Qorti tal-Appell Kriminali

Onor. Imħallef Consuelo Scerri Herrera, LL.D., Dip Matr., (Can)

Appell Nru: 348 / 2018

Il-Pulizija

(Spettur Kylie Borg)

(Spettur Chantelle Casha)

vs

Carmel Polidano

Michael Mercieca

Omissis

Illum 7 ta' Jannar 2020.

Il-Qorti,

Rat l-akkuzi dedotti kontra l-appellati, Carmel Polidano detentur tal-karta tal-identita' bin-numru 506259(M), Michael Mercieca detentur tal-karta tal-identita' bin-numru 624160(M) u Muhammad Saleem detentur tal-karta tal-identita' Taljana bin-numru AV8406515, akkuzati quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali talli:

Lil Carmel Polidano waħdu akkuzat talli:

Nhar it-28 ta' Novembru 2015, għall-ħabta tal-16.30 ta' wara nofs inhar, ġewwa Monte Kristo Animal Park, f'Ħal Farruġ, limiti tas-Siġġiewi:

1. Ikkommetta r-reat illi jrabbi annimali aggressivi li jistgħu joħolqu periklu għas-sigurta tal-bniedem jew annimali oħra u li jappartjenu għal dawk il-kategoriji indikati mill-Ministru ma jistgħux jirtabbew, jew jiġu importati jew mibjugħa f'Malta;

2. U aktar talli żamm stabbiliment zooloġiku mingħajr liċenzja;

3. U aktar talli rrenda ruħu reċidiv b'diversi sentenzi mogħtija mill-Qorti tal-Maġistrati Malta, liema sentenzi hija defenittivi u ma jistgħawx jiġu mibdula ai termini ta' Artikolu 49 u 50 tal-Kap 9 tal-Liġijiet ta' Malta.

Lil Carmel Polidano, Michael Mercieca u Muhammad Saleem:

Akkuzati talli nhar it-28 ta' Novembru 2015, għall-ħabta tal-16.30 ta' wara nofs inhar, ġewwa Monte Kristo Animal Park, Ħal Farruġ, limiti tas-Siġġiewi:

4. B'nuqqas ta' ħsieb, bi traskuraġni, jew b'nuqqas ta' ħila fl-arti jew professjoni taghhom, jew, b'nuqqas ta' tħaris ta' regolamenti, ikkaġunaw offiża li tkun gravi fuq il-persuna ta' Ayden Cordina.

Rat il-provvediment moghti minnha fl-ismijiet premssi nhar l-5 ta' Frar 2019 (fol. 332) fejn iddikjarat li it-tlett (3) stqarrijiet rilaxxjati mill-appellanti ossia nhar it-8 ta, id-8 u l10 ta Novembru, 2016 bhal ainammissibli fejn ordnat ukoll l-isfilz taghhom minn dwn l-atti.

Rat ir-rikors tal-Avukat Generali prezentat seduta stante nhar it-12 ta Novembru, 2019 fejn inter alia talab revoka tad-digriet taghha fuq imsemmi tal-5 ta Frar, 2019 u talab li jghamel sottomissjonijiet orali dwar din l-istess talba tiegh.

Rat ir-rikors ta Avukat Generali pezentat ir-registru ta din il-Qorti nhar il-15 ta Novembru 2019 (fol. 357) fejn talab li jipprezenta nota ta sottomissjonijiet minflok ma jittratta oralment .
Rat in-noa ta' sottomissjonijiet prezentata fir-registru ta' din l-Onorabbli Qorti nhar it-3 ta' Dicembru, 2019 (fol. 381) .

Semghet lill-partijiet jitrattaw it-talba u dan seduta stante nhar it-2 ta' Dicembru 2019.

Ikkunsidrat;

Illi permezz tad-digriet tal-hamsa (5) ta' Frar tas-sena elfejn u dsatax (2019) din il-Qorti kienet laqghet it-talba tal-Avukat Difensur maghmula fid-disgha (9) ta' Ottubru tas-sena elfejn u tmintax (2018) fejn talab li '*stqarrijiet jew dikjarazzjonijiet rilaxxati mill-imputati li ma kellhomx opportunita' li jkollhom Avukat prezenti maghhom ghal waqt it-tehid tal-istess jigu sfilzati jew ma jittiehdux in konsiderazzjoni ghall-finijiet ta' dawn il-proceduri.*' u ddikjarat it-tlett (3) stqarrijiet rilaxxati mill-imputati nhar it-tmienja (8), id-disgha (9) u l-ghaxra (10) ta' Novembru tas-sena elfejn u sittax (2016) bhala inammissibli u ghalhekk ordnat l-isfilz tal-istqarrijiet rilaxxati mill-imputat.

Illi l-Avukat Generali permezz ta' rikors talab li stante li l-gurisprudenza fil-qasam tad-dritt ghall-assistenza legali kompliet tizzewwaq b'iktar decizjonijiet, li l-Qorti tappunta seduta ghas-sottomissjonijiet orali in sosten ghal talba ta' revoka contrario imperio tal-istess rikorrent mid-digriet datat il-hamsa (5) ta' Frar tas-sena elfejn u dsatax (2019). L-Avukat Generali in sostenn tat-talba ghar-revoka contrario imperio tad-digriet tal-hamsa (5) ta' Frar tas-sena elfejn u dsatax (2019), prezenta nota ta' sottomissjonijiet fejn ghamel referenza ghal numru ta' sentenzi u fost bosta sottomissjonijiet, issottometta li l-akkuzati naqsu milli juru li ghandhom jitqiesu bhala persuni vulnerabbli u li mhux talli ma kienux vulnerabbli izda talli Carmel Polidano skont l-Avukat Generali kif jemergi anke mill-atti huwa sid l-istabbiliment Monte Kristo estates u negozjant ewlieni, b'esperjenza f'varji oqsma tan-negozju. Li lanqas ma jirrizulta li c-cirkostanzi li fihom ittiehdet l-istqarrija kienu ghalih intimidanti.

Jissottometti li l-istqarrija inghatat volontarjament, minghajr theddid, weghdi jew promessi ta' vantaggi u wara li nghata d-debita twissija skont il-ligi u cioe' li ma kienx obligat jitkellem sakemm ma kienx hekk jixteq izda li dak li kien ser jghid seta' jingieb bhala prova kontrih, li lanqas ma gie muri li l-akkuzat ma kienx qieghed jifhem l-import tac-cirkostanzi li kien jinsab fihom. Li l-Prosekuzzjoni tinnota li l-imputati mhux talli ma qajmu l-ebda lment dwar l-istqarrijiet li kienu gew irrilxxjati imma huma talbu lil Qorti Kriminali sabiex ikun jistghu jressqu eccezzjoni dar l-inammissibilita' tal-istqarrija biss minhabba dak deciz fis-sentenza fl-ismijiet Il-Pulizija vs Christopher Bartolo.

L-appellant Avukat Generali jissottometti li fiz-zmien tal-ghoti tal-istqarrijiet mill-imputati, il-ligi ma kinitx tipprovdi ghad-dritt li suspettat jaghzel jekk jixtieqx li jkollu Avukat prezenti waqt it-tehid tal-istqarrijiet u kien appuntu permezz tal-legislazzjoni sussidjarja 9.24 (Avviz Legali 102 tal-2017) li dahal tali jedd. Din il-Qorti tissottolinea li propjament id-dritt tal-assistenza legali matul l-interrogazzjoni gie promulgat fil-ligi ta' Malta u cioe' fejn anke sehhet it-trasposizzjoni tad- DIRETTIVA 2013/48/UE TAL-PARLAMENT EWROPEW U TAL-KUNSILL tat-22 ta' Ottubru 2013 dwar id-dritt ta' aċċess għas-servizzi ta' avukat fi proċedimenti kriminali u fi proċedimenti ta' mandat ta' arrest Ewropew, u dwar id-dritt li tiġi infurmata parti terza dwar iċ-ċaħda tal-libertà u d-dritt għal komunikazzjoni ma' partijiet terzi u mal-awtoritajiet konsulari, matul iċ-ċaħda tal- libertà, permezz tal-Att numru LI tal-2016 u sussegwentement dan l-Att dahal fis-sehh permezz tal-Avviz Legali 401 tal-2016. Filwaqt li l-Legislazzjoni Sussidjarja 9.24 li jsemmi l-Avukat Generali jirregola l-procedura waqt l-interrogazzjoni ta' persuni suspettati u persuni akkuzati. Minkejja dan, fid-dati li ttiehdu l-istqarrijiet u dikjarazzjonijiet tal-imputati, din il-ligi kienet ghada ma dahlitx fis-sehh u ghalhekk l-imputati ma nghatawx id-dritt li jkollhom Avukat prezenti matul l-interogazzjoni.

L-Avukat Generali jaghmel referenza ghan-noti ta' sottomissjonijeit rilaxxati minn Carmel Polidano u Michael Mercieca fejn l-imputati kienu assistiti minn difensuri preparati u aggornata bil-gurisdprudenza kollha necessarja in materia.

L-Avukat Generali jaghmel ukoll referenza ghal fatt li fit-tmintax (18) ta' April tas-sena elfejn u tmintax (2018) id-difiza espressament ezentat lil Prosekuzzjoni milli ttella x-xhieda tal-volontarjeta' tal-istqarrijiet u tad-dikjarazzjoni tar-rifjut tal-konsultazzjoni tal-Avukat u dan wara li l-imputati ffirmaw id-dikjarazzjoni ta' rifjut tal-jedd ghal parir legali nhar id-disgha (9) ta' Novembru tas-sena elfejn u sittax (2016).

L-Avukat Generali jissottometti li fejn dak li gie deciz matul it-*trial* ikkonferma l-volontarjeta' tal-istqarrijiet *pre trial* meta l-imputati kienu ghadhom suspettati ghandu jkun raguni sufficjenti sabiex jergaw jigu infilzati l-istqarrijiet in atti. Jissottometti li ghalhekk it-tlett ko-imputati fil-kaz odjern kellhom jigu trattati b'mod distint u separat. Li l-ezami ta' vulnerabilita' ghandu jigi studjat b'mod indiviwali fuq l-gharfien u c-cirkostanzi tal-imputati bhala individiwi u mhux daqs li kieku kienu trinita f'persuna wahda. Li l-prosekuzzjoni ma tarax li l-istqarrijiet tal-appellati fejn huma gew ikkonfermati minn jeddhom quddiem l-Ewwel Qorti wara li l-istqarrijiet rilaxxjati lil Pulizija fl-investigazzjonijiet, u dan meta kien debitament assistit, kellha tigi skartata mill-Ewwel Qorti fid-decizjoni taghha. Jissottometti li kien l-appellat stess effikacjament asisstit li ddecieda juza dak dikjarat minnu bhala prova favur tieghu u jezenta kull prova dwar validita' biex isejjes il-linja difensjonali li ried jiehu kotnra l-akkuzi addebitati lilu, liema linja difensjonali huwa baqa' izomm ferm maghha sa t-tmiem tal-proceduri kontra tieghu u dan anke permezz ta' noti ta' sottomissjonijiet varji u bil-miktub. Li l-appellant ma jistax iqies l-istqarrijiet tieghu b'mod izolat izda fil-kumpless kollu tal-proceduri penali kif imfassla fl-atti probatorji tal-kawza u il-linja difensjnali maghzula minnu stess debitament assisti minn Avukat tal-ghazla tieghu li ieghu kellu kull muent li ezenta kull prova dwar l-istqarrija u ghalhekk li ma jikkontestax il-validita' ta' tali stqarrija kif kellu dritt li jaghmel sabiex ma jinkriminawx ruhhom, sal-mumenti finali tal-kawza meta ghogbu isejjes id-difiza tieghu fuq dik l-istqarrija minnu moghtija. Illi l-prosekuzzjoni ma tarax kif l-appellati jistghu issa fi stadju ta' revizjoni jilmentaw dwar stqarrijiet.

Ikkunsidrat;

Illi fl-ewwel lok jirrizulta li giet ipprezentaa stqarrija ta' Michael Mercieca datata l-ghaxra (10) ta' Novembru tas-sena elfejn u sittax (2016) a fol 6 et sequitur fejn l-akkuzat ghazel li ma jikkonsultax ma' Avukat tal-ghazla tieghu qabel ma bdiet l-interrogazzjoni. Ghalhekk giet ipprezentata d-dikjarazzjoni ta' rifjut tal-jedd ghal parir legali a fol 5. Giet ipprezentata ukoll stqarrija ta' Saleem Muhammad a fol 11 et sequitur rilaxxata fit-tmienja (8) ta' Novembru tas-sena elfejn u sittax (2016) fejn Saleem Muhammad ghazel li jikkonsulta ma' Dr Jean Paul Sammut qabel ma bdiet l-interrogazzjoni. Filwaqt li jirrizulta ukoll li fid-disgha (9) ta' Novembru tas-sena elfejn u sittax (2016) giet rilaxxata stqarrija ta' Carmel Polidano prezentata a fol 32 fejn huwa ghazel li ma jikkonsultax ma' Avukat tal-ghazla tieghu qabel bdiet l-interrogazzjoni, fejn ghalhekk giet anke ipprezentata dikjarazzjoni ta' rifjut tal-jedd ghal parir legali a fol 31.

Jirrizulta ukoll li fl-atti tal-inkjesta xehdu ukoll tnejn mit-tlett imputati quddiem it-Tekniku Vincent E. Ciliberti u cioe' Saleem Mohammed fid-disgha u ghoxrin (29) ta' Novembru tas-sena elfejn u hmistax (2015) 'duly cautioned' a fol 84 et sequitur u Michael Mercieca ukoll fid-disgha u ghoxrin (29) ta' Novembru tas-sena elfejn u hmistax (2015) a fol 87 et sequitur fejn hemm dikjara li nghata s-solita twissija. Biss pero' ma jirrizultax li nghataw id-dritt li jkollhom Avukat tal-ghazla taghhom prezenti waqt it-tehid tax-xhieda taghhom.

Jirrizulta li a fol 144 et sequitur senjatament a fol 147 kif ukoll a fol 212 et sequitur senjatament a fol 215 fir-rapport tal-Pulizija hemm imnizzel verzjonijiet ta' uhud mil-imputati. F'dak l-istadju ma jirrizultax jekk l-imputati inghatalhomx id-dritt li jikkonsultaw ma' Avukat u lanqas ma jirrizulta li inghataw id-dritt li jkollhom Avukat prezenti waqt it-tehid tal-verzjonijiet taghhom.

Jirrizulta li fis-seduta ta' quddiem l-Ewwel Qorti tat-tmintax (18) ta' April tas-sena elfejn u tmintax (2018) gie vverbalizzat li '*Id-difiza qieghda tezenta lill-Prosekuzzjoni milli*

ttella x-xhieda tal-volontarjeta tal-istqarrijiet u tad-dikjarazzjoni tar-rifjut tal-konsultazzjoni tal-avukat.'

Jirrizulta ukoll li l-imputati ghazlu li ma jaghtux ix-xhieda taghhom quddiem l-Ewwel Qorti u ghalhekk ma jistax jinghad li b'xi mod jew iehor l-akkuzati ri-affermaw dak li kienu iddikjaraw fl-istqarrija rilaxxata, fil-verzjoni moghtija lil Puliija jew fix-xhieda moghtija quddiem l-espert Tekniku Ciliberti.

L-Avukat Generali jemfasizza li l-akkuzati naqsu milli juru l-vulnerabilta' taghhom. Din il-Qorti temfasizza li id-decizjoni taghha li tiskarta kwalunkwe stqarrija u dikjarazzjoni moghija mill-akkuzati u kwalunkwe referenza ghal dak li stqarru jew xehdu l-akkuzati 'at pre-trial stage' ma hijiex ibbazata fuq xi allegazzjoni ta' vulnerabbilita' bhal kif lanqas ma hija bbazata fuq xi nuqqas ta' volontarjeta' tant li filfatt id-difiza kienet ezentat lil Prosekuzzjoni milli ttella xhieda dwar il-volontarjeta' tal-istqarrijiet u d-dikjarazzjonijiet ta'rifjut tal-Avukat. Id-decizjoni ta' din il-Qorti kienet imsejsa fuq il-fatt li l-akkuzati ma kellhomx id-dritt li jkollhom Avukat prezenti waqt it-tehid tal-istqarrija u ghalhekk anke fil-kaz ta' Michael Mericeca u Carmel Polidano li kienu ghazlu li ma jezercitawx id-dritt li jikkonsultaw ma' Avukat qabel it-tehid tal-istqarrija, ma jfissirx li kienu sejrin jirrifjutaw il-prezenza ta' Avukat waqt it-tehid tal-istqarrija. L-importanza li jkun hemm Avukat prezenti waqt it-tehid tal-istqarrija u f'kull stadju waqt l-investigazzjoni mhijiex biss biex jigi accertat li l-istqarrija tkun wahda volontarja izda bhala parti integrali mid-difiza tal-akkuzati u cioe' li l-Avukat ikun jista' jistrada d-difiza tieghu mill-bidu nett tal-investigazzjoni.

Din il-Qorti tirrikonoxxi li kien hemm tibdil sostanzjali fid-decizjonijiet moghtija mill-Qorti Ewropea tad-Drittijiet tal-Bniedem. Sentenza ta' certu importanza hija dik moghtija mill-Grand Chamber tal-Qorti Ewropea tad-Drittijiet tal-Bniedem fis-sentenza **'Bueze vs Belgium'**[1] fejn saret emfazi fuq il-fatt li l-fatti u l-proceduri iridu

[1] Deciza mill-Grand Chamber tal-Qorti Ewropea tad-Drittijiet tal-Bniedem fid-9 ta' Novembru, 2018 (Applikazzjoni numru: 71409/10)

jigu evalwati fl-intier taghhom sabiex jigi determinat jekk kien hemm vjolazzjoni tad-dritt ghal smiegh xieraq. Filfatt gie meqjus li:

'150. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account (see Ibrahim and Others, cited above, § 274, and Simeonovi, cited above, § 120):

(a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;

(b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;

(c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;

(d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;

(e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;

(f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;

(g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;

(h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;

(i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and

(j) other relevant procedural safeguards afforded by domestic law and practice.'

Fl-istess sentenza gie kkunsidrat li:

'*193. In conclusion, re-emphasising the very strict scrutiny that must be applied where there are no compelling reasons to justify the restriction on the right of access to a lawyer, the Court finds that the criminal proceedings brought against the applicant, when considered as a whole, did not cure the procedural defects occurring at the pre-trial stage, among which the following can be regarded as particularly significant:*

(a) The restrictions on the applicant's right of access to a lawyer were particularly extensive. He was questioned while in police custody without having been able to consult with a lawyer beforehand or to secure the presence of a lawyer, and in the course of the subsequent judicial investigation no lawyer attended his interviews or other investigative acts.

(b) In those circumstances, and without having received sufficiently clear prior information as to his right to remain silent, the applicant gave detailed statements while in police custody. He subsequently presented different versions of the facts and made statements which, even though they were not self-incriminating stricto sensu, substantially affected his position as regards, in particular, the charge of the attempted murder of C.L.

(c) All of the statements in question were admitted in evidence by the Assize Court without conducting an appropriate examination of the circumstances in which the statements had been given, or of the impact of the absence of a lawyer.

(d) While the Court of Cassation examined the admissibility of the prosecution case, also seeking to ascertain whether the right to a fair trial had been respected, it focused on the absence of a lawyer during the period in police custody without assessing the consequences for the applicant's defence rights of the lawyer's absence during his police interviews, examinations by the investigating judge and other acts performed in the course of the subsequent judicial investigation.

(e) The statements given by the applicant played an important role in the indictment and, as regards the count of the attempted murder of C.L., constituted an integral part of the evidence on which the applicant's conviction was based.

(f) In the trial before the Assize Court, the jurors did not receive any directions or guidance as to how the applicant's statements and their evidential value should be assessed.

194. The Court finds it important to emphasise, as it has done in other cases under Article 6 § 1 of the Convention in which an assessment of the overall fairness of the proceedings was at issue, that it is not for the Court to act as a court of fourth instance (see Schatschaschwili, cited above, § 124). In carrying out such an assessment, as required by Article 6 § 1, it must nevertheless carefully look at how the domestic proceedings were conducted, and very strict scrutiny is called for where the restriction on the right of access to a lawyer is not based on any compelling reasons. In the present case, it is the combination of the various above-mentioned factors, and not each one taken separately, which rendered the proceedings unfair as a whole.

(iv) General conclusion

195. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.'

Ghalhekk skont din is-sentenza, ir-restrizzjoni ghal access ta' Avukat waqt l-interrogatorju ma jfissirx awtomatikament li kien hemm lezjoni tad-dritt ghas-smiegh xieraq izda l-Qorti trid tqis ukoll l-'*overall fairness*' tal-proceduri sabiex tiddetermina jekk kienx hemm lezjoni o meno.

F'dan ir-rigward, il-Qorti tal-Appell Kriminali fis-sentenza fl-ismijiet **'Il-Pulizija Vs Maximilian Ciantar'**[2] wara li ghamlet referenza ghal din is-sentenza u cioe' dik fl-ismijiet **'Philippe Bueze vs Belgium'**[3] qieset:

'*Illi ghalkemm illum kif inghad il-ligi regghet giet emendata u dan sabiex jigi fis-sehh fil-ligi domestika d-dritt komunitarju fir-rigward u sabiex ukoll ir-restrizzjoni sistematika dwar id-*

[2] Deciza mill-Qorti tal-Appell Kriminali fis-27 ta' Frar, 2019 (Appell Numru: 514/2017)
[3] Deciza mill-Grand Chamber fid-9 ta' Novembru, 2018 (Numru: 71409/10)

dritt ghall-avukat jigi regolat, madanakollu fiz-zmien meta giet rilaxxjata l-istqarrija tal-appellant kien hemm dritt, ghalkemm wiehed iktar ristrett, tal-persuna suspettata biex tikkonferixxi mal-avukat tal-fiducja taghha fil-hin precedenti l-interrogatorju mill-pulizija. Illi allura din il-Qorti fid-dawl tal- pronunzjament surriferit tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem ma tistax a priori tiskarta stqarrija ta' persuna li tkun inghatat l-jedd tikkonsulta ma' avukat qabel ma tigi interrogata, izda fejn l-avukat taghha ma kienx prezenti filwaqt tal-interogazzjoni, u dan ghaliex allegatament jista' jkun hemm lezjoni tad-dritt taghha ghal smigh xieraq, billi kif mistqarr f'dan il-pronunzjament kull kaz irid jitqies ghalih u cioe' allura billi jigi mistharreg f'kull kaz individwalment jekk bil-fatt illi l-persuna akkuzata ma kellhiex l-avukat prezenti waqt it-tehid tal-istqarrija dan setax impinga fuq is-smigh xieraq iktar 'il quddiem tul il-proceduri penali istitwiti kontra taghha.

Din il-Qorti ma ghandhiex funzjonijiet kostituzzjonali u allura ma ghandhiex il-poter tistharreg jekk ikunx sehh lezjoni tad-dritt ta' smigh xieraq jew jekk potenzjalment dan jistax isehh u dan f'kaz fejn xi forma ta' assistenza legali tkun giet moghtija. Ma tistax il-Qorti ta' kompetenza penali tiddeciedi a priori illi bil-fatt wahdu illi fiz-zmien li l-persuna akkuzata tkun giet interrogata ma kellhiex il-jedd ikollha l-avukat prezenti maghha dan awtomatikament kien vjolattiv tal-jedd taghha ghal smigh xieraq meta l-Qorti Ewropeja issa qed tidderigi il-qrati domestici jindagaw jekk il- proceduri fl-intier taghhom kenux gusti fil-konfront tal-akkuzat bit-test allura li irid jigi segwiet fuq zewg binarji u cioe':

1. the existence of compelling reasons for the right to be witheld

2. the overall fairness of the proceedings.

Jinghad biss f'dan il-kaz illi l-appellant kien abbilment assistit tul dawn il-proceduri kriminali istitwiti kontra tieghu. Fl-ebda mument tul il-proceduri ma jqanqal il- kwistjoni dwar il-valur probatorju tal-istqarrija minnu rilaxxjata biex b'hekk il-Qorti ghandha quddiemha prova li qatt ma giet ikkontestata. Illi maghdud dan madanakollu l-Qorti tosserva li l-appellant kien ikkonsulta mal-avukat tal-fiducja tieghu qabel ma gie interrogat. F'dak iz-zmien huwa kellu sitta u ghoxrin sena u diga` kellu irregistrati kontra tieghu hdax-il kundanna biex b'hekk ma jistax jitqies li kien bniedem vulnerabbli. L-appellant qatt ma jikkontendi illi hu jew l-avukat tieghu ma gewx mgharrfa mill-pulizija dwar in-natura tal-akkuzi migjuba fil-konfront tieghu

jew tal-provi li l-pulizija kellhom f'idejhom. Fuq kollox dak mistqarr mill- appellant fl-istqarrija minnu rilaxxjata huwa biss korroborazzjoni ta' dak li jikkontendu l-vittmi billi dawn kienu x-xhieda ewlenija f'dan il-kaz meta jistqarru li gharfu lill-appellant bhala wiehed mill-hallelin.

Illi finalment ghalkemm il-ligi f'dak iz-zmien ma kenitx tippermetti lill-avukat li jkun prezenti waqt it-tehid tal-istqarrija, madanakollu ghandu jinghad illi l-ligi kif inhi illum ma tantx toffri dik l-assistenza effettiva bil-fatt illi l-avukat ikun prezenti mal- persuna suspettata waqt li din tkun qed tigi interrogata bil-proviso ghall-artikolu 355AUA (8)(c) tal-Kodici Kriminali jiddisponi hekk:

"Id-dritt tal-avukat li jipparteċipa b'mod effettiv ma għandux jinftiehem bħala dritt tal-avukat li jostakola l-interrogazzjoni jew li jissuġġerixxi tweġibiet jew reazzjonijiet oħra għall-interrogazzjoni u kull mistoqsija jew rimarka oħra mill-avukat għandha, ħlief f'ċirkostanzi eċċezzjonali, issir wara li l-Pulizija Eżekuttiva jew awtorità oħra investigattiva jew awtorità ġudizzjarja jkunu ddikjaraw li ma għandhomx aktar mistoqsijiet."

Fil-fatt minn qari tad-Direttiva tal-Unjoni Ewropeja dwar id-Dritt tal-assistenza legali, ghalkemm din giet tramandata kwazi kelma b'kelma fil-ligi taghna, madanakollu dana l-proviso ma jirriaffigura imkien fl-artikolu 3 tad-Direttiva, li gie trasportat fl-artikolu 355AUA tal-Kodici Kriminali.

Maghmula dawn il-konsiderazzjonijiet ghalhekk din il-Qorti ma issib l-ebda mottiv li jista' igieghlha titbieghed mill-fehma milhuqa mill-Ewwel Qorti li strahet fuq ix- xiehda tal-vittmi f'dan il-kaz abbinata mal-istqarrija rilaxxjata mill-appellant u dan sabiex sejset is-sejbien ta' htija fil-konfront tieghu.[1]

Din il-Qorti sejra taghmel referenza ghal *Joint concurring opinion* tal-Imhalfin Yudkivska, Vučinić, Turković and Hüseynov ghas-sentenza fl-ismijiet **'Beuze v. Belgium'**[4] fejn fost affarijiet ohra ikkunsidraw li:

'22. In sum, we believe that it is vital to make a distinction between the systematic defects and

[4] Deciza mill-Grand Chamber tal-Qorti Ewropea tad-Drittijiet tal-Bniedem fid-9 ta' Novembru, 2018 (Applikazzjoni numru: 71409/10)

the particular defects which are found in individual cases as a result of targeted and context-specific restrictions (e.g. in terrorism cases) or as a result of mistakes and shortcomings in individual cases. It is not correct for the Court to consider the overall fairness of an individual applicant's case when a systematic ban exists, affecting every other individual in the applicant's position and in the absence of any assessment by the relevant national authorities.

23. The formulation of the exception is extremely clear: any derogation must be justified by compelling reasons pertaining to an urgent need to avert danger for the life or physical integrity of one or more people. In addition, any derogation must comply with the principle of proportionality, which implies that the competent authority must always choose the alternative that least restricts the right of access to a lawyer and must limit the duration of the restriction as much as possible. In accordance with the Court's case-law, no derogation may be based exclusively on the type or seriousness of the offence and any decision to derogate requires a case-by-case assessment by the competent authority. Finally, derogations may only be authorised by a reasoned decision of a judicial authority.

24. The Court must apply a strict approach to a blanket prohibition on the right to legal assistance; otherwise we will end up in conflict with the overall direction of both the case-law of the Court and EU law.'

Fis-sentenza fl-ismijiet **'Paul Anthony Caruana v. Avukat Ġenerali, Kummissarju tal-Pulizija, Reġistratur tal-Qrati u Tribunali Kriminali'**[5] il-Qorti Kostituzzjonali ghamlet referenza ghas-sentenza fuq citata fl-ismijiet **'BEUZE VS Belgium'**[6] u kkunsidrat li:

'*18. Din hija interpretazzjoni li hija eqreb mal-posizzjoni li kienet ħadet din il-qorti qabel is-sentenza ta' Borg milli mal-interpretazzjoni mogħtija mir-Raba' Sezzjoni f'Borg u effettivament tfisser li kellha raġuni il-Qorti Kostituzzjonali ta' Malta fil-posizzjoni li kienet ħadet fil-każ ta' Muscat u fis-sentenzi li segwew, qabel ma kienet kostretta tbiddel dik l-inter-*

[5] Deciza mill-Qorti Kostituzzjonali fil-31 ta' Mejju, 2019 (Rikors kostituzzjonali numru: 64/2014 JRM)
[6] Deciza mill-Grand Chamber tal-Qorti Ewropea tad-Drittijiet tal-Bniedem fid-9 ta' Novembru, 2018 (Applikazzjoni numru: 71409/10)

pretazzjoni fid-dawl ta' Borg.

19. Uħud mill-imħallfin membri tal-qorti li tat is-sentenza ta' Beuze, f'opinjoni għalihom, ikkritikaw is-sentenza fejn qalet illi, f'kull każ, trid tqis il-proċess fit-totalità tiegħu u mhux biss in-nuqqas ta' għajnuna ta' avukat, għax dehrilhom illi, iżjed milli preċiżazzjoni tal-interpretazzjoni ta' Salduz fid-dawl ta' Ibrahim, is-sentenza ta' Beuze hija kapo- volġiment ta' dik il-ġurisprudenza. Hu x'inhu, hijiex preċiżazzjoni, elaborazzjoni, evoluzzjoni jew kapovolġiment, din hija sa issa l-aħħar kelma, u tagħti raġun lill-Qorti Kostituzzjonali ta' Malta fil-ġuris- prudenza li segwiet is-sentenza ta' Muscat.

20. Fid-dawl ta' dawn il-konsiderazzjoniiet, l-aggravju tal-attur – safejn igħid illi "l-fatt waħdu illi persuna li tkun instabet ħatja ma tkunx tħalliet tikkonsulta ma' avukat tal-fiduċja tagħha fil-mument tal-investigazzjoni u l-għotja ta' stqarrija lill-pulizija, minħabba restrizzjoni sistematika fil- liġi maltija, awtomatikament ikun ifisser illi saret vjolazzjoni tad-dritt fundamentali tas-smigħ xieraq ta' dik l-istess persuna taħt l-artikolu 6 tal-Konvenzjoni Ewropea" – huwa ħażin u huwa miċħud.'

Fl-istess sentenza, il-Qorti qieset li kien hemm raguni tajba ghall-attur li ma thalliex ikellem avukat qabel jew waqt l-ewwel interrogazzjoni u dan sabiex *issir controlled delivery* lil terza persuna li kienet tipprovdi lill-attur bid-droga. Ikkunsidrat li ma saret ebda allegazzjoni li l-istqarrija saret fic-cirkostanzi mmsemmija fl-artikolu 658 tal-Kodici Kriminali ghalkemm issa jghid li kien xurban u fis-sakra meta ghamel l-istqarrija. In oltre' kkunsidrat li l-istqarrija ma kinitx ir-raguni li wasslet ghal kundanna tal-attur izda li l-attur ammetta l-htija. Din l-ammissjoni saret fil-prezenza tal-Avukat wara konsulta mieghu u quddiem Magistrat li wissieh bil-konsegwenzi tal-ammissjoni u tah l-opportunita' li jiehodha lura. Il-Qorti kkonfermat li ma kien hemm ebda ksur tal-jedd tal-attur ghal smigh xieraq.

Din il-Qorti taghmel referenza ukoll ghas-sentenza fl-ismijiet **'Stephen Pirotta v. L-Avukat Ġenerali u l-Kummissarju tal-Pulizija'**[7] fejn il-Qorti wara li qieset

[7] Deciza mill-Qorti Kostituzzjonali fis-27 ta' Settembru, 2019 (Rikors kostituzzjonali numru: 13/2016 JRM)

gurisprudenza tal-Qorti Ewropeja fis-sezzjoni Maghquda, ikkunsidrat li:

'*Effettivament, dan ifisser illi – kontra dak li qalet l-ewwel qorti fis-silta miġjuba fuq – il-fatt waħdu li ma tkunx tħalliet tingħata l-għajnuna ta' avukat waqt l-interrogazzjoni, ukoll jekk ma kienx hemm raġunijiet impellenti għal dan in-nuqqas, u dik l-istqarrija ntużat fil-proċess, ma huwiex biżżejjed biex, ipso facto, jinsab ksur tal-jedd għal smigħ xieraq: trid tqis il-proċess fit-totalità tiegħu ("having regard to the development of the proceedings as a whole").*'

Il-Qorti qieset li l-attur ma garrab ebda ksur tal-jedd tieghu taht l-artikolu 39 tal-Kostituzzjoni jew l-artikolu 6 tal-Konvenzjoni Ewropea. Ikkunsidrat li:

'*Fil-każ tallum ma jista' jkun hemm ebda dell ta' dubju li l-attur kien ħati tal-imputazzjonijiet imressqa kontra tiegħu, kif wara kollox għarfet l- ewwel qorti stess. L-ewwel qorti għarfet ukoll illi l-qrati ta' ġurisdizzjoni kriminali waslu għall-konklużjoni tal-ħtija tal-attur bis-saħħa ta' xiehda oħra barra l-istqarrija tiegħu. Meqjus il-proċess kriminali fl-intier tiegħu, ma jistax jingħad illi l-attur ma ngħatax smigħ xieraq: kellu għarfien tal- provi kollha mressqa kontrih u ma ntweriex li nżamm mistur xi tagħrif li kellha l-pulizija; kellu għajnuna ta' avukat waqt il-proċess quddiem il- qorti; kellu fakoltà jressaq xhieda u jagħmel konto-eżami tax-xhieda tal-prosekuzzjoni; instab ħati bis-saħħa ta' xiehda oġġettiva li, ukoll jekk ma tqisx l-ammissjoni tiegħu, rabtitu mal-inċident u ma setgħetx tħalli dubju dwar il-ħtija tiegħu.*'

Fis-sentenza moghtija ricentement fl-ismijiet **'Farrugia vs. Malta'**[8] u reza finali fis-sebgha (7) ta' Ottubru tas-sena elfejn u dsatax (2019) mill-Qorti Ewropea tad-Drittijiet tal-Bniedem gie kkunsidrat li:

'*98. Prior to the recent Beuze judgment, in a number of cases, the Court found that systematic restrictions on the right of access to a lawyer had led, ab initio, to a violation of the Convention (see, in particular, Dayanan v. Turkey, no. 7377/03, § 33, 13 October 2009 and Boz v. Turkey, no. 2039/04, § 35, 9 February 2010). That same approach was followed by the Court in relation*

[8] Deciza mill-Qorti Ewropea tad-Drittijiet tal-Bniedem fl-4 ta' Gunju, 2019 (Applikazzjoni numru: 63041/13)

to the Maltese context in Borg (no.37537/13, 12 January 2016).

99. Subsequently, being confronted with a certain divergence in the approach to be followed in cases dealing with the right of access to a lawyer, the Court had occasion to further examine the matter in Ibrahim and Others, Simeonovi and more recently in Beuze, all cited above, where the Court departed from the principle set out in the preceding paragraph. In Beuze, the most recent authority on the matter, the Grand Chamber gave prominence to the examination of the overall fairness approach and confirmed the applicability of a two stage test, namely whether there are compelling reasons to justify the restriction as well as the examination of the overall fairness and provided further clarification as to each of those stages and the relationship between them, as explained below.

(i) Concept of compelling reasons

100. The criterion of "compelling reasons" is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the suspect's first police interview, restrictions on access to a lawyer are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case. A finding of compelling reasons cannot stem from the mere existence of legislation precluding the presence of a lawyer. The fact that there is a general and mandatory restriction on the right of access to a lawyer, having a statutory basis, does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons. Where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to a compelling reason to restrict access to legal advice for the purposes of Article 6 of the Convention (see Beuze, cited above, §§ 142-143).

(ii) The fairness of the proceedings as a whole and the relationship between the two stages of the test

101. Where there are no compelling reasons, the Court must apply very strict scrutiny to its fairness assessment. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a

violation. The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer (see Beuze, cited above, § 145).

102. The Court further emphasises that where access to a lawyer was delayed, and where the suspect was not notified of the right to legal assistance, the privilege against self-incrimination or the right to remain silent, it will be even more difficult for the Government to show that the proceedings as a whole were fair (ibid., § 146).

103. As the Court has already observed, subject to respect for the overall fairness of the proceedings, the conditions for the application of Article 6 §§ 1 and 3 (c) during police custody and the pre-trial proceedings will depend on the specific nature of those two phases and on the circumstances of the case (ibid., § 149).

(iii) Relevant factors for the overall fairness assessment

104. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account:

(a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;

(b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;

(c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;

(d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;

(e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;

(f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;

(g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;

(h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;

(i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and

(j) other relevant procedural safeguards afforded by domestic law and practice (ibid., § 150).'

Fl-istess sentenza gie kkunsidrat ukoll li:

'*118. However, the nature of the statements and their use is of particular relevance in the present case. The Court notes that they did not contain any confessions nor was their content self-incriminating. However, the privilege against self-incrimination is not confined to actual confessions or to remarks which are directly incriminating; for statements to be regarded as self-incriminating it is sufficient for them to have substantially affected the accused's position (see, for example, Schmid-Laffer v.Switzerland, no. 41269/08, § 37, 16 June 2015). Indeed, the statements given by the applicant, at pre-trial stage in the absence of a lawyer, were relied on by the Court of Criminal Appeal in connection with the applicant's credibility. In particular, in its judgment the Court of Criminal Appeal had noted certain inconsistencies in his statements of 1 and 2 February 2002 (see paragraph 22 above) and it had considered that he was not reliable as the applicant had replied in an evasive and hesitant way to police questions concerning his business, profitability, rent, and profits of the previous year (see paragraph 26 above). Nevertheless, the Court cannot but note that the Court of Criminal Appeal had found that A.F.'s statements had been enough to determine the applicant's guilt. In consequence its*

assessment of the applicant's credibility on the basis of his pre-trial statements can be considered as having been made ex abundanti cautela (out of an abundance of caution). In the light of the Court of Criminal Appeal's finding concerning the sufficiency of A.F.'s statements, the Court considers that the use it made of the applicant's statements to assess his credibility cannot be considered as having substantially affected his position.

(iii) Conclusion

119. In conclusion, while very strict scrutiny must be applied where there are no compelling reasons to justify the restriction on the right of access to a lawyer, the Court, in the specific circumstances of the case, finds that having taken into account the combination of the various above-mentioned factors, despite the lack of procedural safeguards relevant to the instant case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer.

120. There has therefore been no violation of Article 6 §§ 1 and 3 (c) of the Convention.'

Interessanti hija l-*joint dissenting opinion* tal-Imhallfin Serghides u Pinto de Albuquerque fejn fost kunsiderazzjonijiet ohra dwar din is-sentenza, ikkunsidraw li:

'*10. In any event, we are of the view that the right to a lawyer at the pre- trial stage does not hinge, in any way or form, on the state of vulnerability of the defendant. Nothing in the Convention makes the Article 6 § 3 (c) right dependent on such vulnerability. Such an abusive and restrictive interpretation of that right contradicts its essence. Every defendant, vulnerable or not, has a right, at the pre-trial stage, to a lawyer who will advise him or her on the defence strategy to be followed.*

11. Secondly, the majority state that "The applicant did not allege, either before the domestic courts or before [the Court], that the Police had exerted any pressure on him, nor that the evidence obtained had been in violation of another Convention provision"[9].

[9] § 111 of the present judgment. (Din ir-referenza tinsab fin-nota ta' qiegh il-pagna enumerata hmistax (15) fil-*joint dissenting opinion* tas-sentenza citata)

12. We disagree with this argument. The fact that a defendant has not been pressured by the police does not limit his or her right to a lawyer. Legal assistance in a criminal procedure is indispensable not only to counter pressure by the police or any other evidence obtained in violation of the Convention, but to define a strategy for the defence and adapt it to every incident throughout the entire proceedings. The police are expected to act lawfully, regardless of the manner in which a defendant presents his or her defence, with or without the benefit of legal assistance. The one has simply nothing to do with the other. Lawful conduct by the police is not a valuable argument on which to restrict the exercise of a Convention right by the defence. Ultimately, this argument by the majority reflects a very restrictive conception of the role of the lawyer in criminal procedure.

13. Thirdly, the majority state that "in the present case, the applicant was informed repeatedly in a sufficiently explicit manner of his right to remain silent and the privilege against self-incrimination"[10]*.*

14. Again, we cannot accept this argument. The right to remain silent is not interchangeable with the right to a lawyer. These are two very different rights. Legal assistance at the pre-trial stage of a criminal procedure is essential to inform the defendant of the advantages and disadvantages, from the perspective of the defence strategy, of speaking out or remaining silent. In other words, the right to a lawyer is instrumental in effective protection of the right to remain silent (and of the privilege against self-incrimination).

15. In short, the fact that the applicant was informed of his right to remain silent if he so desired and the fact that the applicant did not claim that any pressure was exerted on him have nothing to do with his procedural right under Article 6 § 3 (c) of the Convention to have access to a lawyer. Those facts are irrelevant for the purpose of curing the breach of this right. In our view, it is a fundamental mistake at stage two not to take seriously into account the finding of stage one, especially when the test applied should be a very strict scrutiny[11]*. Otherwise, what is the*

[10] § 112 of the present judgment. (Din ir-referenza tinsab fin-nota ta' qiegh il-pagna enumerata sittax (16) fil-*joint dissenting opinion* tas-sentenza citata)

[11] § 108 of the present judgment. (Din ir-referenza tinsab fin-nota ta' qiegh il-pagna enumerata sbatax (17) fil-*joint dissenting opinion* tas-sentenza citata)

point of having two stages!?'

Ikkunsidrat;

Illi l-izvillup fl-interpretazzjonijiet dwar il-jedd ta' smiegh xieraq kif moghtija mill-Qorti Ewropea tad-Drittijiet tal-Bniedem fosthom fis-sentenzi sucitati fl-ismijiet 'Beuze vs Belgium' moghtija mill-Grand Chamber u s-sentenza tal-Qorti Ewropea tad-Drittijiet tal-Bniedem fl-ismijiet 'Farrugia vs. Malta' gia gie rifless fil-pozizzjoni li l-Qorti Kostituzzjonali u l-Prim'Awla tal-Qorti Civili (Sede Kostituzzjonali) qeghdin jiehdu meta jikkunsidraw jekk kienx hemm ksur tal-jedd ta' smiegh xieraq. Jirrizulta li hemm zvillup fis-sens li l-fatt li stqarrija tkun ittiehdet minghajr il-prezenza tal-Avukat skont dawn l-ahhar sentenzi mhumiex awtomatikament jigu kkunsidrati bhala li jiksru d-dritt ghal smiegh xieraq izda li qieghed jittiehed kont tal-proceduri fit-totalita' taghhom sabiex jigi determinat jekk kienx hemm lezzjoni o meno tad-dritt ghal smiegh xieraq.

Din il-Qorti fid-digriet taghha tal-hamsa (5) ta' Frar tas-sena elfejn u dsatax (2019) ghamlet referenza ghas-sentenzi tal-Qorti Kriminali u Qorti tal-Appell Kriminali fl-ismijiet **'Ir-Repubblika ta' Malta v. Martino Aiello'**[12]. Dak iz-zmien ir-referenza kostituzzjonali kienet ghada pendenti. Din illum il-gurnata hija deciza tant li l-Qorti Kostituzzjonali hadet linja diversi minn dik mittiehda primarjament mill-Qorti Kriminali. Filfatt il-Prim'Awla tal-Qorti Civili (Sede Kostituzzjonali)[13] iddeciediet ir-referenza Kostituzzjonali billi iddikjarat li fic-cirkostanzi tal-kaz mhux ser ikun jirrizulta ebda lezjoni tad-dritt fondamentali tal-akkuzat Martino Aiello ghal smigh xieraq kif sancit bl-artikolu 39 tal-Kostituzzjoni ta' Malta u l-artikolu 6 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali

[12] Sentenza preliminari deciza mill-Qorti Kriminali fid-9 ta' Mejju, 2017 (Att ta' Akkuza numru: 13/2015) u decizjoni tal-Qorti tal-Appell Kriminali tad-9 ta' April, 2018 (Att ta' Akkuza: 13/2015)
[13] Fl-ismijiet 'Ir-Repubblika ta' Malta vs Martino Aiello' fis-17 ta' Ottubru, 2019 (Referenza Kostituzzjonali Numru: 38/2018 AF)

jekk isir uzu fil-guri kontra tieghu mill-istqarrija li huwa rrilaxxja lil pulizija fid-dsatax (19) ta' Ottubru tas-sena elfejn u erbatax (2014) wara li fost kunsiderazzjonijiet ohra, ikkunsidrat li:

'Applikati dawn il-prinċipji għall-kawża li għandha quddiemha llum, din il-Qorti hija tal-fehma li ma ġiex muri li bl-użu tal-istqarrija tiegħu fil-ġuri kontra l-akkużat ser jiġi mittiefes id-dritt tiegħu għal smigħ xieraq.

Qabel xejn, din il-Qorti tgħid illi ma jirriżultax li kien hemm raġunijiet tajbin li jżommu lill-akkużat milli jkollu avukat preżenti waqt l-interrogazzjoni u waqt li kien qiegħed jagħti l-istqarrija. L-uniku raġuni li Martino Aiello ma setax ikun mgħejjun minn avukat kienet li, dak iż-żmien, il-liġi ma kienitx tippermetti li l-akkużat ikun hekk mgħejjun f'dak l-istadju imma seta' jikkonsulta ma' avukat biss qabel l-interrogazzjoni, xi ħaġa li mhux kontestat li Martino Aiello rrifjuta li jagħmel.
Madanakollu, il-posizzjoni ġurisprudenzjali kurrenti turi li m'għadux il-każ li l-fatt waħdu li l-liġi ma kienitx tippermetti l-assistenza ta' avukat qabel jew waqt l-interrogazzjoni, awtomatikament iwassal sabiex jinstab li kien hemm ksur tad-dritt għal smigħ xieraq, kif qiegħed jippretendi l-akkużat, imma din il-Qorti għandha tqis diversi fatturi qabel tasal għall-konklużjoni tagħha.

Kif diġà ntqal, dan il-każ huwa kemmxejn differenti mill-każ ta' Aldo Pistella in kwantu li Martino Aiello kien fil-fatt irrinunzja għad-dritt tiegħu li jikkonsulta ma' avukat qabel ma ġie interrogat mill-Pulizija u assolutament ma ġiex muri li huwa xtaq li jkollu avukat preżenti waqt l-interogazzjoni jew waqt li kien qiegħed jirrilaxxja l-istqarrija.

Proprju dwar ir-rinunzja, fil-każ ta' Paskal vs Ukraine, tal-15 ta' Settembru 2011, il-Qorti Ewropea qalet hekk:

> *"neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial, as long as a waiver of the right is given in an unequivocal manner and was attended by the minimum safeguards commensurate to its importance."*

L-akkużat naqas milli juri wkoll li huwa għandu jitqies bħala persuna vulnerabbli. Fil-fatt, meta xehed quddiem din il-Qorti, tista' tgħid li ma semma xejn dwar iċ-ċirkostanzi tal-arrest tiegħu flimkien ma' martu mal wasla tagħhom hawn Malta. Martino Aiello la kien minorenni u lanqas kien ibati minn xi forma oħra ta' vulnerabilità fiż-żmien in kwistjoni. Lanqas jirriżulta xi prova fis-sens li ċ-ċirkostanzi li fihom ittieħdet l-istqarrija kienu għalih intimidanti. L-istqarrija ngħatat volontarjament, mingħajr theddid, wegħdi jew promessi ta' vantaġġi u wara li ngħata d-debita twissija skont il-liġi, u ċioè li ma kienx obbligat jitkellem sakemm ma kienx hekk jixtieq, iżda li dak li kien ser jgħid seta' jinġieb bħala prova kontrih. Lanqas ma ġie muri li l-akkużat ma kienx qiegħed jifhem l-import taċ-ċirkostanzi li kien jinsab fihom. Il-Qorti tinnota wkoll illi Martino Aiello ma qajjem l-ebda lment dwar l-istqarrija li kien irrilaxxja qabel ma ġie deċiż il-każ ta' Borg vs Malta imma huwa talab lill-Qorti Kriminali sabiex ikun jista' jressaq eċċezzjoni dwar l-inammissibilità tal-istqarrija biss minħabba dak deċiż mill-Qorti Ewropea fl-imsemmija każ. Imma kif rajna, din il-ġurisprudenza m'għadhiex applikabbli inkondizzjonatament safejn l-akkużat qiegħed jippretendi li l-istqarrija tiegħu mhijiex ammissibbli bħala prova abbażi tal-fatt waħdu li dak iż-żmien ma setax ikun assistit minn avukat waqt l-interrogazzjoni u waqt li kien qiegħed jirrilaxxja l-istqarrija. Anzi, għandhom jittieħdu in konsiderazzjoni diversi fatturi li flimkien jagħmlu ċ-ċirkostanzi tal-każ.

Martino Aiello fl-ebda stadju ma kkontesta l-awtenticità tal-prova li ġabet il-Prosekuzzjoni kontrih, liema prova mhijiex limitata għall-istqarrija in kwistjoni. Lanqas ma oppona għall-preżentata ta' dik l-evidenza. L-assjem tal-provi ser ikun evalwat minn Imħallef u għalhekk, minn persuna b'għarfien għoli tal-proċedura legali u l-liġi Maltija.

Finalment, il-Qorti tqis illi huwa indubbjament fl-interess pubbliku li jiġi investigat u imressaq sabiex jiġi ġudikat mill-Qrati ta' ġurisdizzjoni kriminali l-akkużat li nqabad in flagrante jittraffika d-droga f'Malta.

Għaldaqstant, il-Qorti ssib li l-akkużat Martino Aiello ma rnexxilux juri li tassew ser iġarrab ksur tad-dritt tiegħu għal smigħ xieraq bl-użu fil-ġuri kontra tiegħu tal-istqarrija li rrilaxxja fid-19 ta' Ottubru 2014.'

Din id-decizjoni tal-Prim'Awla tal-Qorti Civili (Sede Kostituzzjonali) giet appellata, liema appell ghadu pendenti quddiem il-Qorti Kostituzzjonali.

Fis-sentenza fl-ismijiet **'Graziella Attard v. Avukat Ġenerali'**[14] fejn ghalkemm il-kawza ma kinitx titratta biss stqarrija rilaxxata minghajr l-assistenza legali izda anke minghajr l-opportunita' li tikkomunika ma' Avukat tal-fiducja taghha, il-Qorti Kostituzzjonali qieset li:

'10. Madankollu, billi ċ-ċirkostanzi fejn il-persuna interrogata tista' ma titħalliex tkellem avukat huma l-eċċezzjoni aktar milli r-regola, u din il- qorti għandha s-setgħa li tagħti rimedju fejn issib li disposizzjoni li tħares dritt fondamentali mhux biss "qiegħda tiġi" iżda wkoll meta "tkun x'aktarx sejra tiġi miksura", din il-qorti hija tal-fehma, kif osservat fis-sentenza mogħtija fl-24 ta' Gunju 2016 fl-ismijiet Malcolm Said v. Avukat Generali[15]*, illi ma jkunx għaqli – partikolarment fid-dawl ta' inkonsistenzi fis-sentenzi tal-Qorti Ewropea li joħloq element ta' imprevedibilità, kif jixhdu l-posizzjonijiet konfliġġenti li ħadet fil-każ ta' Borg u f'dak ta' Beuze – illi l-proċess kriminali jitħalla jitkompla bil- produzzjoni tal-istqarrija mogħtija mill-attriċi lill-pulizija għaliex tqis illi, fiċ-ċirkostanzi, in-nuqqas ta' għajnuna ta' avukat ma kienx nuqqas li ma jista' jkollu ebda konsegwenza ta' preġudizzju għall-attriċi, aktar u aktar meta fl-istqarrija ammettiet sehma fir-reat.*

11. Għaldaqstant tipprovdi dwar dan l-aggravju tal-avukat Generali billi tgħid illi, għalkemm ma seħħ ebda ksur tal-jedd tal-attriċi għal smigħ xieraq meta tteħditilha stqarrija, madankollu dik l-istqarrija ma għand- hiex tibqa' fl-inkartament tal-kawża kontriha.'

L-istess Qorti qieset li:
'18. Il-qorti tqis illi l-ordni li l-istqarrija titneħħa mill-inkartament, aktar milli rimedju għal ksur li, wara kollox, għadu ma seħħx, huwa garanzija tal- integrità tal-proċess u wkoll fl-interess pubbliku, biex ma jiġrix l- proċess kontra l-attriċi jkollu jitħassar wara li jintemm, b'ħela ta' ħin u riżorsi, li tkun forma oħra ta' inġustizzja għax il-liġijiet għandhom iħarsu

[14] Deciza mill-Qorti Kostituzzjonali fis-27 ta' Settembru, 2019 (Rikors mahluf numru: 83/2016 LSO)
[15] Rik. kost. 74/2014. (Din ir-referenza tinsab fin-nota ta' qiegh il-pagna enumerata sitta (6) fis-sentenza citata.)

mhux biss lil min hu mixli b'reat iżda wkoll lil min jista' jkun vittma ta' reat.

19. Il-qorti għalhekk terġa' ttenni li ma jkunx għaqli li jsir użu mill-istqarrija waqt il-proċess kriminali, u għal din ir-raġuni tiċħad ukoll dan l-aħħar aggravju.'

L-Avukat Generali fin-nota ta' sottomissjonijiet tieghu jaghmel referenza ghas-sentenza fl-ismijiet '**Il-Pulizija Supretendent Anthony Cassar Vs Joseph John Grech**'[16] fejn gie kkunsidrat li;

'*Illi f'dawn il-proceduri din il-Qorti ma hijiex u lanqas tista' tigi imsejjha sabiex tqies jekk irrizultax xi lezjoni tal-jedd ghas-smiegh xieraq tal- appellanti billi hija ma ghandhiex il-kompetenza taghmel dan l-istharrig, izda biss sabiex tqies jekk l-Ewwel Qorti kenitx legalment skorretta illi tistrieh fuq l-istqarrijiet rilaxxjati mill-appellanti anke jekk dawn gew ikkonfermati minnu bil-gurament. Illi fid-dawl ta' dak hawn fuq deciz, allura din il-Qorti hija tal-fehma illi l-Ewwel Qorti setghet legalment tistrieh fuq ix- xhieda moghtija mill-appellanti minn jeddu u debitament assistit mill- avukat tieghu f'liema xhieda gew inkorporati id-dikjarazzjonijiet u l- asserzjonijiet maghmula minnu fl-istqarrijiet tieghu, liema xhieda giet imbaghad uzata minnu bhala prova sabiex isostni il-linja difenzjonali tieghu sahansitra sat-tmiem tal-proceduri quddiem l-Ewwel Qorti fl-2016. Ma jidhirx illi l-appellanti ma kellux okkazzjoni tul is-snin kollha li damet pendenti il-kawza kontra tieghu li igawdi minn difiza adegwata u fit-termini ta'l-izviluppi li sehhew fil-ligi penali nostrana. Illi dan kien ukoll il-hsieb tal- Qorti Ewropeja dwar id-Drittijiet tal-Bniedem meta giet biex tqies kwistjonijiet dwar lezjoni tad-dritt fondamentali tal-persuna akkuzata li ikollha smiegh xieraq:*

"The Court emphasises in that respect that the fairness of proceedings requires that an accused be able to obtain the whole range of services, specifically associated, with legal assistance, pointing out that discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention were fundamental aspects of the defence... Moreover, an accused often finds himself in a particularly vulnerable position at the investigation stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal

[16] Deciza mill-Qorti tal-Appell Kriminali fit-28 ta' Frar, 2018 (Appell numru: 619/2016)

procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer, whose task is, among other thing, to help to ensure respect of the right of an accused not to incriminate himself."- A.T. vs Luxembourg 09/04/2015

Issa, kif inghad, tul il-proceduri kriminali pendenti kontra tieghu huwa indubitat illi l-appellanti gawda minn difiza adegwata, kien dejjem assistit mid-difensur tieghu u kellu l-opportunita kollha jiddiksuti il-kaz mal-avukat tieghu, u ihejji id-difiza tieghu, difiza li hadet il-bixra tal-iskuzanti tal- legittima difeza u/jew il-provokazzjoni kif jirrizulta mill-atti. Illi fid-dawl ta' dan ghalhekk l-appellanti ha il-pedana tax-xhieda u irrakonta il-verzjoni tieghu tal-fatti. Jidher illi minflok qaghad jirrepeti mill-gdid din il-verzjoni huwa ghazel li jikkonferma dik il-verzjoni illi kien ta lill-pulizija meta kien interrogat. Mhux biss izda dina l-assistenza legali huwa baqa' jircevieha b'mod eccellenti, tazzarda tghid din il-Qorti minn kif jixhdu l-atti tal-kaz, sat-tmiem tal-proceduri penali pendenti kontra tieghu fl-2016. Illi allura il- Qorti ma tistax lanqas tinjora il-fatt illi l-appellanti kellu kull opportunita jattakka l-validita tax-xhieda tieghu, haga li baqa' ma ghamilx ghalkemm seta jaghmel dan liberalment sal-mument tad-decizjoni finali fid-dawl tal- izviluppi li sehhew, kif inghad, billi d-difiza tieghu jidher li kienet tistrieh proprju fuq il-fatti kif esposti minnu f'dik ix-xhieda.'

Fl-istess sentenza gie kkunsidrat li:

'Illi l-Qorti Ewropjea dwar id-Drittijiet tal-Bniedem dejjem sahhqet illi sabiex jkun hemm il-lezjoni ta'l-artikolu 6 irid jirrizulta illi ikun sehh pregudizzju serju fil-proceduri penali li isiru fil-konfront tal-persuna akkuzata u dan sa minn mindu il-persuna akkuzata tkun ghadha meqjuza bhala suspettata u allura sa mill hekk imsejjha pre-trial stage cioe' mill-interrogazzjoni. Illi fil- kaz Simeonovi vs Bulgaria deci fl-20 ta' Ottubru 2015 gie deciz:

112. The Court reiterates that the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, as guaranteed by Article 6 § 3 (c), is one of the fundamental features of a fair trial (see Salduz, cited above, § 51, and Dvorski v. Croatia [GC], no. 25703/11, § 76, ECHR 2015). Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, provides a

fundamental safeguard against coercion and ill-treatment of suspects by the police, and contributes to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused (see Salduz, cited above, §§ 53-54, and Ibrahim and Others, cited above, § 255).

113. Article 6 § 3 (c) does not therefore secure an autonomous right but must be read and interpreted in the light of the broader requirement of fairness of criminal proceedings, considered as a whole, as guaranteed by Article 6 § 1 of the Convention. In particular, compliance with the requirements of a fair trial must be examined in each case with regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings (see Ibrahim and Others, cited above, §§ 250 and 251). Article 6 § 3 (c) leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial system, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial

Illi afferrati dawn il-principji legali u abbinati mal-atti probatorji din il-Qorti ma tarax illi x-xhieda ta'l-appellanti f'dik il-parti fejn huwa ikkonferma minn jeddu u bil-gurament l-istqarrijiet tieghu rilaxxjati lill-pulizija fl- investigazzjonijiet, u dan meta kien debitament assistit, kellha tigi skartata mill-Ewwel Qorti fid-decizjoni taghhha.'

Ghalhekk a differenza mill-kawza odjerna, f'dik il-kawza l-akkuzat kien fix-xhieda tieghu kkonferma l-kontenut tal-istqarrijiet rilaxxati minnu ghalkemm kompla jamplifika iktar tul ix-xhieda tieghu. Ghalhekk la darba kien qieghed jikkonferma l-kontenut tal-istqarrijiet bil-gurament quddiem il-Qorti fil-prezenza tal-Avukat huwa kien ghalhekk qieghed jaccetta l-ammissibilita' ta' dik il-prova. Mentri fil-kaz odjern l-akkuzati lanqas xehdu quddiem l-Ewwel Qorti u ghalkemm ma tirrizultax kontestazzjoni dwar l-ammissibilita' tal-prova quddiem l-Ewwel Qorti tant li kienu anke ezentaw il-Prosekuzzjoni milli ttella xhieda dwar il-volontarjeta' tal-istqarrijiet u tad-dikjarazzjonijiet tar-riifjut tal-konsultazzjoni mal-avukat, dan ma jfissirx li tenut kont tal-izvillup gurisprudenzjali, l-akkuzati ma setghux jitolbu lil Qorti anke fi stadju

tal-appell sabiex ma tqis tali stqarrijiet u dikjarazzjonijiet mehuda minghajr il-prezenza tal-Avukat.

Din il-Qorti temfasizza li d-dritt li suspettat ikollu Avukat prezenti minn stadju bikri tal-investigazzjoni mhijiex limitata ghal persuni kkunsidrati vulnerabbli. Anke persuni li kellhom diversi kundanni precedenti kontra taghhom u li ghalhekk huma intizi fil-mod ta' kif jittiehdu l-interogazzjonijiet kif ukoll persuni li l-Avukat Generali jirreferi ghalihom bhala b'esperjenza f'varji oqsma tan-negozju ukoll ghandhom dritt li jkollhom Avukat prezenti minn stadju bikri tal-investigazzjoni. Il-ligi ma tiddistingwix bejn persuna u ohra. Huwa d-dritt ta' kull persuna li jkun assistit minn Avukat anke matul l-interrogazzjoni. Mhuwiex kontestat li fiz-zmien li ttiehdu l-istqarrijiet kif ukoll ix-xhieda ta' uhud mill-akkuzati quddiem l-espert Vincent E. Ciliberti fl-istadju tal-inkjesta, l-ligi ma kinitx taghti jedd lil suspettati biex ikollhom Avukat prezenti waqt it-tehid tal-istqarrija. Biss pero' issa li l-ligi tipprovdi ghal dan id-dritt, huwa rikonoxxut u accettat li d-dritt ghal smiegh xieraq ghandu jigi rispettat minn stadju bikri tal-investigazzjoni.

Din il-Qorti filwaqt li tirrikonoxxi li kien hemm zvilupp sinifikattiv f'dawn l-ahhar xhur, fejn il-Qrati qeghdin iharsu lejn il-proceduri fit-totalita' taghhom sabiex jigi deciz jekk kienx hemm lezzjoni tad-dritt ghal smiegh xieraq , din il-Qorti tissotolinea li bl-ebda mod ma hemm uniformita' fil-kunsiderazzjonijiet u decizjonijiet tal-Qrati dwar jekk stqarrijiet u dikjarazzjonijiet mehuda matul l-investigazzjoni minghajr id-dritt tal-prezenta tal-Avukat jilledux id-dritt ghal smiegh xieraq. Din il-Qorti ma ghandha l-ebda kompetenza biex tiddeciedi dwar lezjoni o meno ta' dritt fundamentali izda trid tiddeciedi biss jekk ghandhiex tiehu in konjizzjoni stqarrijiet u dikjarazzjonijiet ohra fl-istadju tal-investigazzjoni minghajr id-dritt li suspettati jkunu assistiti minn Avukat. Din il-Qorti ghalhekk tqis li gialadarba qieghdin fi stadju ta' revizjoni, filwaqt li bl-ebda mod ma hija tiddikjara li sehh xi ksur tad-dritt ghal smiegh xieraq, tiddeciedi li sabiex ma jkunx hemm ir-riskju ta' xi ksur, kwalunkwe dikjarazzjoni, stqarrija jew xhieda moghtija mill-imputati Carmel Polidano, Michael

Mercieca u Muhammad Saleem fl-istadju tal-investigazzjoni u l-inkjesta minghajr il-prezenza tal-Avukat bhala inammissibli.

Ghaldaqstant din il-Qorti qieghda tichad it-talba tal-Avukat Generali ghal revoka *contrario imperio* tad-digriet ta' din il-Qorti tal-hamsa (5) ta' Frar tas-sena elfejn u dsatax (2019) u ghalhekk tikkonferma l-isfilz tal-istqarrijiet rilaxxati mill-akkuzati fit-tmienja (8), disgha (9) u ghaxra (10) ta' Novembru tas-sena elfejn u sittax (2016) bhala inammissibli u stante li f'dak id-digriet din il-Qorti kienet laqghet it-talba tal-akkuzati maghmulha fid-disgha (9) ta' Ottubru tas-sena elfejn u tmintax (2018) u cioe' li '*stqarrijiet jew dikjarazzjonijiet rilaxxjati mill-imputati li ma kellhomx opportunita' li jkollhom avukat prezenti maghhom ghal waqt it-tehid tal-istess jigu sfilzati jew ma jittiehdux in konsiderazzjoni ghall-finijiet ta' dawn il-proceduri*' , din il-Qorti lanqas ma qieghda tqis bhala ammissibli x-xhieda tal-akkuzati Michael Mercieca u Saleem Muhammed f'dik ix-xhieda indikat bhala 'Saleem Mohammed' moghtija quddiem it-Tekniku Vincent E. Ciliberti fid-disgha u ghoxrin (29) ta' Novembru tas-sena elfejn u hmistax (2015), dikjarazzjonijiet maghmulha mill-akkuzati[17] lil Pulizija skont kif jirrizulta mir-rapport tal-Pulizija a fol 144 et sequitur senjatament a fol 147 kif ukoll a fol 212 et sequitur senjatament a fol 215. Ghalhekk kwalunkwe referenza fl-atti ghall-istqarrijiet, dikjarazzjonijiet u xhieda moghtija mill-imputati minghajr il-prezenza ta' Avukat matul l-investigazzjoni hija ukoll inammissibli.

Din il-Qorti tordna l-prosegwiment tas-smiegh tal-appell.

(ft) Consuelo Scerri Herrera
Imhallef
VERA KOPJA

Franklin Calleja
Deputat Registratur

[17] Michael Mercieca u Saleem Muhammed indikat fir-rapport tal-Pulizija bhala 'Saleen Mohammed'