MALTA

QORTI TA' L-APPELL KRIMINALI

S.T.O. PRIM IMHALLEF
VINCENT DE GAETANO

ONOR. IMHALLEF
JOSEPH A. FILLETTI

ONOR. IMHALLEF
DAVID SCICLUNA

Seduta tal-15 ta' Dicembru, 2005

Numru 19/2002

Ir-Repubblika ta' Malta

v.

Marco Zarb

Il-Qorti:

Dan hu appell minn sentenza moghtija mill-Qorti Kriminali fis-7 ta' Ottubru 2004.

Marco Zarb kien akkuzat mill-Avukat Generali talli fl-24 ta' Gunju 2001 ipprova joqtol lill-habiba tieghu, Gorgina Borg,

billi tefaghha mill-gallerija ta' l-appartament fejn kienu qed joqoghdu ghal isfel fit-triq – gholi ta' erba' sulari (garaxxijiet fil-pjan terran u tlett appartamenti fuqhom). Il-gurati, b'verdett maggoritarju ta' sitta bi tlieta, sabu lill-imsemmi Zarb hati skond l-att ta' akkuza – cioe` ta' tentattiv ta' omicidju volontarju – izda bl-iskuzanti li hu agixxa taht l-influwenza immedjata ta' passjoni istantanja jew agitazzjoni tal-mohh illi minhabba fiha, fil-waqt tad-delitt, ma setax iqis l-eghmil tieghu. Fiz-zmien meta l-imsemmi Zarb ikkommetta dan id-delitt huwa kellu dsatax-il sena.

Is-sentenza ta' l-ewwel Qorti tghid testwalment hekk:

"**Il-Qorti**:

"Rat l-Att tal-Akkuza numru 19 tas-sena 2002 kontra l-akkuzat Marco Zarb, kif emendat bid-Digriet ta' din il-Qorti tat-23 ta' Settembru, 2004, li bih huwa gie akkuzat talli :

"wara li l-Avukat Generali f'isem ir-Repubblika ta' Malta, ppremetta illi f'Gunju tas-sena elfejn u wiehed (2001) Marco Zarb u l-habiba tieghu Gorgina Borg telghu Ghawdex u krew flat fil-Qbajjar limiti taz-Zebbug, Ghawdex. Illi huma kellhom xi argument bejniethom u dawn eskalaw fl-erbgha w ghoxrin (24) ta' Gunju, 2001 ghall-habta tal-hdax ta' bil-lejl (11 pm) meta Marco Zarb iddecieda li joqtol lil Gorgina Borg. Illi infatti, hu beda jahseb kif se joqtolha w iddecieda li jitfaghha mill-gallarija tal-flat. Illi hu dolozament, bil-hsieb li joqtol lil Gorgina Borg jew li jqieghed il-hajja taghha f'periklu car, qabadha w imbottaha l-isfel tlett sulari mill-gallarija, izda fortunatament l-istess Gorgina Borg ma mietitx minkejja li kienet fil-periklu tal-mewt u sofriet feriti gravi b'debulizza permanenti f'gisimha.

"Illi b'ghemilu l-imsemmi Marco Zarb sar hati ta' tentattiv ta' omicidju volontarju u cioe` talli dolozament, bil-hsieb li joqtol persuna jew li jqieghed il-hajja taghha f'periklu car, wera dan il-hsieb b'atti esterni u ta bidu ghall-esekuzzjoni tad-delitt, liema

delitt ma giex esegwit minhabba xi haga accidentali w indipendenti mill-volonta` tieghu.

"Ghaldaqstant l-Avukat Generali fl-isem fuq imsemmi, akkuza lill-imsemmi Marco Zarb hati ta' tentattiv ta' omicidju volontarju, u cioe` talli dolozament, bil-hsieb li joqtol persuna jew li jqieghed il-hajja taghha f'periklu car wera dan il-hsieb b'atti esterni u ta bidu ghall-esekuzzjoni tad-delitt liema delitt ma giex esegwwit minhabba xi haga accidentali w indipendenti mill-volonta` tieghu; talab li jinghamel skond il-ligi kontra l-imsemmi akkuzat u li huwa jigi kkundannat ghal piena ta' prigunerija ghal zmien minn seba snin sa tletin sena skond dak li hemm u jintqal fl-artikoli 41(1)(a), 211(1)(2), 31(1)(a)(b)(i)(ii) u 533 tal-Kodici Kriminali jew ghal kull piena ohra li tista skond il-Ligi tinghata ghall-htija tal-imsemmi akkuzat.

"Rat il-verdett tal-gurati moghti fl-udjenza tas-6 t'Ottubru, 2004, li bih b'sitt voti favur u bi tlitt voti kontra, sabu lil Marco Zarb hati skond l-Att tal-Akkuza, izda b'dana li dan ir-reat hu skuzabbli ghaliex hu agixxa taht l-influwenza immedjata ta' passjoni istantanja jew agitazzjoni tal-mohh illi minhabba fiha fil-waqt tad-delitt ma setax iqis l-eghmil tieghu;

"Tiddikjara lil Marco Zarb hati li fl-24 ta' Gunju, 2001, ghall-habta tal-11 pm, gewwa Sea Breeze Flats, Triq ix-Xwejni, Qbajjar, limiti taz-Zebbug, Ghawdex, dolozament, bil-hsieb li joqtol lil Gorgina Borg jew li jpoggilha hajjitha f'perikolu car, wera l-istess hsieb b'atti esterni u ta bidu ghall-esekuzzjoni tad-delitt, liema delitt baqa' ma giex esegwit minnhabba xi haga accidentali w indipendenti mill-volonta` tieghu, izda b'dana li dan ir-reat hu skuzabbli ghaliex hu agixxa taht l-influwenza immedjata ta' passjoni istantanja jew agitazzjoni tal-mohh illi minnhabba fiha, filwaqt tad-delitt, ma setax iqis l-eghmil tieghu;

"Semghet ix-xhieda prodotti mid-difiza dwar il-piena u cioe` lil ohtu Tina Zarb u lill-"employer" tieghu John Mary Fenech li ddesrivewh bhala guvni tar-rispett, biezel u jmur

tajjeb ma’ kulhadd kemm fil-familja kif ukoll fuq ix-xoghol u li tista’ tafdah;

“Semghet fl-udjenza tal-lum it-trattazzjoni dwar il-piena maghmula mill-Avukati Difensuri Dott. Chris Soler u Dr. Chris Cardona ghall-hati u s-sottomissjonijiet tal-Prosekuzzjoni maghmula mill-Assistent Avukat Generali tar-Repubblika Dottor Anthony Barbara;

“Rat il-fedina penali aggornata netta tal-hati esebita mill-Prosekuzzjoni fis-seduta tallum fuq ordni tal-Qorti;

“Hadet in konsiderazzjoni s-sottomissjonijiet **kollha** tad-difiza dwar il-piena (li jinsabu registrati) u inkluzi – izda mhux biss – is-segwenti :- li fiz-zmien tal-kommissjoni tar-reati l-hati kellu l-eta’ ta’ dsatax il-sena w li l-fedina penali tieghu hi wahda netta, li hu kkoopera mal-Pulizija, li hu guvni habrieki u jahdem, li ddispjacih ghal dak li ghamel anki ftit minuti wara u li l-istess omm il-vittma Emilia Borg iddeskrivietu bhala ragel sewwa. Ghalhekk kien il-kaz li l-qorti tuza klemenza mieghu;

“Hadet in konsiderazzjoni s-sottomissjonijiet tal-Prosekuzzjoni u cioe` illi kieku ma kienx ghall-insistenza tal-Pulizija dan il-kaz seta indifen bhala kaz ta’ tentattiv ta’ suicidju u kien biss meta l-Pulizija baqghu jinsistu mall-hati li hu fl-ahhar ammetta x’kien ghamel. Ghalhekk id-difiza ma kienitx korretta li tghid li f’dan il-kaz l-hati kien ikkoopera. Inoltre il-konsegwenzi ta’ dan ir-reat kienu mill-iktar gravi li setghu ikunu ghaliex, apparti li f’xi hin il-vittma kienet fil-perikolu tal-mewt, irrizulta li hi issa baqghet ipparalizata minn qadda l-isfel ghal ghomorha.

“Il-Prosekuzzjoni ssottomettiet ukoll li ma kellux jinghata messagg lis-socjeta` li ghax wiehed jghid li kien qieghed taht l-influwenza ta’ passjoni istantanja w agitazzjoni tal-mohh jista’ b’daqshekk jehlisha hafif. Tant hu hekk illi f’kazijiet bhal dawn, mit-2002 l-hawn, il-Ligi stabilit minimu tal-piena li qabel ma kienx hemm u anki introduciet it-test oggettiv li bih wiehed ghandu iqis jekk kienx hemm jew ma kienx hemm din il-passjoni istantanja jew agitazzjoni tal-mohh. Dana ghaliex illum, kemm f’kazijiet ta’

provokazzjoni kif ukoll f'kazijiet ta' passjoni istantanja jew agitazzjoni tal-mohh, ir-raguni trid tkun tali li f'nies ta' temperament ordinarju, komunement iggib l-effett li ma jkunux kapaci li jqisu l-konsegwenzi tad-delitt. Ghalhekk il-Prosekuzzjoni talbet li f'dan il-kaz il-piena ghandha tkun eqreb lejn il-massimu milli lejn il-minimu w cioe` wahda li tkun bejn disa' u ghaxar snin prigunerija;

"Ikkonsidrat:

"Qieset iz-zmien kollu li l-hati ghamel taht arrest preventiv in konnessjoni ma dan il-kaz;

"Qieset ukoll li l-verdett tal-gurati kien wiehed ta' sitta kontra tlieta;

"Qieset li skond l-artikolu 228(2) tal-Kodici Kriminali, il-piena ghall-omicidju volontarju bl-iskuzanti fuq imsemmija fil-verdett skond il-ligi kif kienet qabel l-emendi ghall-Kodici Kriminali introdotti bl-Att III tas-sena 2002, kienet ghal zmien sa ghoxrin sena w bla minimu;

"Qieset li skond l-artikolu 41 il-piena ghat-tentattiv ta' reat tigi mnaqqsa bi grad jew zewg gradi mill-piena ghar-reat kunsmat u ghalhekk, skond l-artikolu 31 (1)(b) tal-Kodici Kriminali, l-massimu tal-piena jkun ta' tnax il-sena jekk jonqos bi grad u ta' disa' snin jekk jonqos b'zewg gradi;

"Qieset ukoll il-gravita` tar-reat li ghalkemm ma wassalx ghar-reat ikkunsmat li kellu l-hsieb li jikkommetti l-hati, wassal biex il-vittma Gorgina Borg sofriet korriment tant gravi li ser ihalliha paraplegika, go *wheelchair* u dipendenti minn haddiehor ghal hajjitha kollha;

"Qieset dak li gie ritenut fis-sentenza Ingliza ta' **Bancroft** (1981) [3 Cr. App. R. (S) 119] citata b'approvazzjoni mill-Qorti tal-Appell Kriminali (kolleggjali) fil-kawza ***Ir-Repubblika ta' Malta vs. Francis sive Cikku Farrugia*** [3.10.2003] u minn din il-Qorti fis-sentenza ***Ir-Repubblika ta' Malta vs. Francis Buhagiar*** [5.11.2003] konfermata fl-appell [24.9.2004] :-

""….notwithstanding that a man's reason might be unseated on the basis that the reasonable man would have found himself out of control, there is still in every human being a residual capacity for self-control, which the exigencies of a given situation may call for. That must be the justification for passing a sentence of imprisonment, to recognise that there is still left some degree of culpability….(ara Jeremy Horder : *Provocation and Responsibility* (OUP, 1992 p. 120)"

"Ghal dawn il-motivi, l-Qorti wara li rat l-artikoli 31(1)(b), 41, 211, 227 (c) 228 (2) u 533 tal-Kap. 9, tikkundanna lill-hati Marco Zarb ghall-piena ta' tmin (8) snin prigunerija, li minnhom ghandu jitnaqqas il-perjodu kollu li l-hati qatta' taht arrest preventiv in konnessjoni ma' dan il-kaz u tikkundannah ukoll ihallas lir-Registratur tal-Qrati s-somma ta' mitejn u tlieta u tmenin lira Maltin u sebgha w hamsin centezmi (LM283.57c) rapprezentanti l-ispejjes kollha tal-perizji inkorsi tul il-kumpilazzjoni, u dana bl-applikazzjoni tal-Art. 533 tal-Kodici Kriminali."

Marco Zarb appella minn din is-sentenza limitatament dwar il-piena fuqu inflitta. Huwa jillanja bazikament li l-piena kienet, fic-cirkostanzi tal-kaz, wahda eccessiva. Aktar specifikatament l-appellant jghid li l-ewwel Qorti ma "ddecidietx jekk l-istqarrija moghtija u iffirmata [minnu]…tikkostitwix kooperazzjoni mal-pulizija o meno, u allura…jekk ghandhiex tinghata piz fil-valutazzjoni tal-piena." Skond l-appellant is-sentenza timmanifesta t-tezi tal-prosekuzzjoni li l-appellant ma ikkoperax. Jilmenta wkoll l-appellant li l-ewwel Qorti skartat id-deposizzjoni tal-psikjatra Dott. Joseph Spiteri. Skond l-appellant l-ewwel Qorti ma tatx piz bizzejjed, ankorke` fil-kuntest ta' tentattiv ta' omicidju volontarju bl-iskuzanti tal-provokazzjoni kif misjuba mill-gurati, ghall-provokazzjonijiet u "l-agir abuziv" ta' Gorgina Borg[1] (ez. il-fatt li kienet qed tiffrekwenta ragel iehor, li ghalkemm kienet qed iggorr it-tarbija tieghu, cioe` ta' l-appellant, riedet titlaq lill-istess appellant). Fi kliem iehor, l-appellant jilmenta in generali li l-ewwel Qorti ma

[1] Zarb u Borg ma kienux mizzewgin izda kienu ilhom jghixu ghal xi erba' xhur flimkien.

evalwatx bizzejjed il-grad u l-intensita` tal-“provokazzjoni” f’dan il-kaz, kif ukoll il-grad u l-intensita` ta’ l-imhabba li kien hemm bejn l-appellant u l-imsemmija Borg (l-appellant, fir-rikors ta’ appell tieghu, jelenka seba’ fatturi li, skond hu, iddeterminaw l-incident *de quo*). Skond l-appellant, piena karcerarja (jew piena karcerarja ta’ tmien snin) f’dan il-kaz ma tilhaq ebda wiehed mill-ghanijiet principali tas-sanzjoni kriminali.

Din il-Qorti ezaminat bir-reqqa mhux biss is-sentenza appellata izda anke l-provi migjuba kemm fil-kumpilazzjoni kif ukoll dawk ta’ waqt il-guri, u hi tal-fehma li ma tistax takkolji dana l-appell. Jibda biex jinghad li ma hux korrett jinghad li l-ewwel Qorti skartat jew ma kkunsidratx bizzejjed xi aspett partikolari ta’ fatt li kien jincidi fuq il-piena. Kif jinghad fl-istess sentenza appellata, dik il-Qorti hadet in konsiderazzjoni s-sottomissjonijiet kollha lilha maghmula, inkluza dik maghmula mid-difiza dwar li l-hati kien ikkoopera mal-pulizija, kif ukoll, s’intendi, t-tezi kuntrarja proposta mill-prosekuzzjoni li hawn proprjament wiehed ma kienx jista’ jitkellem dwar kooperazzjoni mal-pulizija minhabba li kien biss wara insistenza da parti taghhom li hu ammetta. Issa, kif diga` din il-Qorti kellha l-opportunita` li tosserva fis-sentenza taghha fl-ismijiet ***The Republic of Malta v. Kandemir Meryem Nilgum and Kucuk Melek*** tal-25 ta’ Awissu 2005, meta l-Qorti Kriminali tigi biex taghti s-sentenza taghha wara l-verdett tal-gurija, ma hux mehtieg li din toqghod taghti ragunijiet dettaljati ghal kif waslet ghax xi piena partikolari jew ghall-*quantum* ta’ dik il-piena (sia jekk din tkun ta’ prigunerija u sia jekk tkun wahda pekunjarja). Anqas ma hemm xi htiega li kull sottomissjoni maghmula min-naha jew minn ohra tigi ripetuta fis-sentenza, jew li jsir xi kumment partikolari dwarha, b’mod li tigi espressament akkolta jew skartata. Inoltre kien gie osservat f’dik l-istess sentenza li fuq appell mill-piena din il-Qorti bhala regola ma tirrimpjazzax il-piena moghtija mill-ewwel Qorti b’dik li kieku hija – cioe` din il-Qorti – kienet taghti f’dawk ic-cirkostanzi kemm-il darba ma jkunx jirrizulta li l-piena moghtija mill-ewwel Qorti kienet b’xi mod “wrong in principle” jew “manifestly excessive”. F’dik is-sentenza, in fatti kien inghad testwalment hekk:

"…the Criminal Court is not obliged to give detailed reasons explaining either the nature or the *quantum* of the punishment being meted out, or to spell out any mathematical calculations that it may have made in arriving at that *quantum*. Although the determination of the nature and the *quantum* of the punishment is, of its nature, the determination of a question of law – see Sections 436(2) and 662(2) of the Criminal Code – all that is required is that the Court state the facts of which the accused has been found guilty (or, as in the present case, the facts to which he/she has pleaded guilty), quote the relevant provision or provisions of the law creating the offence (which provisions generally also determine the punishment applicable), and state the punishment or other form of disposal of the case. Unless expressly required by law to spell out in detail something else – as for instance is required by Section 21 of the Criminal Code or by the first proviso to subsection (2) of Section 7 of the Probation Act, Cap. 446 – the above would suffice for all intents and purposes of law. The principle *nulla poena sine lege* does not mean or imply that a Court of Criminal Justice has to go into any particular detail as to the nature and *quantum* of the punishment meted out, or, where the Court has a wide margin of discretion with various degrees and latitudes of punishment, that it has to spell out in mathematical or other form, the logical process leading to the *quantum* of punishment. This is also the position in English Law. As stated in **Blackstone's Criminal Practice 2004** [2]:

""Save where the statutory provisions mentioned below apply, there is no obligation on the judge to explain the reasons for his sentence. However, the Court of Appeal has encouraged the giving of reasons, and has indicated that that should certainly be done if the sentence might seem unduly severe in the absence of explanation…It has been held that failure by the sentencing court to give reasons when required to do so does not invalidate the

[2] OUP (2003) at p 1546, para. D18.34.

sentence…although the failure may no doubt be taken into account by the appellate court should the offender appeal. Where the sentencer does give reasons and what he says indicates an error of principle in the way he approached his task, the Court of Appeal sometimes reduces the sentence even though the penalty was not in itself excessive. Similarly a failure by the judge to state expressly that he is taking into account any guilty plea, although contrary to [statutory provision], does not oblige the Court of Appeal to interfere with what is otherwise an appropriate sentence…"

"This Court is in full agreement with the principles stated above. Indeed, it is highly recommendable that, when the law provides for a wide margin of discretion in the application of the punishment, reasons, possibly even detailed reasons, be given explaining how and why the court came to a particular conclusion."

U f'dik is-sentenza din il-Qorti kompliet hekk:

"This Court can find no valid reason why the Criminal Court should necessarily have applied the reduction by two degrees, as opposed to a reduction by one degree, which appears to have been the case. It is clear that the first Court took into account all the mitigating as well as the aggravating circumstances of the case, and therefore the punishment awarded is neither wrong in principle nor manifestly excessive, even when taking into account the second and third grounds of appeal of appellant Melek. As is stated in **Blackstone's Criminal Practice 2004** (*supra*):

""The phrase 'wrong in principle or manifestly excessive' has traditionally been accepted as encapsulating the Court of Appeal's general approach. It conveys the idea that the Court of Appeal will not interfere merely because the Crown Court sentence is above that which their lordships as individuals would have imposed. The appellant must

be able to show that the way he was dealt with was outside the broad range of penalties or other dispositions appropriate to the case. Thus in *Nuttall* (1908) 1 Cr App R 180, Channell J said, 'This court will…be reluctant to interfere with sentences which do not seem to it to be wrong in principle, *though they may appear heavy to individual judges*' (emphasis added). Similarly, in *Gumbs* (1926) 19 Cr App R 74, Lord Hewart CJ stated: *'…that this court never interferes with the discretion of the court below merely on the ground that this court might have passed a somewhat different sentence; for this court to revise a sentence there must be some error in principle."* Both Channell J in *Nuttall* and Lord Hewart CJ in *Gumbs* use the phrase 'wrong in principle'. In more recent cases too numerous to mention, the Court of Appeal has used (either additionally or alternatively to 'wrong in principle') words to the effect that the sentence was 'excessive' or 'manifestly excessive'. This does not, however, cast any doubt on Channell J's dictum that a sentence will not be reduced merely because it was on the severe side – an appeal will succeed only if the sentence was excessive in the sense of being outside the appropriate range for the offence and offender in question, as opposed to being merely more than the Court of Appeal itself would have passed." [3]

"This is also the position that has been consistently taken by this Court, both in its superior as well as in its inferior jurisdiction."

Wara li din il-Qorti ezaminat, kif inghad, il-provi kollha hija sodisfatta li l-piena erogata mill-ewwel Qorti kienet wahda gusta. Hawn ghandna kaz fejn il-hati ghamel il-hsieb li jivvendika ruhu u joqtol lill-persuna li maghha kien qed ighix semplicement ghax din ma riditx tibqa' tghix mieghu (minkejja li kienet qed iggorr it-tarbija tieghu, li eventwalment tilfet). Il-fatt li huwa hassu urtat, anke jekk

[3] Page 1695, para. D23.45

urtat hafna, bl-agir taghha – inkluz il-fatt li bdiet tkellem ragel iehor – b'ebda mod ma jista' jiggustifika jew jiskuza dak li ghamel l-appellant. Huwa veru li l-gurati sabu l-iskuzanti li l-appellant agixxa taht l-influwenza immedjata ta' passjoni istantanja jew agitazzjoni tal-mohh fit-termini tal-paragrafu (c), izda dan ma jnaqqas xejn mill-gravita` oggettiva ta' l-akkadut: il-legislatur f'kazijiet simili semplicement jirridimensjona l-piena biex jittiehed kont ta' l-istat ta' fatt partikolari konsistenti fil-*furia di sangue* tal-hati. Huma ghal kollox barra minn lokhom is-sottomissjonijiet ta' l-appellant fejn jipprova jinvoka dawk li huwa jsejjah bhala "l-imhabba qawwija hafna" li huwa kellu ghal Borg u "l-intensita` tar-relazzjoni" taghhom bhala ragunijiet ghala ghandha titnaqqas il-piena. Fil-fehma tal-Qorti l-appellant qed jikkonfondi s-sens ta' dominazzjoni li huwa ried li jkollu fuq l-imsemmija Borg ma' l-imhabba. Kif tajjeb isottomettiet il-prosekuzzjoni, l-ewwel versjoni jew ahjar versjonijiet li l-appellant ta lill-pulizija kienu fis-sens li Borg kienet jew waqghet jew qabzet mill-gallerija, u kien biss b'rizultat tal-pacenzja u l-persistenza tal-ufficjal li kien qed jinterroga lill-appellant – l-Ispettur Antonello Grech – li l-appellant wasal biex ammetta u qal kif verament graw l-affarijiet. Din il-Qorti anqas ma tista' tinjora l-fatt importanti li, kif jidher mill-atti, Gorgina Borg, ser ikollha tghaddi l-kumplament ta' hajjitha f'*wheelchair* b'rizultat ta' l-agir doluz ta' l-appellant.

Ghall-motivi premessi, tichad l-appell u tikkonferma s-sentenza appellata.

< Sentenza Finali >

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