpose of the present Convention being to improve the battery of criminal law measures against corruption it appeared essential to introduce this offence of trading in influence, which would be relatively new to some States.

65. This provision criminalises a corrupt trilateral relationship where a person having real or supposed influence on persons referred to in Articles 2, 4, 5, and 9 – 11,²⁰ trades this influence in exchange for an undue advantage from someone seeking this influence. The difference, therefore, between this offence and bribery is that the influence peddler is not required to "act or refrain from acting" as would a public official. The recipient of the undue advantage assists the person providing the undue advantage by exerting or proposing to exert an improper influence over the third person who may perform (or abstain from performing) the requested act. **"Improper" influence must contain a corrupt intent** by the influence peddler: acknowledged forms of lobbying do not fall under this notion. Article 12 describes both forms of this corrupt relationship: active and passive trading in influence. **As has been explained (see document GMC (95) 46), "passive" trading in influence presupposes that a person, taking advantage of a real or pretended influence with third persons, requests, receives or accepts the undue advantage, with a view to assisting the person who supplied the undue advantage by exerting the improper influence. "Active" trading in influence presupposes that a person promises, gives or offers an undue advantage to someone who asserts or confirms that he is able to exert an improper influence over third persons.**

66. States might wish to break down the offence into two different parts: the active and the passive trading in influence. The offence on the active side is quite similar to active bribery, as described in Article 2, with some differences: a person gives an undue advantage to another person (the 'influence peddler') who claims, by virtue of his professional position or social status, to be able to exert an improper influence over the decision-making of domestic or foreign public officials (Articles 2 and 5), members of domestic public assemblies (Article 4),²¹ officials of international organisations, members of international parliamentary assemblies or judges and officials of international courts (Articles 9-11). The passive trading in influence side resembles passive bribery, as described in Article 3, but, again the influence peddler is the one who receives the undue advantage, not the public official. What is

²⁰ Din il-frazi takkwista sinifikat aktar l-isfel meta jigi kkunsidrat jekk il-prosekuzzjoni ressqietx prova li missier Agius kien persuna msemmija fis-Sub-Titolu IV tat-Titolu III tat-Tieni Parti tal-Ewwel Ktieb tal-Kodici Kriminali

²¹ Ibid.

*important to note is the outsider position of the influence peddler: he cannot take decisions himself, but misuses his real or alleged influence on other persons. **It is immaterial whether the influence peddler actually exerted his influence on the above persons or not as is whether the influence leads to the intended result.***

L-Ewwel Qorti tat ir-raġunijiet għala ma dan ir-reat ma jissustix fil-konfront tal-appellanti. Meta l-appellanti kienet qed tgħid li taf lill-ex-Ministru u lix-xufiera tiegħu, din kienet kollha **messa in xena**.

.....

Huwa tassew li f'ċerti liġijiet, bħal, per eżempju fil-Kapi 31 u 101, insibu dispożizzjoni li tgħid hekk:

'The conspiracy referred to in subarticles 1(d) and 1(f) shall subsist from the moment in which any mode of action whatsoever is planned or agreed upon between such persons.'

Iżda s-sitwazzjoni kkontemplata fis-subinċiż (3) tal-artikolu 121A hija differenti minn dik kkontemplata fis-subinċiżi li għadhom kif issemmej. Fiż-żewġ subinċiżi wieħed mill-elementi tar-reati hemm imsemmija huwa 'l-għan'. Per eżempju, fis-subinċiż (2) hemm il-kliem 'bil-għan li jeżercita xi influwenza'.

U fl-explanatory report tal-Konvenzjoni hemm referenza għall-'corrupt intent'.

Issa mill-provi fil-proċess minn imkien ma tirriżulta din l-intenzjoni. Biex jiskatta l-paragrafu (3) tal-artikolu 121A irid li minn xi prova jkun jirriżulta tali intenzjoni. Jekk hemm provi ta' din l-intenzjoni, jsegwi li wieħed jista' jinstab ħati taht l-artikolu 121A ukoll jekk il-kapċita allegata ma kinitx teżisti. Mela jekk fil-mument tal-ftehim, min jirċievi l-flus jkun għadu jikkontempla lil min ser itihom biex jista' juża l-influwenza tiegħu, ir-reat xorta jkun twettaq għaliex l-għan li ssir xi haġa li mhux xierqa diġa' qiegħed hemm u l-elementi kollha tar-reat ikun jissusistu minkejja li dak li jkun ikun għadu jħammem dwar min tista' tkun il-persuna addattata. Ir-reat ukoll jitwettaq jekk wieħed jawniċina lil xi ħadd biex jinfluwenzah iżda din linfluwenza ma sseħx. (Qabbal l-artikolu 22(5) tal-Kap 101).

Imma fiċ-ċirkostanzi ta' dan il-każ, l-Ewwel Qorti kienet korrettissima meta ddeskriviet li dak li sar kien biss messa in scena u xejn aktar. Qatt ma kien hemm l-iċken ħsieb li jsir influwenza fuq xi ħadd.

Fil-fatt **Noel Agius** jammetti li kien inganna lil John Borg u lil Sammy Borg billi taghhom l-impresjoni li huwa kien ser jghinhom sabiex jirbhu t-tender:²²

Pros: Jigifieri inti ghidtilhom li ha tghinhom biex jirbhu t-tender?

Xhud: Ezattament

Pros: Tajjeb. U allura x'gara sadanittant?

*Xhud: Sadanittant ltqajna kemm il darba ut-tender **hadha Sammy Borg**, pero' hadha Sammy Borg ghax kontu ccekjajtu intom wkoll intom, **hadha Sammy Borg bla ghajnuna ghax kellhu maggoranza tal-voti**, ghax kellu l-karti kollox kif suppost.*

Riprodott izid:²³

"I led them to believe that I would help them in winning the tender as my father was the Mayor of San Gwann during that period. My father had no clue that I was dealing with John Borg and Sammy Borg and insist that my father had no involvement in anything related to these events."

Fid-dawl tal-gurisprudenza enuncjata, din l-imputazzjoni ma tistax tissussisti galadarba dan ir-rekwizit, l-intezjoni tal-*influence peddler* li jezercita *improper influence* fuq terz, (is-Sindku ta' San Gwann), hi mankanti, minkejja li *active trader in influence* ikun ghall kollox injar minn dan il-fatt.

²² A fol 43 et seq

²³ A fol 275 et seq

Inoltre` minkejja li Agius, bix-xhieda tieghu meta jitkellem fil-plural, (“them”), jaghti l-impressjoni li anke l-imputat kien involut fil-*bidding* tat-tender, ma gie pruvat lanqas remotament li dan kellu xi shab jew involviment fl-entrapriza li kienet qed tibbiddja ghal dik it-tender. Fil-fatt analizi tad-dokumenti esebiti dwar l-ghoti tat-tender ghall-gbir tal-iskart minn San Gwann²⁴ kollha jaghmlu riferenza ghall Sammy Borg Enterprises Ltd, jew ghal Sammy Borg. L-imputat John Borg ma jissemma mkien.

Illi aktar sinifikanti hu l-fatt li ma giex soddisfacentement ippruvat li kien effettivament l-imputat li ghamel il-ftehim ma Agius, jew li kien hu li weghdu, offrielu jew tah xi flejjes! Lanqas ma gie pruvat sal-grad rikjest li meta sar il-ftehim ma Agius l-imputat kien prezenti, anzi Agius stess hu cjar meta jiddikjara li l-ftehim sar ma Sammy: *“Before receiving the payment of €4000 I met with John Borg and Sammy Borg about four or five times. During our meetings we discussed the tender that Sammy Borg was submitting..... Originally I agreed with Sammy Borg that he would pay me €12000 for four years. Sammy Borg gave me a cheque of €24000 and two bills of exchange of €12000 each. A few days later we spoke about it again and he said he made a mistake....We then decided we would meet at Andrews Bar at St Julians and he told me he would bring along his business partner John Borg. During the meeting we agreed there was a misunderstanding and John Borg kept insisting that there was no problem and everything would be sorted outSammy was worried that his tender would be too high and might not win him the contract....A few days later Sammy*

²⁴ Dok.T1 sa T7

Borg called again saying he could not give me the money we agreed on, so instead we agreed on €4000 over the phone....."²⁵

Illi b'hekk jirrizulta li l-imputat dahal fix-xena wara li kien sar il-ftehim bejn Sammy u Agius; hu minnu li akkumpanja lil Sammy kemm qabel u kemm wara li sar il-ftehim bejn Sammut u Agius, izda ma jirrizultax li kien prezenti meta sar il-ftehim jew meta Borg ghadha c-cheque u l-kambjali lil Agius. Sahansitra Agius itemm ix-xhieda tieghu hekk: "Sammy Borg was meant to give me another €4000 by the end of 2010 and John Borg said he would pay the €4000 if Sammy Borg had a problem or did not have the money. John Borg kept on insisting that he would be Sammy Borg's guarantor."²⁶

Issir riferenza ghas-sentenza tal-Qorti tal-Appell Kriminali **Il-Pulizija vs Keith Stagno Navarra:**²⁷

11. Fil-liġi Maltija, il-figura ta' *accessory after the fact* li teżisti fil-liġi Ingliża ma tiffurmax parti mill-elementi inklużi u msemmija tassattivament fil-liġi, biex ikun hemm komplicità' fir-reat. [Appell Kriminali Inferjuri **Il-Pulizija kontra Shirley Chircop**, 6 ta' Ġunju 2002] Fin-Noti tal-Professor Mamo [Paġna 126. 8] insibu dan li ġej: 'Concurrence after the fact is impossible. All that comes after the event cannot be the cause thereof ... it is extraneous to its happening whatever its connection with it. Thus to receive stolen articles, or to harbour a fugitive from the prisons, or to conceal the dead body of a murdered person, cannot in themselves considered as a participation in the respective crimes. All such actions may be, in fact, are made punishable by the law as offences 'sui generis' but it would be absurd to regard them as forms of accession to the crime. Nor can it be objected that such actions are very often but the carrying out of a previous promise; for, in any such case, the antecedent promise being made to

²⁵ Fol.276-277

²⁶ Fol.277

²⁷ Per Onor.Imhalled David Scicluna, Deciza 11.12.2017; App. Nru. 307/12 DS

appear, it would be such promise made before the event that would constitute complicity and not its fulfilment after the fact.'

Illi fid-dawl ta' dak li jixhed Agius, ghalkemm jirrizulta li ltaqa' kemm ma Sammy kif ukoll mal-imputat xi 4 darbiet qabel mar sar il-ftehim ma Sammy, jibqa' ma giex ppruvat sal-grad rikjest li l-ftehim sar fil-presenza tal-imputat jew li kien l-imputat li tah xi pagamenti. Anzi bixhieda tieghu jeskludi lill-imputat: *"Originally I agreed with Sammy Borg that he would pay me €12000 for four years. Sammy Borg gave me a cheque of €24000 and two bills of exchange of €12000 each. A few days later we spoke about it again and he said he made a mistake....Sammy was worried that his tender would be too high and might not win him the contract....A few days later Sammy Borg called again saying he could not give me the money we agreed on, so instead we agreed on €4000 over the phone....Sammy Borg was meant to give me another €4000 by the end of 2010..."*.²⁸

Ghalhekk il-provi juru li l-imputat involva ruhu attivament wara li kien sehh il-ftehim bejn Sammy Borg u Noel Agius; wara li Sammy ghadda flejjes lil Noel, u ghalhekk l-irwol tieghu, fl-aghar ipotezi, jinkwadra ruhu perfettament f'dak t'*accessory after the fact*, kuncett aljen ghad-dritt procedurali penali taghna.

Illi fl-ahhar nett ghandu jigi sottolinejat li qabel l-emendi introdotti bl-*Att IV tal-2013*, l-artikolu 121A(1) tal-Kodici Kriminali kien jipprovdi:

²⁸ Fol.276-277

121A. (1) Kull min iwiegħed, jagħti jew joffri, sew b'mod dirett sew indirett, xi vantaġġ mhux xieraq lil xi persuna oħra li tasserixxi jew tikkonferma li huwa jew hija jkunu kapaċi li jagħmlu xi influwenza mhux xierqa fuq il-mod **kif tiddeċiedi xi persuna li hemm imsemmija fl-artikoli preċedenti ta' dan is-subtitolu**, sabiex iġieghel lil dik il-persuna oħra tesercita dik l-influwenza, sew jekk dak il-vantaġġ mhux xieraq ikun għal dik il-persuna oħra jew għal xi ħadd ieħor,

Illi kien biss bl-emendi introdotti fl-2013 li zdiedet il-frazi "*u ta' xi persuna oħra*"²⁹ mal-frazi "*xi persuna li hemm imsemmija fl-artikoli preċedenti ta' dan is-subtitolu*", u dan kien intiz sabiex jigi kriminalizzat l'hekk maghruf *it-trading in influence in the private sector*.

Ghaldaqstant biex treggi din l-akkuza li tirreferi għall-kondotta li sehhet qabel ma giet introdotta din l-emenda, kellu jigi pruvat li missier Noel Agius kien persuna li hemm imsemmija fis-Sub-Titolu IV tat-Titolu III tat-Tieni Parti tal-Ewwel Ktieb tal-Kodici Kriminali, *inter alia*, persuna msemmija fl-artikolu 121(4)(e) u cioe` "*xi membru, ufficjal jew impjegat ta' Kunsill Lokali*".

Illi Dr. Angele Vella, in rappreżentanza tad-Dipartiment tal-Gvern Lokali, xehdet unikament fuq Frank Fabri u mhux fuq J.M. Agius; ma saritilha l-ebda domanda dwar il-Kunsill ta' San Gwann jew dwar min kienu il-membri, ufficjali jew impjegati fi hdanu fiz-zmien prospettat bit-tieni akkuza!³⁰ Ghalhekk baqa ma giex determinat li fil-fatt missier Noel Agius, fiz-zmien li ntlahaq il-ftehim ma Sammy Borg, kien involut fil-

²⁹ 121A. (1) Kull min iwiegħed, jagħti jew joffri, sew b'mod dirett sew indirett, xi vantaġġ mhux xieraq lil xi persuna oħra li tasserixxi jew tikkonferma li huwa jew hija jkunu kapaċi li jagħmlu xi influwenza mhux xierqa fuq il-mod kif tiddeċiedi **xi persuna li hemm imsemmija fl-artikoli preċedenti ta' dan is-subtitolu u ta' xi persuna oħra**, sabiex iġieghel lil dik il-persuna oħra tesercita dik l-influwenza, sew jekk dak il-vantaġġ mhux xieraq ikun għal dik il-persuna oħra jew għal xi ħadd ieħor,.....

³⁰ Fol.92-94

Kunsill ta' San Gwann, u b'hekk jikkwalifika bhala persuna li ssir riferenza ghalha fl-artikolu 121A(1) tal-Kodici. Ghalkemm hu minnu li gie esebit il-kuntratt bejn il-Kunsill ta' San Gwann u Sammy Borg, li jgib id-data tat-8 ta' Frar, 2010,³¹ u minn fejn jirrizulta li s-Sindku kien certu J.M. Agius, sabiex dan ir-rekwizit jigi sodisfatt kellu anke jigi pruvat li fiz-zmien li sar il-ftehim bejn Sammy Borg u Noel Agius, missieru kien verament "*xi membru, ufficjal jew impjegat ta' Kunsill Lokali*". Dak li jixhed Noel Agius, li missieru kien is-Sindku, jammonta ghall-*hearsay*, meta korollarju ghall-artikolu 598 tal-Kodici t'Organizzazzjoni u Procedura Civili, u l-artiklu li jsegwi mmedajament warajh, ukoll rez applikabbli ghall-procedurali penali bl-artikolu 520(1)(d) tal-Kodici jipprovdi:

559. Il-qorti ghandha fil-każijiet kollha tordna li ssirilha l-aħjar prova li l-parti tista' ġgib.

Mill-banda l-oħra l-artikolu 638(1) tal-Kodici Kriminali jipprovdi:

638. (1) Bħala regola, għandu jitqies li tingieb il-prova l-aktar shiħa u sodisfaċenti illi l-każ ikun jagħti, u li ma jithalla barra ebda xhud li x-xieħda tiegħu tkun importanti.

Ghalhekk kien jinkombi fuq il-prosekuzzjoni biex tipprova dan ir-rekwizit essenzjali sabiex javvera ruhu r-reat ravvizat bl-artikolu 121A tal-Kodici Kriminali.

³¹ Dok.T7 a fol.138

Ghal dawn il-mottivi, in vista tal-mankanza assoluta ta' provi, il-Qorti mhux qed issib lill-imputat hati u konsegwentement tilliberah minn kwalunkwe htija u piena.

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