

QORTI TA' L-APPELL KRIMINALI

IMHALLEF

ONOR. VINCENT DEGAETANO LL.D.

Illum, 1 ta' Frar, 2002.

Appell Nru 68/01

Il-Pulizija

v.

Manwel Borg

Il-Qorti,

Rat l-imputazzjonijiet migjuba mill-Pulizija Ezekuttiva kontra Manwel Borg talli (1) fl-24 ta' Settembru, 1999, ghall-habta tad-disgha w nofs ta' filghaxija, quddiem il-kazin Nazzjonalista ta' Hal-Balzan, kiser volontarjament il-bon-ordni w il-paci pubblika b'ghajjat u glied, u dan bi ksur tal-artikolu 338(dd) tal-Kap 9 tal-Ligijiet ta' Malta; kif ukoll talli (2) fl-istess lok, hin u cirkostanzi, minghajr il-hsieb li joqtol jew li jqieghed il-hajja ta' haddiehor f'perikolu car, ikkaguna hsara fil-gisem ta' Joachim Wihl ta' 58 sena ta' nazzjonalita` Germaniza, iben Peter u Theresa nee` Koenig, imwieled Dusseldorf fil-21 ta' Ottubru, 1941 u residenti The Rose, n/s off Annibale Preca Street, l/o Lija (passaport nru 5155602837), liema hsara giet iccertifikata bhala ta' natura gravi mit-tabiba Daniela Laurenti M.D. tal-Casualties Section tal-Isptar San Luqa, u dan bi ksur tal-artikolu 214 u 216(d) **[recte: 216(1)(d)]** tal-Kap 9 tal-Ligijiet ta' Malta;

Rat is-sentenza tal-Qorti tal-Magistrati (Malta) tat-30 ta' Marzu, 2001, li fil-parti dispozittiva taghha tghid hekk:

"Illi ghal dawn il-motivi il-Qorti ssib lill-imputat hati skond l-akkuza. Rat Art 338dd, Art 214, 215, 216, 17(c), 20, Art 28A kap 9 u tikkundannah sena prigunerija sospizi **[recte: sospiza]** ghal tlett snin";

Rat ir-rikors ta' appell ta' l-istess Manwel Borg, minnu ppresentat fl-10 ta' April, 2001, li permezz tieghu talab ir-revoka ta' l-imsemmija sentenza;

Rat l-atti kollha tal-kawza; semghet lid-difensuri tal-partijiet; ikkunsidrat:

L-appellant ghandu diversi aggravji, pero` l-aggravju principali tieghu huwa, bazikament, li l-ewwel qorti “ghamlet apprezzament erroneu, mhux ezatt u zbaljat tal-fatti, tax-xhieda u tal-provi b’mod generali”. In sostenn ta’ dana l-aggravju l-appellant ghandu kwazi seba’ faccati li fihom janalizza siltiet mid-diversi deposizzjonijiet moghtija minn diversi xhieda quddiem l-ewwel qorti, kif ukoll siltiet mis-sentenza appellata, sabiex, skond hu, juri li l-ewwel qorti zbaljat fl-apprezzament tal-provi “b’mod generali”. Din il-Qorti ezaminat bir-reqqa kollha mhux biss is-siltiet indikati mill-appellant izda d-deposizzjonijiet kollha u fl-intier taghhom moghtija quddiem il-Qorti tal-Magistrati u debitament traskritti skond il-ligi. Essenzjalment il-kwistjoni hi jekk wiehed ghandux jemmen il-verzjoni tal-akkadut moghtija minn Joachim Bernard Wihl jew il-verzjoni – jew, ahjar, wahda mid-diversi verzjonijiet – moghtija minn dawk li kienu presenti fil-kazin (inkluz l-appellant) fl-24 ta’ Settembru, 1999 f’xi hin ghall-habta tad-disgha ta’ filghaxija. Il-kwerelant Wihl jghid li hu dahal fil-kazin in kwistjoni biex jaghmel telefonata biex jittestja t-“telephone answering machine” li kellu d-dar, u wara li ghamel hekk ordna birra. Waqt li kien qed jixrob din il-birra il-kliem waqa’ fuq is-shubija ta’ Malta fl-Unjoni Ewropea, u meta hu – Wihl – esprima xi opinjoni, il-barman – l-imputat – kien verbalment aggressiv mieghu. Wihl, ghalhekk, hallas il-kont (u l-barman tah il-bqija) u beda hierreg mill-hanut. Fi kliem l-imsemmi Wihl:

“But while I was going out, I heard him coming after me and shouting at me, and I got afraid. So I hurried, I went out, and as soon as I was near the cars parked, I felt him grabbing me, throwing me on the ground and started kicking me” (fol. 34).

B’rizultat ta’ wahda mid-daqqiet ta’ sieq li dana Wihl jallega li qala, huwa garrab ksur f’idu x-xellugija qrib il-polz (ara d-deposizzjoni ta’ Dott. Daniela Laurenti M.D., fol. 66). A fol. 37 l-istess Wihl jerga jirrepeti kif gara l-incident:

“When I left the bar and went out, he was shouting at me giving me the money so I quickly put it in my pocket and turned to go out. Then when I were¹ on the point just to go out, I heard him shouting at me and coming after me. So I didn’t walk as I do normally, I hurried, there were two cars parked, and as I passed these cars he grabbed me from behind and turned me round and threw me on the floor. I must have fallen at the end of the car but it was on the road, and instinctively I put my hands on top of my head to protect myself”.

Kemm l-appellant kif ukoll tlieta minn erba’ persuni ohra li kienu fil-hanut dak il-hin – John Demicoli, Donatello Azzopardi u hu l-imputat, Nicholas Borg – jghidu li hadd ma aggredixxa lil dana Wihl, izda li dana waqa wahdu fuq jew vicin tal-ghatba tal-hanut u x’hin l-appellant mar biex jghinu jqum dana rrifjuta l-ghajnuna u, skond l-appellant u xi whud minn dawn ix-xhieda, kien Wihl li hebb jew kwazi hebb ghall-appellant. Skond l-istqarrija li l-appellant ghamel lill-pulizija l-ghada, 25 ta’ Settembru, 1999, meta huwa (Borg) rah ihebb ghalih, huwa beza u dahal gewwa, u

¹ “was”?

I-Germaniz qam wahdu u mar lil hemm bil-kwiet (ara fol. 16). Meta xehed quddiem l-ewwel qorti l-appellant, allura imputat, tant jimminimizza dak li gara li addirittura jghid li proprjament anqas kien hemm dak li tista' ssejjahlu "incident" (fol. 155). Hu jghid li meta mar biex jghin lil Wihl – li allura, skond hu, kien waqa' wahdu fil-ghataba tal-bieb tal-kazin – dana Wihl semplicement irrifjuta kull ghajnuna. In fatti, fil-kors ta' l-ezami tieghu l-appellant jghid li wara li huwa sema' lil xi hadd jaqa' u jghid "shit", hu u dawk kollha fil-hanut hargu barra:

"...Jiena, hija u l-kumplament li kien hemm hargu, jien mort fuqu biex inqajjmu, qalli "I don't need any help"...Ma riedx ghajnuna. Jien qbadtu minn spalltu biex nghinu, kien hemm hija Colin², ukoll qabdu minn spalltu...U qajjmtu u daqshekk, telaq u dhalna 'l gewwa." (fol. 161, 162).

Skond xi whud minn dawn – cioe` l-appellant, huh, Demicoli u Azzopardi – Wihl kien diga imlahlah meta dahal fil-kazin u hemm gew xorob xi hamsa jew sitta birra ohra qabel ma hareg u waqa' kif inghad. W.P.C. 59 Grace Borg, pero`, li kienet fil-Ghassa ta' Birkirkara u li irceviet l-ewwel rapport minghand l-istess Wihl f'xi 9.30 p.m. tghid kategorikament li ghalkemm Wihl kien mugugh u kien "quite frustrated about it", huwa kien altrimenti normali u ma kienx xurban (fol. 76). Pero` hemm xhud iehor li jmeri sostanzjalment il-versjoni moghtija minn l-ahwa Borg u minn Demicoli u Azzopardi: Roy Russell. Dana Russell kien ukoll fil-kazin filmument li dahal Wihl. Skond Russell, Wihl kullma lehaq ha kien birra wiehed li anqas spiccaha sakemm inqala l-battibekk li wasslu biex johrog mill-kazin:

"An older German man came in and he ordered one beer, because he speaks English we were talking about the European Common Market. The bartender started getting in the conversation and within just a matter of minutes he was interrupting, and then German gentleman said "Well, you'll never join the EU if you keep...". Manwel took offence, reached over towards the German, and the German bieng intelligent reached towards the door, just as he got out the door he actually slept³ on the pavement. Colin, Manwel's brother raised⁴ and grabbed Manwel and there was this other man in the pub, red-haired, wearing an ear-ring, and he walked out and he started kicking the German and saying "you are a German bastard". I raised⁵ over, I grabbed him and then everybody went back to the bar, and I took the German off to another bar to make a phone call and he called his wife". (fol. 78, 79).

L-ahwa Borg, Demicoli u Azzopardi jichdu li kien hemm xi persuna ohra fil-bar li twiegeb ghad-deskrizzjoni li ta Russell, u cioe` b'xaghru ahmar u b'misluta. Skond dawn, huma biss (oltre Russell u Wihl) kienu fil-bar. Wihl jikkorobora in parti dak li jghid Russell, fis-sens li kien dan Russell li intervjena biex hu (Wihl) ma jkomplix jinghata bis-sieq:

² Nicholas

³ "stepped", "slipped"?

⁴ "raced"?

⁵ "raced"?

“There was one person who lifted me up. I don’t know whether it was him who held him backwards from continuing kicking me, and he said “I am Roy Russell” (fol. 38).

Kollox ma’ kollox din il-Qorti hi sodisfatta li l-ewwel qorti kienet korretta meta kkonkludiet li kien l-appellant, cioe` Manwel Borg, li aggedixxa u sawwat lil Wihl; u li Roy Russell – l-unika persuna li jsemmi l-aggressjoni u s-swat fuq Wihl – qieghed semplicement jissostitwixxi il-figura fantomatika tal-persuna b’xaghrha ahmar u b’misluta ghall-appellant biex (minghalih) ma jgharraqx lill-appellant. Fattur li donnu anke l-ewwel qorti ma taghtux l-importanza li jisthoqqlu huwa c-certifikat mahrug mit-Tabib Dott. John Zammit Montebello u ezibit mill-prosekuzzjoni (fol. 13). Skond l-appellant, kif appena ghalaq il-kazin dak in-nhar tal-24 ta’ Settembru, 1999 huwa mar ghand dana t-tabib peress li hass gismu jitrieghed (ara l-istqarrija, fol. 16). Skond din l-istqarrija, sussegwentement konfermata bil-gurament fil-qorti, meta dana t-tabib invistah, sabu (cioe` lill-appellant) li kien qed ibati “minn stat ta’ xokk kbir”. Gustament l-ewwel qorti stqasiet kif u ghala, meta skond l-appellant anqas kien hemm “incident”, dana kien fi stat ta’ xokk kbir semplicement ghax qabel ma ghalaq gew il-pulizija jistaqsu jekk kienx gara xi incident fil-hanut. Pero` aktar importanti huwa dak li jghid l-istess certifikat dwar l-irkoppa tal-lemn ta’ l-appellant, u cioe` “He [jigifieri Manwel Borg] was suffering from agitation and contusion to R knee” (sottolinear ta’ din il-Qorti). Din il-Qorti tistaqsi: kif seta’ l-appellant ikollu kontuzjoni, jigifieri daqqa, fuq irkobbtu l-lemnija, u li huwa hass li kellu jurija lit-tabib biex din tigi rekordjata fic-certifikat, jekk ma kien hemm ebda kuntatt vjolenti bejnu u bejn xi persuna ohra dak il-lejl? Ghall-motivi premissi din il-Qorti tirrespingi dan l-ewwel aggravju.

It-tieni aggravju ta’ l-appellant hu fis-sens li Wihl qatt ma identifika pozittivament lill-appellant bhala l-aggressur tieghu. Dana l-aggravju jirrazenta l-fieragh. Hu evidenti jekk wiehed jaqra bis-sens id-deposizzjoni kollha ta’ Wihl, li dana qed jirreferi ghall-barman, u barman wiehed biss kien hemm, u cioe` l-appellant. Anke mis-silta aktar ‘1 fuq riportata minn fol. 37 huwa evidenti li x-xhud qed jirreferi ghall-imputat (il-barman) peress li kien il-barman li meta hallas tah il-bqija. U fir-rapport li ghamel lill-pulizija huwa wkoll identifika lill-aggressur tieghu bhala l-barman (ara r-rapport a fol. 29). Din il-Qorti ma jidhrilhiex li ghandha ghalfejn tghid aktar dwar dana l-aggravju.

It-tielet aggravju ta’ l-appellant hu fis-sens li “l-Ewwel Qorti ghamlet apprezzament hazin u enuncjazzjoni zbaljata ghall-ahhar tar-regoli tal-*hearsay evidence*”. L-appellant jilmenta li l-ewwel qorti ikkunsidrat id-deposizzjoni ta’ mart l-aggredit, u cioe` ta’ Sylvana Wihl, b’mod skorrett. Frankament din il-Qorti ma tista’ tirravviza ebda skorrettezza kif qed jigi allegat. Id-deposizzjoni ta’ Sylvana Wihl l-ewwel qorti jidher li haditha in konsiderazzjoni (bhalma haditha in konsiderazzjoni din il-Qorti) biex tara jekk Joachim Wihl kienx konsistenti fil-versjoni li huwa ta lil martu, u mhux bhala prova li dak li kien qed jghid li sehha fil-kazin kien fil-fatt sehha. Kif intqal fil-kaz ***Subramaniam v.***

Public Prosecutor [1956] 1 WLR 956, PC, “*Evidence of a statement made to a witness...may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made*” (at 969). Ghalhekk dana l-aggravju huwa infondat.

L-ahhar zewg aggravji jistghu facilment jigu kkunsidrati flimkien. L-appellant jilmenta dwar il-piena lil moghtija ta' sena prigunerija sospiza ghal tlett snin. Jilmenta wkoll li l-ewwel qorti naqset li tispjegalu l-portata u l-import tas-sentenza sospiza. Jibda biex jinghad li l-fatt li ma jirrizultax, la mis-sentenza u anqas minn xi verbal, li l-ewwel qorti ottemperat ruhha mas-subartikolu (4) tal-Artikolu 28A tal-Kodici Kriminali, ma jwassalx ghan-nullita` ta' dik is-sentenza (ghalkemm jista', potenzjalment, ikun hemm konsegwenzi ohra, pero` li din il-Qorti m'ghandhiex ghalfejn tidhol fihom f'din is-sentenza). Dana n-nuqqas ta' l-ewwel qorti huwa sanabbli fi stadju ta' appell, anke jekk l-appell ikun tal-persuna misjuba hatja. Kwantu ghall-piena ta' sena prigunerija, din il-Qorti tara li, fic-cirkostanzi, tali piena kienet gusta. Bhala regola, kazijiet ta' vjolenza fizika li tikkaguna offiza gravi fuq il-persuna ghandhom igibu maghhom il-piena ta' prigunerija b'effett immedjat. Il-vjolenza ma ghandha qatt tigi tollerata f'socjeta` civili; u l-qorti ghandhom l-obbligu li jzommu f'mohhom il-gid tas-socjeta` in generali, u li jkunu severi f'dan ir-rigward biex il-piena sservi principalment ta' deterrent. F'dan il-kaz, tenut kont tal-fatt li l-offiza kagunata kienet wahda gravi fit-termini tal-Artikolu 216 tal-Kodici Kriminali, din kellha tkun ta' prigunerija bejn minimu ta' tlett xhur sa massimu ta' tlett snin. Il-piena ta' sena erogata hi, fil-fehma ta' din il-Qorti, wahda gusta. L-ewwel qorti deherilha li kellha tissospendi din il-piena ghall-periodu operattiv ta' tlett snin. Din il-Qorti mhix tal-fehma li dana l-periodu ghandu jitnaqqas.

Ghall-motivi premissi, tichad l-appell u tikkonferma s-sentenza appellata, b'dan li l-periodu operattiv ta' tlett snin tas-sentenza sospiza ta' sena prigunerija jibda jiddekorri mill-lum. Il-Qorti ghall-kull buon fini qed tispjega lill-hati bi kliem car ir-responsabbilta` tieghu taht l-Artikolu 28B jekk huwa jikkommetti matul il-periodu operattiv reat li ghalih hemm piena ta' prigunerija.

Fl-ahhar nett il-Qorti tigbed l-attenzjoni tar-registratur ghas-subartikolu (8) tal-Artikolu 28A tal-Kodici Kriminali.

(ft.) Aldo Testone
D/Registratur

