MALTA

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

MAGISTRAT DR. EDWINA GRIMA

Seduta tat-13 ta' Ottubru, 2011

Numru. 28/2008

Il-Pulizija
(Spettur Frank Anthony Tabone)

Vs

Domenic Azzopardi ta’ 42 sena bin Anthony u Joan nee’ Briffa imwieled Pieta’ nhar l-1 ta’ Ottubru 1969 residenti fil-fond numru 149, Triq il-Knisja Xaghra Ghawdex u 38 Triq il-Knisja Xaghra Ghawdex detentur ta’l-karta ta’l-identita’ numru 398969(M)

Il-Qorti,

Rat l-imputazzjoni migjuba kontra l-imputat Domenic Azzopardi akkuzat talli nhar it-8 ta’ April, 2008, ghal habta tas-siegha ta’ wara nofs inhar (13.00 hrs) gewwa r-residenza numru 111, fi Triq Santa Marija, Marsalforn, Zebbug, Ghawdex, ikkommetta :

a) serq ta’ DVD player tad-ditta ‘VIGO’, ghad-detriment ta’ Klaus Peter Jobi, liema serq huwa kkwalifika bil-lok u bil-persuna;

b) Ukoll talli fl-istess data, hin, lok u cirkustanzi seraq DVD player tad-ditta ‘Red Star 420G’ ghad-detriment ta’ Klaus Peter Jobi, liema serq huwa kkwalifikat bil-lok, bil-valur, u bil-persuna;

c) Ukoll talli fl-istess data, hin, lok u cirkustanzi seraq computer b’pentium CPU u 320GB HDD komplut b’monitor 17 CRT, printer tad-ditta ‘KLexmark 6100’ zewg settijiet loudspeakers, u PC camera set ghad-detriment ta’ Klaus Peter Jobi, liema serq huwa kkwalifkat bil-lok, bil-valur, u bil-persuna.

d) Ukoll talli fl-istess data, hin, lok u cirkustanzi seraq mobile cell phone tad-ditta ‘Nokia N70’ flimkien ma’ zewg charges ta’ l-istess mobile ghad-detriment ta’ Klaus Peter Jobi, liema serq huwa kkwalifikat bil-lok, bil-valur u bil-persuna.

e) Ukoll talli fl-istess data, hin, lok u cirkustanzi seraq ghodda li jikkonsistu b’Budger BBR7600 Belt Sander, Parkside PEH 950 Powerplanner, Power dritt, Jigsaw li kien go case tal-metal, Grinder bid-diski u diska ohra tal-wire brush ghad-detriment ta’ Klaus Peter Jobi, liema serq huwa kkwalifikat bil-lok, bil-valur, u bil-persuna.

f) Ukoll talli fl-istess data, hin, lok u cirkustanzi seraq extension wire bi tlett sockets u extension wire b’hames sockets tad-ditta ‘Surgemaster’ gghad-detriment ta’ Klaus Peter Jobi, liema serq huwa kkwalifikat bil-lok u bil-persuna.

g) Ukoll talli fl-istess data, hin, lok u cirkustanzi seraq Melita Cable TV decoder u Melita Onvol Modem ghad-detriment ta’ Klaus Peter Jobi, liema serq huwa kkwalifikat bil-lok, bil-valur u bil-persuna.

h) Ukoll talli fl-istess data, hin, lok u cirkustanzi seraq shaver tal-elettriku tad-ditta ‘Braun’ ghad-detriment ta’ Klaus Peter Jobi, liema serq huwa kkwalifikat bil-lok u bil-persuna.

i) Ukoll talli fl-istess data, hin, lok u cirkostanzi seraq portable CD player ghad-detriment ta’ Klaus Peter Jobi, liema serq huwa kkwalifikat bil-lok u bil-persuna.

j) Ukoll talli naqas milli jigi l-ghassa tar-Rabat, Ghawdex nhar id-19 ta’ April 2008 fl-10.00 hrs kif kien hemm miktub fil-kundizzjoni tar-rilaxx tal-Bail u dan bi ksur ta’ l-artikolu 355AL (5) tal-Kap 9 tal-Ligijiet ta’ Malta.

k) U talli xjentement laqa’ ghandu jew xtara hwejjeg misruqa, mehuda b’qerq jew akkwistati b’reat sew jekk dan isir f’Malta jew barra minn Malta jew xjentement b’kull mod li jkun ndahal biex ibieghhom jew imexxihom.

l) Talli huwa sar ricediv b’sentenza tal-Qorti tal-Magistrati (Malta) moghtija fil-15 ta’ Marzu, 2007 u sentenza ohra moghtija fit-13 ta’Lulju, 2007.

Rat id-dokumenti u l-atti kollha ta’ dan il-procediment.

Rat n-nota ta’ rinviju ghall-gudizzju tal-Avukat Generali tad-19 ta’ Mejju 2009.

Semghet lill-imputat jiddikjara illi huwa ma kellux oggezzjoni illi dana l-kaz jigi trattat u deciz bil-procedura sommarja.

Semghet il-provi.

Semghet trattazzjoni.

Ikkunsidrat:

Illi minn qari tan-nota ta’ rinviju ghall-gudizzju tal-Avukat Generali jidher illi l-imputat qed jigi mixli b’mod ewlieni bir-

reati tas-serq aggravat u r-ricettazzjoni. Illi bhala xhud ewlieni f'dina l-kawza, il-prosekuzzjoni tressaq lil certu Romina Cauchi li fil-gurnata indikata fl-akkuza kienet qieghda fil-kumpanija tal-imputat. Dina Cauchi tixhed kemm quddiem dina il-Qorti kif ukoll fl-istqarrija rilaxxjata minnha lill-pulizija, illi fil-jum in kwistjoni l-imputat dahal fl-appartament ta' siehbu Klaus Peter Jobi, minghajr il-kunsens tal-istess Jobi u filwaqt li dan tal-ahhar kien jinsab xoghol gewwa Malta, u minn hemm huwa ha diversi oggetti fosthom, computer, printer, camera, DVD players, mobile phone, decoder, modem, CD player u xi ghodda. Hija tghid illi l-imputat ghabba dawn l-affarijiet fil-vettura u immedjatament iltaqa' ma diversi nies kemm 'Ghawdex, kif ukoll aktar tard meta nizlu Malta u bieghhom.[1] Illi l-istess Cauchi meta giet mitkellma mill-pulizija, indikatilhom il-post minn fejn sehhet is-serqa kif ukoll xi postijiet ohra gewwa Ghawdex fejn l-imputat kien biegh xi oggetti. Illi sabiex tikkorrobora dina x-xhieda, il-prosekuzzjoni tressaq ukoll bhala xhud lil certu Ralph Jones, li kien habib ukoll mal-imputat, illi fil-jum u fil-hin li sehhet is-serqa huwa kien ra lill-imputat gewwa Marsalforn bil-vettura tieghu, vicin ir-residenza ta' Jobi, kif ukoll lil Romina Cauchi li kienet qed tistennieh. Fil-fatt meta Jobi jgharrfu illi kienu dahhlulu fl-appartment u serquh, Jones mal-ewwel jissuspetta fl-imputat. Illi ghalkemm Cauchi tghid illi l-imputat bhala spjegazzjoni 'il ghala ha l-oggetti minn ghand Jobi jghidilha illi dana ghamlu ghaliex Jobi kellu jaghtih xi flus, madanakollu Jobi fix-xhieda tieghu jichad dana kollu u jsostni illi l-imputat kien sellfu xi flus f'okkazzjoni wahda biss meta kien tah €5 ghal pakkett sigaretti ghax ma kellux flus fuqu, peress illi kien qed jistenna li jircevi l-paga.[2] L-imputat la jikkonferma u lanqas jichad dan. La jixhed u lanqas iwiegeb ghal mistoqsijiet meta jigi interrogat mill-pulizija.[3] Lanqas ma jressaq provi in sostenn ta' dak li mill-atti jidher li qed jallega.

[1] Ara xhieda ta' Romina Cauchi a fols. 39 et seq. u 153, kif ukoll l-istqarrija taghha Dokument RC a fol.83 tal-process

[2] Ara xhieda ta' Klaus Peter Jobi a fol. 59 u 60.

[3] Ara stqarrija ta'l-imputat Dokument FT1 a fol.28 u 29

Fil-fatt id-difiza qed tikkontendi illi l-imputat qatt ma jista' jinstab hati tar-reat tas-serq u dana peress illi huwa ha l-oggetti mill-appartement ta' siehbu Klaus Peter Jobi peress illi dan tal-ahhar kellu jaghtih xi flus ghal xi oggetti li kien bieghlu. L-intenzjoni tal-imputat kienet illi huwa jbiegh l-oggetti li ha minghand dan Jobi sabiex mir-rikavat huwa jiehu l-flus dovuti lilu. L-imputat ghalhekk ma kellu l-ebda intenzjoni illi jirritorna l-oggetti li ha u immedjatament wara li hadhom ipproceda sabiex jiddisponi minnhom mill-iktar fis possibbli. Ghaldaqstant l-abbli difensur tal-imputat jargumenta illi il-fattispecje ta' dana l-kaz iktar jixbhu dawk tar-*ragion fattasi* ikkontemplat fl-artikolu 85 tal-Kapitolu 9 milli dawk tar-reat tas-serq.

Illi d-distinzjoni bejn ir-reat tas-serq u dak tar-*raggion fattasi* giet esposta b'mod esawrjenti f'sentenza moghtija mill-Qorti tal-Appell Kriminali fl-ismijiet **The Police vs Siddy Sangari** deciza fis-16 ta' Lulju 2010 (per Prim'Imhallef Vincent De Gaetano) fejn il-Qorti stqarret:[4]

"It is trite knowledge that for the offence of arbitrary exercise of a pretended right to subsist, the interference with another's property, moveable or immoveable, must be effected "without intent to steal or to cause any wrongful damage, (sottolinjar ta' din l-Qorti) but only in the exercise of a pretended right". The words underlined clearly imply that in the first place **there must be the exclusion of the intent to steal** (sottolinjar tal-Qorti); the intent to exercise a pretended right coupled with the intent to steal (that is, the intent to steal for the purpose of exercising a pretended right) would put the material element of the offence outside the ambit of Article 85(1) (see inter alia **Il-Pulizija v. Godwin Zammit**, Court of Criminal Appeal, 20/11/1998). Although as was stated by this Court in its judgment of the 15/11/1996 in the names **Il-Pulizija v. Mario Lungaro** the particular intent with which the material act is committed will generally determine whether the offence is one of ragion fattasi or some other offence, such as voluntary damage to

[4] Is-sentenza inghatat bil-lingwa Ingliza billi l-proceduti kienu bl-ingliz peress illi l-imputat ma huwiex ta' nazzjonalita' Maltija

property or theft, the starting point must always be to examine whether the intent to steal can be excluded.

In the words of Luigi Maino (***Commento al Codice Penale Italiano*** [*terza ristampa della terza edizione*], UTET, 1922, vol. IV, pp. 13-14, para. 1842:
“Nel reato di furto il dolo e` di doppia specie, cioe` generico, o consistente nella scienza e volonta` di fare cosa illegittima, e specifico, ossia dipendente dall’animo di lucro, che differenzia questo delitto da altra specie di reati contro la proprieta`. Per mancanza di dolo generico non risponde di furto chi abbia preso la cosa altrui per semplice disavvertenza; chi per errore creda esservi il consenso del proprietario al suo impossessarsi della medesima; chi in buona FEDE ha creduto trattarsi di cosa abbandonata.”
As was pointed out by this Court (Galea Debono, J.) in its judgment of the 30/1/2003 in the names **Il-Pulizija v. John Galea u Paul Galea**, the gain envisaged by the *animus lucrandi* – the specific intent – for the purpose of theft is not necessarily a pecuniary gain. There would be “gain” if the person takes something, belonging to another person, simply for the former to enjoy the thing so taken (e.g. a painting or other piece of art). Again in the words of Maino:
“…per *lucro* o *profitto* nel furto si intende non soltanto il lucro borsuale che puo` ritrarsi dalla cosa rubata vendendola, oppure un effettivo aumento del patrimonio del ladro, ma qualunque godimento o piacere, qualunque soddisfazione procurata a se` stesso, onde anche chi rubi per donare o chi sottragga per mero diletto artistico un’opera d’arte, anche lasciando al proprietario il prezzo od altro oggetto di pregio equivalente o superiore, e` responsabile di furto.”

But then this same author goes on to qualify the gain required for the purpose of theft as being an illicit or unlawful gain – *profitto illecito* – and on the basis of this qualification goes on to state (and the following quotation

was reproduced, apparently with approval, in the **Galea** case, abovementioned):
"…non sara` dunque applicabile il titolo di furto, ma quello di ragion fattasi, a chi prenda una cosa del suo debitore per rivalersi o garantirsi del suo credito e a chi sotragga una cosa litigiosa nella credenza di avervi diritto: e cio` perche` in tali casi la coscienza del diritto esclude il dolo del furto, sostituendo al proposito di procurarsi un *illecito* profitto quello di evitarsi un danno."

This Court, as now presided, cannot completely agree with this proposition. Carrara's definition of theft does not require that the gain should be an illicit or illegal gain – *animo di farne lucro* and not *animo di farne ingiusto lucro*.
Moreover, the definition of the offence of *ragion fattasi* in the *Codice Zanardelli* – to which Maino was evidently referring when writing – *Articolo 235* – did not, unlike our Article 85(1), require specifically, as a starting point, the exclusion of the intent to steal; that provision merely provided *"Chiunque, al solo fine di esercitare un preteso diritto, nei casi in cui potrebbe ricorrere all'Autorita`, si fa ragione di se` medesimo…"*. Our law, as we have seen, specifically requires not only the intent to exercise a pretended right, but also that this pretended right should not be exercised concurrently with any intent to steal: (sottolinjar ta' din il-Qorti)
"…without intent to steal…but only in the exercise of a pretended right…". Consequently it is immaterial whether the gain is *giusto* or *ingiusto*. This also appears to be the position taken by modern Italian jurists. Thus Francesco Antolisei, in his ***Manuale di Diritto Penale – Parte Speciale I*** Giuffre` Editore (Milano) 1986, pp. 255-256 comments as follows:
"…il legislatore non ha voluto permettere che colui il quale vanta una pretesa legittima possa soddisfarla, prendendosi senz'altro le cose altrui. La tutela del possesso realizzata con l'incriminazione del furto sarebbe molto affievolita se si ammettesse una facolta` cosi` estesa…Riteniamo, pertanto, che l'ingiustizia del profitto sia estranea alla nozione del furto, il quale, percio`, sussiste anche se il vantaggio

a cui mirava l'agente non presentava quel carattere, e cioe` era legittimo.""

Illi maghmula dina l-esposizzjoni legali ghalhekk, il-Qorti tistqarr li ma tistax taqbel mal-linja difensjonali tal-imputat. Illi anke kieku stess wiehed kellu jabbraccja t-tezi tal-imputat u cioe' illi l-imputat ha l-oggetti kollha mill-appartament ta' siehbu bhala tpattija ghal xi dejn, madanakollu jidher illi dana ghamlu billi huwa intenzjonalment seraq l-oggetti billi dahal illegalment gewwa proprjeta li ma kenitx tieghu minghajr il-permess u l-konsapevolezza tas-sid. Tant hu hekk illi qabel ma dahal gewwa l-appartament huwa ivverifika permezz ta' telefonata li ghamel lill-istess Jobi illi dan tal-ahhar kien jinsab Malta fuq xoghol u ghalhekk f'dak il-hin ma kienx ser jirritorna lejn id-dar.

Illi d-dicitura tal-artikolu 85 huwa car u ma ghandu bzonn tal-ebda interpretazzjoni. Kif inghad fis-sentenza hawn fuq iccitata l-artikolu 85 jibda mal-ewwel biex ighid il-kliem: "**Kull min, bla hsieb li jisraq**". Illi dak li ghamel l-imputat kien proprju li seraq u xejn izjed. Seraq bil-hsieb li jaghmel qliegh tant hu hekk illi immedjatament kif ghabba l-oggetti fil-vettura huwa prattikament dar ma' Malta u Ghawdex kollu, cempel lil diversi nies, iltaqa' wkoll ma' ohrajn sabiex jiddisponi minn dawn l-oggetti u b'hekk jaghmel qliegh minnhom. Jidher illi f'dak iz-zmien l-imputat kien ghadu dipenedenti fuq id-droga u mix-xhieda ta' Romina Cauchi jidher illi f'dik il-lejla stess huwa kien abbuza minn xi sustanzi. Illi l-Qorti finalment tosserva illi ghalkemm l-imputat iressaq dina l-linja difensjonali, madanakollu ma ressaq l-ebda prova in sostenn tal-istess u dana sabiex juri lill-Qorti illi l-intenzjoni tieghu ma kenitx wahda ta' serq. L-imputat meta jigi interrogat ma jwiegeb ghall-ebda domanda li jsirulu. Lanqas ma jaghti x-xhieda tieghu f'dawn il-proceduri. L-uniku ombra ta' prova li hemm huwa dak li tghid Romina Cauchi meta tixhed illi l-imputat qalilha illi l-oggetti li ha kienu tieghu ghax Jobi kellu jaghtih xi flus. Dina l-prova certament m'hijiex bizzejjed lanqas fuq bazi ta' probabbilita' sabiex tikkonvinci lil din il-Qorti mod iehor.

Illi dwar il-valur tal-oggetti misruqa d-derubat jezebixxi lista bil-valur ta' kull ogggett. Huwa ma jesebixxi l-ebda ricevuta billi jikkontendi illi dawn ma kenux iktar fil-pussess tieghu. Ma jidhirx madanakollu illi d-difiza ressqet xi kontestazzjoni dwar il-valur indikat li jammonta ghal madwar €2300.[5]

Ghaldaqstant l-akkuzi dwar is-serq kif aggravat bil-lok, valur u l-persuna jirrizultaw ampjament ippruvati. Illi l-akkuza dwar ir-ricettazzjoni ai termini tal-artikolu 334 tal-Kodici Kriminali nghatat bhala kap alternattiv ghall-akkuza tas-serq, u kwindi peress illi l-Qorti kif diga inghad ser issib htija ghal dan l-ahhar reat, kwindi ser tghaddi biex tastjeni milli tiehu konjizzjoni ta' dina l-akkuza.

Illi l-Avukat Generali jindika wkoll illi tista' tinstab htija fil-konfront tal-imputata ai termini tal-artikolu 579(1) u (2) tal-Kodici Kriminali. Illi mill-qari tal-akkuza jidher illi l-prosekuzzjoni kienet qed tixli lill-imputat bir-reat ai termini tal-artikolu 355AL(5) u cioe' dwar il-ksur tad-dritt tal-helsien mill-kustodja jew kif inhu ahjar maghruf bhala il-*police bail*. Ma jidhirx illi l-imputat gie akkuzat illi kiser xi kundizzjoni ta' ordni ta' qorti dwar il-helsien mill-arrest u lanqas ma hemm prova fl-atti li jindikaw dan. Kwindi l-imputat ser jigi illiberat minn dina l-akkuza.

Illi meta tigi biex tikkonsidra l-piena li ghandha tigi inflitta l-Qorti ser tiehu in konsiderazzjoni b'mod ewlieni x-xhieda kollha imressqa mid-difiza li taw dettalji dwar ir-riabilitazzjoni tal-imputat kemm mill-vizzju tieghu tad-droga kif ukoll minn dak tax-xorb[6]. Jidher illi sa minn nofs is-sena 2008, l-imputat ma baqax jabbuza minn dawn is-sustanzi. Minn ezamijiet li sarulu jirrizulta car illi l-imputat mhux qed jabbuza mid-droga[7]. Il-Qorti ghalhekk hija tal-fehma illi f'dawn ic-cirkostanzi piena karcerarja effettiva tkun iktar ta' detriment ghall-imputat u anke ghas-socjeta in generali peress illi jekk l-imputat jispicca l-habs huwa jkun tilef il-progress li ghamel sa issa u ghalhekk ikun

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[5] Ara KPJ a fol 106

[6] Ara xhieda ta' Fleur Bianco, Anthony Gerard, Michael Lunn u Salvu Camilleri a fols. 147, 149, 170 u 173 rispettivament.

[7] Dokumenti DA2 u DA3 a fols. 164 u 165.

hemm il-biza li meta johrog mill-habs jerga' jaqa' ghall-vizzju tad-droga u ghalhekk ikun hemm il-possibbilita' tar-ripetizzjoni tar-reati li dwarhom huwa jinsab akkuzat.

Illi l-Qorti tixtieq taghmel referenza ghal dak li qalet il-Qorti tal-Appell Kriminali (sede inferjuri) f'sentenza tat-18 ta' Jannar 2001 fil-kawza fl-ismijiet 'Pulizija vs George Farrugia' fejn intqal is-segwenti :-

Apparti li din il-Qorti ma tistax taqbel ma' l-Avukat Generali fejn dan jghid li s-sitwazzjoni ta' l-appellant hija « irriversibbli » - fil-fehma tal-Qorti hija l-mewt biss li ggib stat jew sitwazzjoni ta' irriversibilita' assoluta – anqas ma tista' din il-Qorti tikkondividi l-fehma ta' l-Avukat Generali li Ordni ta' *Probation* hu indikat biss ghal « first offenders » zghazagh. Anke fil-kaz ta' persuna ta' eta' mhux zghira u li forsi hu recediv, tista' titfacca fil-hajja ta' dik il-persuna « a window of opportunity » li permezz taghha jkun jista' jinkiser ic-ciklu ta' kundanni u ta' prigunerija. Kif jispjega David Thomas fil-ktieb tieghu **Principles of Sentencing** (Heinemann, London, 1979) :
"The term "inadequate recidivist" is used to describe an offender, middle aged or older, who has over a long period of years committed numerous offences, not in themselves in the first rank of seriousness, and has served many terms of imprisonment as well as experiencing an extensive selection of other penal measures. Faced with such an offender, the Court will usually grasp any chance of breaking the cycle of offence and sentence, even if the chances of success are obviously limited…As in the case of the intermediate recidivist there must be some prospect of success, however remote" (pp. 22,23) U aktar tard l-istess awtur jghid hekk dwar l-uzu ta' l-Ordni ta' Probation :

'The probation order is clearly the most important individualized measure available to a sentencer. It is not limited to any one group of offenders; as the discussion in chapter one illustrates, probation is used to deal with recidivists of mature age as well as the young and those of good character' (p. 236)."

Illi ghaldaqstant ghalkemm l-imputat huwa recidiv u dana gie ampjament ippruvat f'din il-kawza,[8] il-Qorti ser tghaddi sabiex tapplika l-provedimenti tal-artikolu 7 tal-Kapitolu 446 tal-Ligijiet ta' Malta bit-tama illi l-imputat jirriforma hajtu darba ghal dejjem.

Illi finalment il-Qorti ma hijiex ser tordna lill-imputat jikkumpensa il-vittma ta' dana r-reat ghat-telf u danni subiti minnu billi mill-atti jirrizulta illi Klaus Peter Jobi telaq minn Malta permanentement.[9]

Ghaldaqstant, il-Qorti wara li rat l-artikoli 261(c)(d) u (e), 267, 268(b), 269(g), 49, 50 u 289 tal-Kapitolu 9 tal-Ligijiet ta' Malta, filwaqt li tastjeni milli tiehu konjizzjoni tal-akkuza dwar ir-ricettazzjoni u filwaqt li tilliberah mill-akkuza ai termini tal-artikoli 579(1) u (2) tal-Kapitolu 9 tal-Ligijiet ta' Malta, issib lill-imputat hati tal-akkuzi l-ohra kollha migjuba fil-konfront tieghu, izda fid-dawl tal-konsiderazzjonijiet hawn fuq maghmula u b'applikazzjoni tal-artikolu 7 tal-Kapitolu 446 tal-Ligijiet ta' Malta qed tqieghed lill-hati taht Ordni ta' Probation ghal zmien tlett snin mil-lum.

Il-Qorti twissi lil hati bil-konsegwenzi skond il-ligi jekk huwa jikkometti reat iehor matul il-perijodu ta' dina l-ordni jew jekk jonqos mill-josserva l-ordni imposta fuqu llum.

Finalment wara li rat l-artikolu 533 tal-Kapitolu 9 tal-Ligijiet ta' Malta tordna lill-imputat ihallas lir-Registratur tal-Qorti s-somma ta' €313.39 u dana bhala spejjez peritali.

Il-Qorti tordna komunika ta' dina s-sentenza lid-Direttur tal-Probation Services skond il-Ligi.

< Sentenza Finali >

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[8] Ara sentenzi Dokument A u B esebieti a fols.97 u 103 tal-process

[9] Ara riferta a fol.154 tal-process