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

Magistrat Dr. Joseph Mifsud B.A. (Legal & Int. Rel.),
B.A. (Hons), M.A. (European), LL.D.

Il-Pulizija
(Spettur Johann J. Fenech)

vs.

Dorothy Refalo

Numru: 105/2010

Illum 22 ta' Mejju 2019

Il-Qorti;

Rat l-imputazzjonijiet migjuba kontra l-imputata **Dorothy Refalo**, bint Peter u Mary Grace nee' Pisani, imwielda r-Rabat, Ghawdex, nhar it-13 ta' Dicembru 1971, residenti fil-fond numru 57, Triq Ghajn Qatet, Rabat, Ghawdex u detentrici tal-karta tal-identita' bin-numru 2872(G), akkuzata talli f'dawn il-Gzejjer matul ix-xhur ta' Lulju u Awissu 2009:

a) Forniet jew ipprokurat jew offriet li tforni jew li tipprokura d-droga Erojina specifikata fl-ewwel skeda tal-Ordinanza dwar il-medicini Perikoluzi Kap. 101 tal-Ligijiet ta' Malta lill-persuna jew persuni jew ghall-uzu ta' persuna/i minghajr ma kellha licenzja mill-President ta' Malta minghajr ma kienet awtorizzata bir-regoli tal-1939 ghall-kontroll intern tad-drogi perikoluzi (G.N.292/1939) jew minn xi awtorita' moghtija mill-President ta' Malta li tforni d-droga u minghajr ma kienet fil-pussess ta' awtorizazzjoni ghall-importazzjoni jew esportazzjoni mahruga mit-Tabib Principali tal-Gvern skont id-dispozizzjonijiet tas-sitt taqsima tal-Ordinanza imsemmija u minghajr ma kellha licenzja jew xorta ohra awtorizzata li timmanifattura jew tforni d-droga imsemmija u minghajr ma kellha licenzja li tipprokura l-istess droga u dan bi ksur tar-regoli tal-1939 ghall-kontroll intern tad-drogi perikoluzi (G.N. 292/1939) kif sussegwentament emmendati u bi ksur tal-Ordinanza dwar il-Medicini Perikoluzi Kap. 101 tal-Ligijiet ta' Malta;

b) U aktar talli fit-23.03.2010 u matul il-gimghat ta' qabel din id-data kellha fil-pussess taghha d-droga Erojina specifikata fl-ewwel skeda tal-Ordinanza dwar il-medicini perikoluzi Kap. 101 tal-Ligijiet ta' Malta meta ma kinitx fil-pussess ta' awtorizzazjoni ghall-importazzjoni jew ghall-esportazzjoni mahrug mit-Tabib Principali tal-Gvern skont id-dispozizzjonijiet tar-4 u s-6 Taqsima tal-Ordinanza u meta ma kinitx bil-licenzja jew xorta ohra awtorizzata li timmanifattura, jew li tforni d-droga msemmija u meta ma kinitx b'xi mod iehor bil-licenzja mill-President ta' Malta li jkollha d-droga msemmija fil-pussess taghha u naqset li tipprova li d-droga msemmija giet fornuta lilha ghall-uzu taghha skont ir-ricetta kif provdut fir-regolamenti msemmija u dan bi

ksur tar-regoli tal-1939 dwar il-kontroll intern tad-drogi perikoluzi (G.N. 292/1939) kif sussegwentament emmendati u bi ksur tal-Ordinanza dwar il-Medicini Perikoluzi Kap. 101 tal-Ligijiet ta' Malta, liema droga nstabet f'tali cirkustanzi li juru li ma kinitx ghall-uzu esklussiv taghha;

Il-Qorti giet mitluba sabiex fil-kaz ta' htija, barra milli tapplika l-piena skont il-Ligi, tordna lill-imputata thallas l-ispejjez li ghandhom x' jaqsmu mal-hatra tal-esperti skont l-Artikolu 533 tal-Kapitolu 9 tal-Ligijiet ta' Malta.

Rat l-ordni tal-Avukat Generali *ai termini* tas-subartikolu (2) tal-Artikolu 22 tal-Ordinanza dwar il-Medicini Perikoluzi (Kapitolu 101 tal-Ligijiet ta' Malta) (Dok. "C").

Rat illi din il-kawza giet assenjata lil din il-Qorti kif preseduta b'digriet datat 30 ta' Gunju 2015 moghti mis-Sinjurija Tieghu l-Prim'Imhallef.

Rat illi fis-seduta tal-5 ta' April 2017 il-Qorti tat cans lill-Prosekuzzjoni u lid-Difiza sabiex jipprezentaw is-sottomissjonijiet taghhom bil-miktub.

Rat illi l-Prosekuzzjoni pprezentat is-sottomissjonijiet taghha bil-miktub fl-4 ta' Mejju 2017.

Rat illi d-Difiza pprezentat is-sottomissjoni taghha bil-miktub fil-5 ta' Gunju 2017.

Rat l-atti kollha ta' dan il-procediment u d-dokumenti esebiti.

XHIEDA

F'dan il-kaz xehdu 13-il xhud:

Spettur Johann J. Fenech (a fol. *13 et seq.), WPS 136 Charlene Ciantar (a* fol. *19.), PS 1086 Johann Micallef (a* fol. *20 et seq.), WPC 109 Frances Portelli (a* fol. *22 et seq.), Spizjar Mario Mifsud (a* fol. *29), WPC 127 Carmen Gauci (a* fol. *42 et seq.), Spettur Johann J. Fenech (a* fol. *58 et seq.), Spettur Johann J. Fenech (a* fol. *63 et seq.), Gina Camilleri (a* fol. *73), Dr. Peter Muscat (a* fol. *82 et seq.), Rodianne Azzopardi (a* fol. *85 et seq.), Noel Scerri (a* fol. *91 et seq.) u PC 138 Joseph Portelli (a* fol. *96 et seq.).*

IL-FATTI TAL-KAZ

L-imputata tinsab mixlija bi traffikar ta' eroina u li kellha fil-pussess taghha l-istess tip ta' droga liema droga nstabet f'tali cirkostanzi li juru li ma kinitx ghall-uzu esklussiv taghha. Illi l-perjodu indikat fl-akkuza huwa Lulju u Awwissu 2009. Jirrizulta li l-pulizija xlew lill-istess imputata f'kaz iehor relatat mat-traffikar ta' droga. F'dak il-kaz il-pulizija xlew lill-imputata li "**f'dawn il-Gzejjer nhar it-tlieta ta' Marzu, 2010, u matul l-ahhar erba' snin ta' qabel**" liema kawza giet deciza anke fl-istadju tal-Appell b'sentenza moghtija mill-Imhallef Giovanni Grixti fis-26 ta' April 2019[1]. L-imputata permezz tal-Avukat taghha Dottor Angie Muscat kienet qajmet l-eccezzjoni ta' nebis in idem u allura din il-Qorti stenniet l-ezitu tal-kawza l-ohra qabel bdiet tiddelibera u tiddeciedi dwar dan il-kaz tallum.

[1] Appell Nru 275/2017 Il-**Pulizija (Spettur Bernard c. Spiteri) vs Dorothy Refalo**

KUNSIDERAZZJONIJIET LEGALI

Il-kunċett ta' *nebis in idem*

Issir referenza għad-diċitura tal-liġi koncernanti l-kunċett ta' *nebis in idem*, naraw li dan il-priċipju huwa indikat kemm fil-Kodiċi Kriminali kif ukoll fil-Kostituzzjoni ta' Malta u dan fl-artikolu 527 u l-artikolu 39(9) rispettivament. Dawn jinqraw kif ġej:

> 527. '*Wara sentenza li f'kawza tillibera imputat jew akkuzat, dan ma jistax għall-istess fatt ikun suġġett għal kawza oħra.*'

> 39(9). '*Ebda persuna li turi li tkun għaddiet proċeduri quddiem xi qorti kompetenti għal reat kriminali u jew tkun ġiet misjuba ħatja jew liberata ma għandha terga tgħaddi proċeduri għal dak ir-reat jew għal xi reat kriminali ieħor li għaliħ setgħat tiġi misjuba ħatja fil-proċeduri għal dak ir-reat ħlief wara ordni ta' qorti superjuri mogħti matul il-kors ta' appell jew proċeduri ta' reviżjoni dwar id-dikjarazzjoni ta' ħtija jew liberazzjoni; u ebda persuna ma għandha tgħaddi proċeduri għal reat kriminali jekk turi li tkun ħadet il-maħfra għal dak ir-reat;...*'

Illi jekk inqabblu d-diċitura ta' dawn iż-żewġ disposizzjonijiet naraw li fil-Kodiċi Kriminali jitqies il-'fatt' jew il-mertu tal-każ ai fini ta' din il-kunsiderazzjoni filwaqt li fil-Kostituzzjoni tagħna, liema liġi hija kkunsidrata bħala l-liġi suprema ta' pajjiżna, ir-riferiment isir għar-reat

kriminali. Għaldaqstant jidher li in vista tad-diċitura tal-Kostituzzjoni sabiex jitqies jekk japplikax il-priċipju o meno trid isir referenza kemm għall-fatti kif ukoll għar-reat kriminali formanti l-mertu tal-fatt u kwindi anki l-elementi tar-reati jridu jittieħdu in kunsiderazzjoni.

F'sentenza moghtija mill-Qorti Kostituzzjonali, nhar il-hamsa u ghoxrin (25) ta' Mejju, tas-sena elfejn u ghaxra (2010), fl-ismijiet **Francis Vella vs Avukat Generali,** il-Qorti fil-kunsiderazzjonijiet taghha, spjegat hekk il-principju tan-nebis in idem: '*Il- Kostituzzjonali ta' Malta u l-Konvenzjoni Ewropeja jiprojbixxu proceduri kriminali darbtejn fuq l-istess fatt, anke jekk fit-tieni process tinbidel in nomen iuris ta' l- akkuza...'*

<u>Il-kuncett kif applikat minn Qrati differenti[2]</u>

<u>Qorti tal-Appell Kriminali</u>

Li l-poziżzjoni legali dwar in-nebis in idem kif toħrog ̇mill-kaziżtika tal-Qorti tal-Appell Kriminali hija s-segwenti:

a) Meta fatt jivvjola aktar minn provvediment wieħed tal-Ligi

Illi jista' jiġri li l-istess fatt jista' jivvjola aktar minn provvediment wieħed tal-ligi u għalhekk jista' joħloq diversi raġunijiet għall-inkriminazzjoni. X'inhu fatt kien spjegat fil-kaz ̇'**Rex versus Rosaria**

[2] Seduta ta' l-14 ta' Mejju, 2012 Numru 6/2011 Ir-**Repubblika ta' Malta Vs Christian Grech** Sentenza dwar l-Eċċezzjonijiet Preliminari ppreseduta mill-Imhallef Lawrence Quintano

Portelli' fil-kaz ̇deċiż ̇fit-23 ta' Frar, 1904 (Vol.XIX.P.IV p1). Il-Qorti kienet qalet hekk:

> *'La legge intende il fatto principale in quanto meritevole di pena, o come altri si espresse non intende semplicemente il fatto storico o naturale nei suoi diversi momenti ma il fatto giuridico nel suo complesso,'*

Dwar dan il-Professur Mamo fin-Noti tiegħu dawar il-Proċedura (paġina 45) jgħid hekk:

> *'In any such case if the agent is tried for any one of the several violations of the law arising out of that fact, be it even the least serious, and a judgement is given, it shall not be lawful to subject the agent to another trial for the more serious violations.*
>
> *This principle, first expressly affirmed in 'Rex versus Rosaria Portelli' has now become settled law.'*

Fil-fatt fit-2 ta' Diċembru, 1939, l-Imħallef Harding fil-kaz ̇'**Camilleri versus Cilia**' kien qal li huwa prinċipju stabbilit fil-ġurisprudenza tagħna li meta mill-istess fatt, mibni fuq l-istess intenzjoni, jinkisru żewġ ̇ drittijiet jew aktar, m'hemmx pluralita' ta' offiżi iżda offiżà waħda bil-vjolazzjonijiet li jkunu iżġħar ikunu assorbiti fil-vjolazzjoni l-aktar serja. U jekk persuna tkun iġġudikata għal waħda mill-vjolazzjonijiet u jkun meħlus jew jinstab ħati, is-sentenza żżomm kull prosekuzzjoni ġdida li

tista' ssir għal kull vjolazzjoni oħra, ukoll jekk il-vjolazzjoni li jkun tressaq fuqha l-ewwel darba tkun l-anqas waħda serja.

Fil-kaz "**Rex versus Agatha Mifsud et**' tal-15 ta' Ġunju, 1918 (VolXXIII. Part I p.1077), kaz li huwa kkwotat ukoll mill-Professur Mamo f'pagna 44 ta' l-istess Noti ċitati, il-Qorti kienet qalet hekk:

> *'L'eccezione sollevata dagli accusati ed accolta dalla Corte si fonda sul motivo che I fatti esposti nell'odierno atto di accusa per corruzione di minorenni sono quelli stessi che furono addotti in un precedente giudizio per adulterio pel quale furono processati e liberati.'*

Lejn it-tmiem tas-sentenza l-Qorti ikkwotat b'approvazzjoni dak li qalet il-High Court Inġliża f'**Regina versus Miles'** u qalet hekk:

> *'No doubt it seems a little startling that a conviction for a common assault should afford an answer to a subsequent indictment for that same assault, upon conclusive evidence that it was accompanied by an intent to murder; but reason and good sense point out that, even at the risk of occasional miscarriages of justice when once a criminal charge has been adjudicated upon by a Court having jurisdiction, that adjucative ought to be final.....'*

<u>(b) Mill-kaziistika tal-Qorti Kostituzzjonali</u>

F'dan il-kamp zewg deċiżjonijiet tal-Qorti Kostituzzjonali huma relevanti:

(i) Il-**Pulizija (Spettur Angelo Caruana) versus Anthony Zammit, John Woods u Ahmed Esawi Mohamed Fakri** tal-10 ta' Jannar 2005; u

(ii) Il-**Pulizija (Spettur Jesmond Borg) versus Kevin Gatt** tal-15 t'April, 2008.

Fl-ewwel waħda l-Qorti Kostituzzjonali kienet sabet possibilita' ta' ksur tal-prinċipju *nebis in idem* minħabba li l-imputati kienu digà' tilfu r-*remission* mill-perjodu ta' prigunerija tagħhom u allura, jekk jgħaddu proċeduri oħra quddiem il-Qorti, kien ikun qed jinkiser il-prinċipju msemmi. F'din id-deċiżjoni l-Qorti Kostituzzjonali kienet iffokat fuq il-kwistjoni jekk il-proċeduri li l-imputati kienu għaddew quddiem l-Awtoritajiet fil-Faċilita' Korrettiva ta' Kordin kinux proċeduri kriminali jew le. Il-Qorti ddeċidiet li dawn kienu proċeduri kriminali u qieset il-'*loss of remission*' bħala piena kriminali.

Fil-kawzà 'Il-**Pulizija versus Kevin Gatt**' il-Qorti Kostituzzjonali eżaminat jekk il-Kummissarju tal-Pulizija, wara li jkun ressaq persuna fuq ksur tal-kundizzjonijiet tal-liberta' provvizzòrja u dan kien punit, setax jibda proċediment ieħor billi jitlob espressament għat-telfien tal-liberta' provvizòrja għaliex fl-ewwel rikors kien għamel talba waħda. Il-Qorti Kostituzzjonali wkoll sabet li t-tieni proċedura tikser il-prinċipju ta' *nebis in idem*.[3]

[3] Barra dawn iż-żewġ deċiżjonijiet, il-problema kienet mistħarrgà mill-Prim'Awla tal-Qorti Ċivili f'sentenza mogħtija fl-10 ta' Mejju 1990 mill-Imħallef il-Professur Victor Borg Costanzi fl-ismijiet '**John Gauci versus Kummissarju tat-Taxxi Interni et**' fejn il-Qorti kienet qalet hekk:

(c) Mill-Kaz istika tal-Qorti Ewropea Dwar id-Drittijiet tal-Bniedem

Mid-deċiżjonijiet tal-Qorti Ewropea dwar id-Drittijiet tal-Bniedem il-Qorti qed tirreferi għal dawn id-deċiżjonijiet:

Ponsetti and Chesnel versus France – Deċiżjoni tal-14 ta' Settembru 1999 fejn rikors li kien jallega ksur tal-priċinċipju tan-*nebis in idem* għaliex kien hemm sanzjonijiet amministrattivi kif ukoll kriminali minħabba li r-rikorrent ma kienx mela d-dikjarazzjonijiet tat-taxxa kien dikjarat mhux ammissibbli.

Isaksen versus Norway – fejn kien hemm kundanna minħabba frodi tat-taxxa kif ukoll impożizzjoni tat-tax surcharge kien dikjarat mhux ammissibbli (Deċiżjoni tat-2 t'Ottubru 2003).

Nilsson versus Sweden – Deċiżjoni tat-13 ta' Diċembru 2005 fejn instab li kien hemm konnessjoni qawwija bejn il-kundanna tar-rikorrent minħabba offiżi tat-traffiku u s-sospensjoni tal-liċenzja tas-sewqan għal tmintax-il xahar u għalhekk ir-rikors kien dikjarat mhux ammissibbli.

'Id-dritt taħt l-artikolu 39(9) tal-Kostituzzjoni jista' jinkiser biss jekk wara li tkun ingħatat sentenza penali li fiha jkun ġie dikjarat li l-akkużat digà' għadda proċeduri kriminali għal dak l-istess reat quddiem Qorti kompetenti, huwa jergà' jiġi espost għal proċeduri kriminali oħra dwar dak l-istess reat li għalih ikun gà' ġie misjub ħati jew li minnu jkun ġie liberat. L-eċċezzjoni ta' nebis in idem għandha tiġi mistħarrgà u deċiżà mill-Qorti li quddiemha jingieb l-akkużat u wara, jekk ikun il-kaz, il-Qorti ta' l-Appell Kriminali.'

Storbraten versus Norway (12277/04) u **Mjelde versus Norway (11143/04)** fejn kien hemm kundanna kriminali għall-offiżi dwar falliment wara li kienu nħargu ordinijiet li bihom ir-rikorrenti kien skwalifikati milli jifformaw il-kumpaniji jew li jkunu diretturi u għalhekk ir-rikorrenti allegaw ksur ta' dan il-prinċipju. Dan il-każ kien ukoll dikjarat inammissibbli.

U fl-aħħar il-każ '**Franz Fischer versus Austria'** fejn il-Qorti qed tipproduċi l-aktar siltiet importanti:

'THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

On 6 June 1996, the applicant, whilst driving under the influence of drink, knocked down a cyclist who was fatally injured. After hitting the cyclist, the applicant drove off without stopping to give assistance and only gave himself up to the police later that night.

On 13 December 1996, the St.Pol̈ten District Administrative Authority (Bezirkshauptmannschaft), finding the applicant guilty of a number of road traffic offences, ordered him to pay a fine of 22,010 Austrian schillings (ATS) with twenty days' imprisonment in default. This sentence included a fine of ATS 9,000 with nine days' imprisonment in default imposed for driving under the influence of drink, contrary to sections 5 (1) and 99 (1)(a) of the Road Traffic Act 1960 (Straßenverkehrsordnung).

On 18 March 1997 the St. Polten Regional Court (Landesgericht) convicted the applicant under Article 81 § 2 of the Criminal Code (Strafgesetzbuch) of causing death by negligence "after allowing himself ... to become intoxicated ... through the consumption of alcohol, but not to an extent which exclude[d] his responsibility ...", and sentenced him to six months' imprisonment.

Omissis

ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL NO. 7 TO THE CONVENTION

The applicant alleged a violation of Article 4 of Protocol No. 7 which, so far as relevant provides as follows:

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

The applicant contended that he was punished twice for driving under the influence of drink, first by the District Administrative Authority under sections 5 (1) and 99 (1)(a) of the Road Traffic Act and, secondly, by the Regional Court, which found that the special circumstance of section 81 § 2 of the Criminal Code applied. In the applicant's view, the conviction by the criminal courts in its entirety,

or at least the fact that the conviction was not limited to Article 80 of the Criminal Code, but also extended to Article 81 § 2, infringed Article 4 of Protocol No. 7. The applicant maintained that the present case was not comparable to the Oliveira v. Switzerland case (judgment of 30 July 1998, Reports of Judgments and Decisions 1998-V) as in that case the criminal courts had quashed the fine imposed by the police magistrate and stated that, if the fine had already been paid, it was to be deducted from the second fine. However, in his case two sentences were actually imposed.

Omissis

The Court recalls that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision (see the Gradinger judgment cited above, p. 65, § 53).

As the Government pointed out, the Court's approach in the Gradinger and Oliveira judgments in order to determine whether the respective applicants were tried or punished again "for an offence for which [they had] already been finally acquitted or convicted" appears somewhat contradictory. The Court recalls that in each case two sets of proceedings arose out of one traffic accident. In the Gradinger case, the applicant was first convicted by the criminal courts for causing death by negligence, but acquitted of the special element under Article 81 § 2 of "allowing himself to become intoxicated", where there was an irrebuttable presumption of intoxication with a blood alcohol level

of 0.8 grams per litre. He was then convicted by the administrative authorities of driving "a vehicle under the influence of drink" contrary to sections 5 (1) and 99 (1)(a) of the Road Traffic Act, where the influence of drink is deemed present with a blood alcohol level of 0.8 grams per litre.

In the Oliveira case, the applicant was first convicted by the police magistrate for failing to control her vehicle as she had not adapted her speed to the road conditions. Subsequently, she was convicted by the criminal courts of causing physical injury by negligence.

In the Gradinger case the Court, while emphasising that the offences at issue differed in nature and aim, found a violation of Article 4 of Protocol No. 7 as both decisions were based on the same conduct (ibid., §§ 54-55). In the Oliveira case it found no violation of this provision, considering that it presented a typical example of a single act constituting various offences (concours ideál d'infractions) which did not infringe Article 4 of Protocol No. 7, since that provision only prohibited people being tried twice for the same offence (see the Oliveira judgment, previously cited, p. 1998, § 26).

The Court observes that the wording of Article 4 of Protocol No. 7 does not refer to "the same offence" but rather to trial and punishment "again" for an offence for which the applicant has already been finally acquitted or convicted. Thus, while it is true that the mere fact that a single act constitutes more than one offence is not contrary to this Article, the Court must not limit itself to finding that an applicant

was, on the basis of one act, tried or punished for nominally different offences. The Court, like the Austrian Constitutional Court, notes that there are cases where one act, at first sight, appears to constitute more than one offence, whereas a closer examination shows that only one offence should be prosecuted because it encompasses all the wrongs contained in the others (see paragraph 14 above). An obvious example would be an act which constitutes two offences, one of which contains precisely the same elements as the other plus an additional one. There may be other cases where the offences only slightly overlap. Thus, where different offences based on one act are prosecuted consecutively, one after the final decision of the other, the Court has to examine whether or not such offences have the same essential elements.

This view is supported by the decision in the case of Ponsetti and Chesnel v. France (nos. 36855/97 and 41731/98 ECHR 1999-VI, [14.9.99]), relating to separate convictions for two tax offences arising out of the failure to submit a tax declaration, where the respondent Government also argued that this was an example of one act constituting more than one offence. Nevertheless, the Court examined whether the offences in question differed in their essential elements.

It can also be argued that this is what distinguishes the Gradinger case from the Oliveira case. In the Gradinger case the essential elements of the administrative offence of drunken driving did not differ from those constituting the special circumstances of Article 81 § 2 of the Criminal Code, namely driving a vehicle while having a blood alcohol level of 0.8 grams per litre or more. However, there was no

such obvious overlap of the essential elements of the offences at issue in the Oliveira case.

In the present case, the applicant was first convicted by the administrative authority for drunken driving under sections 5 (1) and 99 (1)(a) of the Road Traffic Act. In subsequent criminal proceedings he was convicted of causing death by negligence with the special element under Article 81 § 2 of the Criminal Code of "allowing himself to become intoxicated". The Court notes that there are two differences between the Gradinger case and the present: the proceedings were conducted in reverse order and there was no inconsistency between the factual assessment of the administrative authority and the criminal courts, as both found that the applicant had a blood alcohol level above 0.8 grams per litre.

However, the Court considers that these differences are not decisive. As said above, the question whether or not the ne bis in idem principle is violated concerns the relationship between the two offences at issue and can, therefore, not depend on the order in which the respective proceedings are conducted. As regards the fact that Mr Gradinger was acquitted of the special element under Article 81 § 2 of the Criminal Code but convicted of drunken driving, whereas the present applicant was convicted of both offences, the Court repeats that Article 4 of Protocol No. 7 is not confined to the right not to be punished twice but extends to the right not to be tried twice. What is decisive in the present case is that, on the basis of one act, the applicant was tried and punished twice, since the administrative offence of drunken driving

under sections 5 (1) and 99 (1)(a) of the Road Traffic Act, and the special circumstances under Article 81 § 2 of the Criminal Code, as interpreted by the courts, do not differ in their essential elements.

The Court is not convinced by the Government's argument that the case was resolved due to the reduction of the applicant's prison term by one month, being equivalent to the fine paid in the administrative proceedings. The reduction of the prison term by virtue of the Federal President's prerogative of pardons cannot alter the above finding that the applicant was tried twice for essentially the same offence, and the fact that both his convictions stand.

The Court therefore rejects the Government's preliminary objection based on the same argument.

Finally, the Court observes that, in a case like the present, the Contracting State remains free to regulate which of the two offences shall be prosecuted. It further notes that the legal situation in Austria has changed following the Constitutional Court's judgment of 5 December 1996, so that nowadays the administrative offence of drunken driving under sections 5 (1) and 99 (1)(a) of the Road Traffic Act will not be pursued if the facts also reveal the special elements of the offence under Article 81 § 2 of the Criminal Code.

However, at the material time, the applicant was tried and punished for both offences containing the same essential elements.

There has, thus, been a violation of Article 4 of Protocol No. 7.'

U fil-**<u>European Court of Justice</u>**

Din hija l-Opinjoni ta' Kokott fil-kaz ̇ta' Toshiba (C- 17/10) 14 ta' Frar 2012.

Il-Qorti għandha tuzà l-istess kriterju – ikun xi jkun il-kaz ̇quddiemha u mhux tuzà kriterja differenti skont il-kontenut. U dejjem għandu jintgħarbel jekk kienx hemm l-istess fatt jew fatti. U hawn hija l-parti l-aktar importanti l-Opinjoni tal-Avukat Gėnerali.

'117. To interpret and apply the ne bis in idem principle so differently depending on the area of law concerned is detrimental to the unity of the EU legal order. The crucial importance of the ne bis in idem principle as a founding principle of EU law which enjoys the status of a fundamental right means that its content must not be substantially different depending on which area of law is concerned. (127) For the purposes of determining the scope of the guarantee provided by the ne bis in idem principle, as now codified in Article 50 of the Charter of Fundamental Rights, the same criteria should apply in all areas of EU law. This point has rightly been made by the EFTA Surveillance Authority.

118. There is no objective reason why the conditions to which the ne bis in idem principle is subject in competition matters should be any different from those applicable to it elsewhere. For, in the same way as,

within the context of Article 54 of the CISA, that principle serves to guarantee the free movement of EU citizens in EU territory as a 'single area of freedom, security and justice', (128) so, in the field of competition law, it helps to improve and facilitate the business activities of undertakings in the internal market and, ultimately, to create uniform conditions of competition (a 'level playing field') throughout the EEA.

119. For the purposes of identifying the relevant criteria for defining idem, it must be borne in mind that the ne bis in idem principle is based largely on a fundamental right enshrined in the ECHR, (129) more specifically, Article 4(1) of Protocol No 7 to the ECHR, although that protocol has not yet been ratified by all the EU Member States. (130) That close proximity to the ECHR is indicated not only by the Explanations on Article 50 of the Charter of Fundamental Rights, which must be duly taken into account by the courts of the European Union and of the Member States, (131) but also by the previous case-law of the Court of Justice concerning the general EU-law principle of ne bis in idem. (132)

120. The requirement of homogeneity (133) is therefore applicable. It follows from that requirement that rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR. In other words, Article 4(1) of Protocol No 7 to the ECHR, as interpreted by the European Court of Human Rights (ECtHR), describes the

minimum standard that must be guaranteed in the interpretation and application of the ne bis in idem principle in EU law.

121. Whereas the case-law of the ECtHR on the meaning of idem had lacked uniformity for a long time, the ECtHR held, in a landmark judgment in 2009, that Article 4 of Protocol No 7 to the ECHR prohibits the prosecution or trial of a second offence in so far as it arises from identical facts or facts which are substantially the same. (134) This means that the ECtHR has regard only to whether or not the facts are identical and expressly not to the legal classification of the offence. (135) Moreover, in so doing, it is itself guided primarily by the case-law of the Court of Justice on the area of freedom, security and justice. (136) In addition, the form of words used by the ECtHR to define the meaning of identical facts is very similar to that employed by the Court of Justice. There is nothing to indicate that the ECtHR might be inclined to the view that the scope of the guarantee provided by the ne bis in idem principle is less extensive specifically in the area of competition law. (137) On the contrary, while the judgment of the Court of Justice in Aalborg Portland, which establishes the criterion of unity of the legal interest protected, is cited by the ECtHR, it does not rely on it as a basis for its interpretation of the ne bis in idem principle. (138)

122. It follows that, for the purposes of interpreting and applying idem in the context of the prohibition against prosecution and punishment for the same cause of action under EU law also, account

should henceforth be taken only of the identity of the facts (which necessarily includes the unity of the offender).'

KONKLUZZJONI

Il-Qorti tagħmel referenza għas-sentenza fl-ismijiet: Il-**Pulizija vs. Joseph Balzan**, deċiza mill-Qorti tal-Appell Kriminali[4] fl-20 ta' Lulju, 2011, (Appell Kriminali 505/2010) fejn ġie ritenut illi: '*Kif inhu risaput, ir-regola tan-ne bis in idem kif espresso fl-artikolu 527 tal-Kodici Kriminali hija aktar wiesa' minn kif formulata fl-artikolu 39(9) tal-Kostituzzjoni. Filwaqt li l-artikolu 39(9) tal-Kostituzzjoni jitkellem dwar "reat kriminali" u japplika d-dottrina tan-ne bis in idem ghal dak ir-"reat kriminali" partikolari li tieghu dak li jkun ikun gie misjub hati jew illiberat u ghal "reati kriminali" ohra komprizi u involuti f'dak ir-reat kriminali partikolari1, l-artikolu 527 jitkellem dwar "l-istess fatt". L-artikolu 527, infatti, jghid hekk: "Wara sentenza li f'kawza tillibera imputat jew akkuzat, dan ma jistax ghall-istess fatt ikun suggett ghal kawza ohra" (sottolinear ta' din il-Qorti). Hu* ***Anthony Vella et.*** *App. Krim., 19 ta' Frar 1999;* ***Il-Pulizija v. Adrian Cassar Galea*** *App. Krim., 20 ta' Novembru 2000). appena necessarju li jigi osservat li ghalkemm din id-disposizzjoni titkellem dwar il-liberazzjoni ta' dak li jkun, u mhux ukoll dwar il-kundanna tieghu, il-qrati taghna dejjem interpretawha bhala li tinkludi wkoll il-kaz fejn persuna tkun giet misjuba hatja ta' l-istess fatt (ara* ***Il-Pulizija v. Anthony Vella et.*** *App. Krim., 19 ta' Frar 1999;* ***Il-Pulizija v. Adrian Cassar Galea*** *App. Krim., 20 ta' Novembru 2000).'*

[4] Preseduta mill-Imħallef David Scicluna

Dwar il-materja in dizamina, din il-Qorti hi gwidata mill-insenjament emergenti mid-decizjoni tal-Qorti Kostituzzjonali fil-kawza fl-ismijiet: **Il-Pulizija vs Nicolai (Nicolai-Christian) Magrin** (Rikors numru 29/08) tal-4 ta' Gunju 2018 li kkonfermat is-sentenza fl-istess ismijiet moghtija mill-Prim'Awla tal-Qorti Civili (Gurisdizzjoni Kostituzzjonali) tas-26.3.2009 fejn kien trattat *funditus* l-elementi formanti l-prinicpju ta' *ne bis in idem* fejn ukoll kienet mistharrga d-differenza bejn l-istess fatti u l-istess reat ghal-fini ta' protezzjoni minn dupplicita' ta' proceduri kriminali.

Minn ezami tas-sentenzi appena citati, dak li din il-Qorti jehtieg li tistharreg hu jekk hemmx l-identita' ossia konkorrennza tal-istess fatt jew reat bejn iz-zewg proceduri kontra l-istess imputat. Dan ghaliex kif inghad fis-sentenza citata *supra* tal-Prim'Awla Il-**Pulizija vs Magrin**:

> *Illi huwa wkoll stabilit li l-principju tan-ne bis in idem imhares fl-artikolu 39(9) tal-Kostituzzjoni jimplika li persuna li tkun ghaddiet minn process dwar reat, m'ghandha qatt terga tghaddi minn process iehor dwar tali reat jew dwar reati ohra li setghet tinstab hatja dwarhom f'dak l-ewwel process. Dan il-principju jidher li huwa l-verzjoni tad-dritt penali ta' dak il-principju l-iehor tar-res judicata li jikkostitwixxi eccezzjoni perentorja tal-gudizzju fil-qasam tal-procedura civili".*

Għaldaqstant l-imputata ma tistax tiġi kkundannata darbtejn dwar l-istess fatti ghaliex Lulju u Awwissu 2009 huma inkluzi fil-perjodu **3 ta'**

<u>Marzu 2010 u matul l-erba' snin ta' qabel</u>, li tieghu nstabet hatja u kundannata.

Ghalhekk il-Qorti qeghda tilqa d-difiza tal-imputata tan-'*ne ibis inidem*' u ghalhekk tilliberaha minn kull htija u piena.

Il-Qorti theggeg lill-pulizija biex meta jkunu jinvestigaw kazijiet bhal dawn ikun hemm aktar koordinazzjoni bejn taqsimiet varji tal-Korp tal-Pulizija. F'dan il-kaz jidher li l-imputata kienet investigata f'kaz minnhom mill-Pulizija tad-Distrett u l-iehor minn dawk tat-Taqsima ta' Kontra d-Droga. Veru li hemm fliegu jaqsam bejn iz-zewg gzejjer izda llum bil-mezzi ta' komunikazzjoni li jezistu jista' jkun hemm aktar koordinament u ma nispiccawx b'kaz bhal dan fejn kien hemm overlapping fl-akkuzi. Illum din il-problema jidher li kienet indirizzata ghaliex il-glieda kontra d-droga f'Ghawdex issahhet bil-prezenza ta' skwadra permanenti kkordinata mit-Taqsima Kontra d-Droga f'Malta u ghalkemm il-membri tal-iskwadra huma Ghawdxin u jahdmu f'Ghawdex hemm koordinament shih kemm fil-gbir ta' informazzjoni kif ukoll tal-azzjonijiet diretti kontra minn qieghed ixerred il-mewt f'din il-gzira.

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Dr. Joseph Mifsud
Magistrat