



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

**MAGISTRAT DR.
LAURENCE QUINTANO**

Seduta tas-17 ta' Ottubru, 2008

Numru 4/2008

Il-Pulizija

versus

John Mary Galea

Il-Qorti

Rat l-imputazzjonijiet dedotti konta John Mary Galea ta' 44 sena bin il-mejjet Nazzareno u li joqgħod California Constitution Street Mosta.

Akkużat talli f'dawn il-Gzejjer u f'dawn l-aħħar xhur naqas li jikkonforma ruħu mas-sentenza mogħtija lillu mill-Qorti Kriminali ta' l-Appell fl-24 t'Awwissu 1977 fejn kien misjub ħati skond l-akkuża u kien imwaħħal Lm50 (€58.23) u mogħti xahrejn żmien biex jikkonforma ruħu mal-liġi taħt penali ta' Lm25 kull jum fin-nuqqas.

Kopja Informali ta' Sentenza

Il-Qorti ntalbet li tikkundanna lill-imsemmi John Mary Galea li jhallas is-somma ta' Lm2450 (€5708) bħala penali mill-25 t'Ottubru 1977 sat 30 ta' a1978 salva l-penali għan-nuqqas ulterjuri.

Rat l-atti kollha tal-proċess inkuża s-sentenza ta' l-24 t'Awissu 1977, u ir-ritratti esibiti bil-ġurament u li kienu juru l-istat tal-bini kif kien fil-bidu ta' Mejju 2006 kif kien ikkonfermat bil-ġurament mis-sur Anthony Borg.

Isegwi li sa din id-data l-bini kien għadumhux konformi mas-sentenza msemmija aktar 'il fuq.

Semgħet lil Anthony Baldacchino jixhed li nħareġ PA 5821/2004 fuq John Mary Galea. Rat id-dokument PAB bid-data 1 ta' Marzu 2007 li nħareġ biex jissanzjona existing boathouse/garage fi 20 Triq ix-Xtut San Pawl il-Baħar.

Ikkonsidrat

Illi s-sanzjoni tal-bini ma jfissirx li ma kinitx inkisret l-ordni tal-Qorti mogħtija fis-sentenza ta' l-24 t'Awissu 1977.

Rat il-Full Development Permission /01 li nħareġ fl-1 ta' Marzu 2007 fuq John Mary Galea fuq il-fond numru 20 Triq Tax-Xtut San Pawl il-Baħar.

Il-permess li nħareġ jgħid hekk:

'The permission is subject to a planning gain to the value of Lm1000 (one thousand Malta Liri (€2330) towards MEPA's Environmental Initiatives Partnership Programme. The funds raised from the planning gain shall be used to fund environmental improvements in the locality of the site.'

Semgħet it-trattazzjoni tal-partijiet b'mod partikolari fuq l-insistenza tad-difiża li diġa' tħallas il-Planning Gain li d-difiża tqis bħala multa amministrattiva u li għalhekk m'għandhiex titħallas multa oħra minħabba l-prinċipju ta' 'ne bis in idem'.

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Iżda l-Prosekuzzjoni ssottomettiet li

(a) il-Bank Guarantee illum qed ikun impost across the board u mhux għal dawn il-każi biss;

(b) La l-applikazzjoni hija sanatorja, dan ifisser li hemm xi ħaġa li mhux sewwa ;

(ċ) li l-imputat m'għaddiex proċeduri darbtejn;

(d) li l-Mepa ma aġixxietx taħt l-artikolu 58 tal-Kap 356;

(e) Mingħajr l-impożizzjoni tal-Planning Gain ma setax jinħareġ il-permess;

(f) Li l-miżura li ħadet il-Mepa hija waħda purament amministrattiva.

Ikkonsidrat

Li l-ewwelnett minkejja li ċ-ċitazzjoni tablet li jibqgħu jithallsu penali għall-perjodu oltre it-30 ta' Jannar 1978, dan fuq skorta ta' sentenza mogħtija mill-Qorti ta' l-Appell Kriminali ma jistax isir għaliex għal dan il-perjodu jinħtieġ li ssir ċitazzjoni oħra.

Li bla dubju ta' xejn il-pożizzjoni ta' l-imputat ma kenitx regolari u dan joħroġ mis-sentenza hawn fuq ċitata kif ukoll mill-istess applikazzjoni biex ikun sanat il-permess.

Li l-pożizzjoni legali dwar in-ne bis in idem kif toħroġ mill-każistika tal-Qorti tal-Appell Kriminali hija s-segwent:

(a) Meta fatt jivvola aktar minn provvediment wieħed tal-Liġi

Illi jista' jiġri li l-istess fatt jista' jivvola aktar minn provvediment wieħed tal-liġi u għalhekk jista' joħloq diversi raġunijiet għall-inkriminazzjoni. X'inhu fatt kien spjegat fil-każ 'Rex versus Rosaria Portelli' fil-każ deċiż fit-

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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-Professor 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-każ '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 pluralità ta' offiżi iżda offiża waħda bil-vjolazzjoni li jkunu iżgħar jkunu assorbiti fil-vjolazzjoni l-aktar serja. U jekk persuna tkun iġġudikata għal waħda mill-vjolazzjonijiet u jkun meħlus jew jinsab ħati, is-sentenza iżżomm 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.

Id-difiża għamlet referenza wkoll għall-każ 'Rex versus Agatha Mifsud et' tal-15 ta' Ġunju, 1918 (VolXXIII. Part I p.1077), każ li huwa kkwotat ukoll mill-Professor Mamo f'paġina 44 ta' l-istess Noti citati. 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 adottati 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 Ingliża 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 adjudicative ought to be final.....'

(b) Mill-każistika tal-Qorti Kostituzzjonali.

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

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

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

Fil-ewwel waħda l-Qorti Kostituzzjonali kienet sabet possibilita' ta' ksur tal-prinċipju 'ne bis in idem' minħabba li l-imputati kienu diġa' 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-Facilita' 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-kawża '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' provizzorja u dan kien punit, setax jibda proċediment ieħor billi jitlob espressament għat-telfien tal-liberta' provvizorja għaliex fl-ewwel rikors kien għamel talba waħda. Il-Qorti Kostituzzjonali wkoll sabet li t-tieni proċedura tikser il-prinċipju ta' 'ne bis in idem'.

(ċ) Mill-Każistika 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 ta' l-14 ta' Settembru 1999 fejn rikors li kien jallega ksur tal-prinċipju tan-ne bis 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**.

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 jiformaw 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 jinħtieġ li jingħataw aktar dettalji. Il-Qorti qed tipproduċi l-aktar siltiet importanti:

'THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. 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.

8. On 13 December 1996, the St. Pölten 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*).

9. On 18 March 1997 the St. Pölten 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

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

20. 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

22. 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).

23. 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.

24. 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 (*concoure idéal 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).

25. 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.

26. 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.

27. 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.

28. 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.

29. However, the Court considers that these differences are not decisive. As said above, the question whether or not the *non 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.

30. 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.

31. 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.

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

Ikkonsidrat

Li ħafna mill-każistika kemm ta' Malta kif ukoll ta' barra aktar iddur dwar proċeduri doppji jew jekk 'il-piena' jew kastig mogħti kienx ta' natura kriminali. Xi deċiżjonijiet tal-Qorti Ewropea Dwar id-Drittijiet tal-Bniedem kienu saħansitra kkritikati għax dehru kontradittorji. (Dwar dan ara; John A.E.Vervaele fl-Utrecht Law Review Volum 1 Issue Number 2 (December) 2005 <http://www.utrechtlawreview.org/page102>).

Il-Qorti rreferiet fit-tul għaliex dan kien każ ta' piena amministrattiva għax kienet mogħtija minn St.Polten District Administrative Authority kif ukoll piena kriminali għax kienet mogħtija mis-St.Polten Regional Court.

Il-Qorti tara differenza netta bejn dejn id-deċiżjoni u l-każ odjern fejn wieħed la jista' jgħid li l-imputat għadda minn xi forma ta' proċeduri ġudizzjarji quddiem il-Mepa u lanqas jista' wieħed jgħid li kien jista' jinkorri xi piena serja karċerarja jew pekunjarja. Il-Mepa ma kinitx qed taġixxi taħt l-artikolu 58 tal-Kap 356 u li kieku l-imputat m'għamilx l-applikazzjoni biex il-bini mtella' mhux skond il-liġi jiġi sanat ma kienx qed jistenna li l-Mepa, bħala enti amministrattiva, kienet ser tagħmel xi ħaġa.

L-imputat ħallas il-'planning gain' minn jeddu u mhux ikun sfurzat. Il-liġi kriminali minnha nnifisha bil-fors iġġorr xi forma ta' sanzjoni kif dejjem kien tenut fil-filosofija tad-dritt. Il-Qorti ma tistax tqis bħal piena dak li wieħed iħallas għax irid biex ikun jista' jzomm il-bini kif ittella'. Din kienet għażla ta' l-imputat filwaqt li fil-każistika eżaminata ħadd mir-rikorrenti ma kellu din ix-xelta. Huwa sinifikanti wkoll li mhux bil-fors li kull pass li tiegħu enti amministrattiva jista' joħloq is-sitwazzjoni tal-prinċipju eżaminat. Dan jidher

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sew mill-każistika tal-Qorti Ewropea dwar id-Drittijiet tal-Bniedem.

Għalhekk il-Qorti qed tqis li l-imputat la għadda xi proċeduri quddiem il-Mepa u wisq anqas ma jista' jgħid li jekk, wara li ħallas il-Planning Gain, għadhom pendenti dawn il-proċeduri li dawn jammontaw għall-ksur tal-prinċipju ne bis in diem kif sancit bl-artikolu 527 tal-Kap 9.

Konkluzjoni

Il-Qorti, wara li rat l-artikolu 63(2)(i)(ii) ta' l-Att I ta' l-1992, l-artikolu 17(3) tal-Kap 10 kif kien fiż-żmien fil-perjodu indikat fiċ-ċitazzjoni – jiġifieri sat-30 ta' Jannar 1978, issib lill-imputat ħati li naqas li jikkonforma ruħu mas-sentenza ta' l-24 t'Awwissu 1997 u għalhekk qed tikkundannah iħallas is-somma ta' Lm2450 (€5708) bħala penali mill-25 t'Ottubru 1977 sat-20 ta' Jannar 1978 biss u mhux oltre.

MAGISTRAT

< Sentenza Finali >

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