



MALTA

**QORTI KOSTITUZZJONALI**

**S.T.O. PRIM IMHALLEF**

**SILVIO CAMILLERI**

**ONOR. IMHALLEF**

**GIANNINO CARUANA DEMAJO**

**ONOR. IMHALLEF**

**NOEL CUSCHIERI**

Seduta tal-5 ta' Dicembru, 2014

Appell Civili Numru. 47/2011/1

**Edgar Publio Bonnici Cachia**

**v.**

**Avukat Generali**

**Il-Qorti:**

**Preliminari**

1. Dan hu appell interpost mill-attur minn sentenza moghtija fid-29 ta' April 2014 mill-Prim' Awla tal-Qorti Civili, fil-kompetenza kostituzzjonali taghha, li cahdet it-talba tal-attur kontenuta fir-rikors promotur prezentat fil-21 ta' Lulju 2011.

2. F'dak ir-rikors l-attur talab lil dik il-Qorti li tiddeciedi li "bis-sentenza" tal-Qorti tal-Magistrati [Malta] bhala Qorti ta' Gudikatura Kriminali [il-Qorti tal-Magistrati] moghtija fil-konfront tieghu fit-18 ta' Jannar 2010 u wkoll "bis-sentenza" sussegwenti moghtija mill-Qorti tal-Appell Kriminali fit-12 ta' Awwissu 2010 gie miksur id-dritt tieghu ta' smigh xieraq protett bl-Artikolu 39 tal-Kostituzzjoni ta' Malta [il-Kostituzzjoni] u l-Artikolu 6 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali [il-Konvenzjoni], u ghaldaqstant talab rimedju opportun.

### **Il-meritu**

3. L-attur isostni li gew lezi fil-konfront tieghu d-drittijiet fundamentali protetti bl-artikoli precitati, meta l-Qorti tal-Magistrati cahdet it-talba tieghu li tisma' x-xhieda tad-Dottoressa [gja` Prokuratur Legali] Giuliana Scerri Ferrante "*bhala espert biex tezamina l-atti u taghti l-opinjoni taghha dwar il-firem meritu ta' dawn il-proceduri*"<sup>1</sup>. F'digriet precedenti l-istess Qorti kienet iddegretat li "*fic-cirkostanzi ma tarax lok li Dr. Juliana Scerri Ferrante tixhed*

<sup>1</sup> Ara verbal tal-udjenza tal-11 ta' Jannar 2010.

*f'dawn il-proceduri, u in vista tal-fatt li diga` gie nominat espert kalligrafu mill-Qorti u li diga` ipprezenta r-rapport tieghu, u anke gie kontro ezaminat mill-konsulent [legali] tal-imputat, tiddikjara li l-provi tad-difiza maghluqa u tipprocedi bit-trattazzjoni*<sup>2</sup>.

## **Il-Fatti**

4. Dawn gew adegwatament deskritti fis-sentenza appellata li fil-parti relevanti taghha taqra hekk:

“1) Fis-seduta tal-1 ta` Dicembru 2008 quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti Strutturja (fol 101 u 102), il-Prosekuzzjoni talbet in-nomina ta` espert kalligrafu biex janalizza l-genwinita` o meno tal-firma tal-account holder li tidher fuq numru ta` cheques. Il-Qorti laqghet t-talba u hatret lil Martin Bajada bhala espert ghal dak l-iskop.

“2) Fis-seduta tat-12 ta` Jannar 2009 (fol 126), l-espert Martin Bajada pprezenta r-relazzjoni tieghu quddiem il-Qorti u kkonferma l-kontenut taghha bil-gurament. Fl-istess seduta sar il-kontroezami ta` Martin Bajada mid-difensur tal-imputat (ara fol 128 u fol 129) u jidher illi kien konkluz ukoll. Fl-istess seduta, il-Prosekuzzjoni ddikjarat li ma kellhiex aktar provi. Kif appena r-relazzjoni kienet mahlufa, kienet prontament inserita fl-atti tal-kawza.

“3) Fit-13 ta` Frar 2009, l-Avukat Generali hareg l-Artikoli, u fis-seduta tas-16 ta` Frar 2009, inqraw l-Artikoli. L-imputat assistit mill-avukat tieghu iddikjara li ma kellux oggezzjoni li l-kaz jigi trattat bil-procedura sommarja.

“4) Fis-seduta tat-30 ta` Marzu 2009, l-imputat debitament assistit iddikjara li se jixhed pero` x-xiehda tieghu ma nstemghetx billi fil-bini tal-Qorti kien hemm theddida ta` bomba.

“5) Fis-seduta tal-25 ta` Mejju 2009, l-imputat rega` ma setax jixhed billi rega` kien hemm theddida ta` bomba fil-bini tal-Qorti.

“6) Fis-seduta tas-6 ta` Lulju 2009, xehed l-imputat u sar il-kontroezami tieghu. L-imputat kien mghejjun minn avukat differenti minn dak li kien qieghed jassistieh sa dakinhar.

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<sup>2</sup> Ara verbal tal-udjenza tat-3 ta' Dicembru 2009.

## Kopja Informali ta' Sentenza

“7) Fis-seduta tat-18 ta` Settembru 2009, xehdu erba` persuni li tressqu bhala xhieda mill-akkuzat.

“8) Fis-seduta tas-26 ta` Ottubru 2009 (fol 197) xehdu erba` persuni ohra. FI-istess udjenza, id-difiza ddikjarat illi kien fadlilha xhud wiehed u cioe` I-PL Giuliana Scerri Ferrante.

“9) Fis-seduta tat-18 ta` Novembru 2009, I-PL Scerri Ferrante ssejhet biex tixhed izda ma dehrinx.

“10) Il-verbal tal-udjenza tat-3 ta` Dicembru 2009 ighid hekk :-

*“Meta ssejjhet il-kawza deher l-ufficjal prosekutur l-Ispettur Angelo Gafa` u l-imputat.*

*“Deher ukoll Dr Stephen Tonna Lowell ghall-parte civile.*

*“L-imputat iddikjara li ghas-seduta tal-lum mhux qieghed jesigi l-assistenza ta` l-avukat tieghu.*

*“Il-Qorti tirrileva li ghal habta ta` 11.45 a.m. dehret Dr Giuliana Scerri Ferrante li nfurmat lil Qorti li hija kellha appuntament l-isptar u ma setghatx toqghod il-Qorti wara nofsinhar.*

*“Hija wkoll infurmat lil Qorti li dwar il-fatti tal-kaz ma taf xejn, pero` gie avvicinata mill-imputat biex hija tezemina l-atti u taghmel rapport dwar il-firem mertu ta` dawn il-proceduri.*

*“L-imputat fil-fatt kkonferma lill-Qorti li dan kien l-involvement ta` Dr Giuliana Scerri Ferrante u li ma taf xejn dwar il-fatti tal-kaz in ezami.*

*“Il-Qorti fic-cirkostanzi ma tarax li Dr Giuliana Scerri Ferrante tixhed f`dawn il-proceduri u in vista tal-fatt li diga` gie nominat espert kaligrafu mill-Qorti u li diga` pprezenta r-rapport tieghu u anke gie kontroezaminat mill-konsulent ta` l-imputat, tiddikjara li l-provi tad-difiza maghluqa u tipprocedi bit-trattazzjoni.*

*“Saret trattazzjoni minn Dr Stephen Tonna Lowell u l-Ispettur Angelo Gafa`*

*“...*

*“Il-Qorti qieghed tiddifferixxi l-kawza ghas-sentenza ghall-11 ta` Jannar 2010 fid-9.00 a.m. b`dan li l-imputat ghandu zmien sat-18 ta` Dicembru 2009 biex jaghmel nota ta` sottomissjonijiet tieghu jekk jixtieq.*

*“Il-Qorti tordna li dan il-verbal jigi kkomunikat lil Dr Chris Cardona.*

“11) Fis-7 ta` Dicembru 2009, l-imputat ipprezenta rikors (fol 257) fejn talab lill-Qorti sabiex tissospendi l-prolazzjoni tas-sentenza u tawtorizzah biex

iressaq bhala xhud lil Dr Giuliana Scerri Ferrante billi skond l-imputat dik kienet xhud indispensabbli sabiex ikollu smigh xieraq.

“12) Permezz ta` digriet taghha tad-9 ta` Dicembru 2009 (fol 260) il-Qorti tat lill-imputat gimgha zmien min-notifika tad-digriet lil Dr Chris Cardona biex jindika x`hinu l-iskop tax-xiehda ta` Dr Scerri Ferrante u dan in vista ta` dak verbalizzat fl-udjenza tat-3 ta` Dicembru 2009.

“13) L-imputat baqa` ma ndikax l-oggett tal-prova kif kien dirett jaghmel.

“14) Fit-22 ta` Dicembru 2009, l-imputat ipprezenta nota ta` sottomissjonijiet.

“15) Il-verbal tal-udjenza tal-11 ta` Jannar 2010 jaqra hekk :-

*“Meta ssejjhet il-kawza deher l-ufficjal prosekutur l-Ispettur Angelo Gafa` u l-imputat.*

*“Il-Qorti ordnat li jissejjah Dr Chris Cardona pero` l-imputat informa lil Qorti li hu mhux ser jinsisti ghall-presenza ta` Dr Chris Cardona ghas-seduta tal-lum.*

*“Il-Qorti xorta ordnat biex jissejjah Dr Chris Cardona u li gie msejjah diversi drabi izda ma deherx.*

*“Il-Qorti irrilevat li mill-atti ma jirrizultax li d-digriet taghha tad-9 ta` Dicembru 2009 gie notifikat lil Dr Chris Cardona.*

*“Il-Qorti [recte: L-imputat] pero` nforma lil Qorti li Dr Chris Cardona bilfors gie notifikat minhabba li qrahulu.*

*“L-imputat mistoqsi mill-Qorti ddikjara li huwa xtaq lil Dr Giuliana Scerri Ferrante bhala espert biex tezamina l-atti u taghti l-opinjoni taghha dwar il-firem mertu ta` dawn il-proceduri.*

*“Il-Qorti wara li rat il-verbal tat-3 ta` Dicembru 2009 u l-atti rilevanti tichad it-talba dedotta fir-rikors tas-7 ta` Dicembru 2009.*

*“Il-Qorti qeghda tiddeferixxi l-kawza ghat-18 ta` Jannar 2010 fil-11.30 a.m.*

“16) Il-kawza kienet deciza fit-18 ta` Jannar 2010. Kienu prezenti l-ufficjal prosekutur u l-imputat assistit minn Dr Chris Cardona. Wara l-qari tas-sentenza, l-imputat talab is-suspensjoni tal-esekuzzjoni tas-sentenza ghall-fini ta` appell. L-imputat ipprezenta r-rikors tal-appell fis-26 ta` Jannar 2010.

“17) L-appell kien trattat fis-26 ta` Frar 2010 u deciz mill-Qorti tal-Appell Kriminali fit-12 ta` Awissu 2010. Il-Qorti cahdet l-appell u kkonfermat is-sentenza appellata.

## **Is-Sentenza Appellata**

5. L-ewwel Qorti waslet ghad-decizjoni taghha wara li ghamlet is-segweni konsiderazzjonijiet fattwali u guridici, ukoll hadet kont tas-sottomissjonijiet maghmula mill-partijiet:

“Minn Pag 81 sa Pag 267 tar-Raba` Edizzjoni (2011) ta` **A Practitioner`s Guide to the European Convention on Human Rights** (Sweet & Maxwell), il-gurista **Karen Reid** tittratta dak li hija ssejjah il-“*problem areas*” tal-“*fair trial guarantees*”. Il-Qorti sejra tisset brani minn din il-kitba li fil-fehma taghha huma rilevanti ghall-mertu tal-kawza tal-lum :-

“**Pag 81 :-**

*“The key principle governing Art 6 is **fairness ... of the proceedings as a whole ...***

“**Pag 82 :-**

*“The right to a fair trial is seen as holding so prominent a place in democratic society that the Court has stated that there is not justification for interpreting Art 6 Para 1 restrictively. Whatever the importance of public interest in, for example, fighting organised crime, the fair administration of justice cannot be sacrificed to expedience ...*

*“As to fairness, it is perhaps simpler to say what it does not mean. The Commission frequently stated, and the Court continues to emphasise, that the Convention organs are not courts of appeal from domestic courts and cannot examine complaints that a court has made errors of fact or law or reached the wrong decision or that a person was, for example, wrongly convicted. They will not enter into the merits of decisions. For this reason, complaints concerning miscarriages of justice are unlikely to succeed before them.*

*“Domestic courts are in the best position to assess the evidence before them, to decide what is relevant or admissible. Matters of appreciation of domestic law and the categorisation of claims in domestic law are also primarily for the appreciation of domestic courts ...*

“**Pag 83 :-**

*“From the Convention point of view it is not so much the result that is in question but the process of “hearing” ...*

***“Equality of arms between the parties, or “a fair balance” must be achieved. This means that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent ...***

**“Pag 84 :-**

***“The accused, and in civil proceedings the parties, must be able to participate effectively in proceedings ...***

**Pag 85 :-**

*“Measures taken in the conduct of a criminal trial must be reconcilable with an adequate and effective exercise of the rights of the defence. The importance of securing defence rights in criminal proceedings has been identified as a principle of democratic society and, in this respect, Art 6 must be interpreted to render them practical and effective rather than theoretical and illusory ...*

***“The proceedings are looked at as a whole and one restriction on the defence may be insufficient to render the proceedings as a whole unfair ...***

**“Pag 156 :-**

***“The Commission did not exclude that the refusal by a court to order an expert, hear a witness or to accept other types of evidence might in certain circumstances render the proceedings unfair. Since, however, it was for the national courts to decide what was necessary or essential to decide a case, it commented that only in exceptional circumstances would it conclude that a decision of a national court in such a matter violated the right to a fair hearing. It gave the example of where an applicant adduced some evidence which the court rejected outright, refusing to allow verification of it and without giving sufficient reasons for its refusal ...***

***“Where in “Accardi v. Italy” (30598/02 – Dec. January 20. 2005 – ECHR 2005-II) the decision of a domestic court not to order a psychologist’s report or to call the expert requested by the defence was based on logical and pertinent arguments and the conclusion that such evidential measures were of no relevance to the proceedings, there was no infringement of the rights of the defence or the fairness principle ...***

**“Ikkunsidrat :**

**“VII. Gurisprudenza**

“Fis-sentenza tagħha tas-26 ta` Lulju 2011 fil-kawza “**Huseyn and Others vs Azerbaijan**” il-Qorti ta` Strasbourg qalet hekk :-

“175. *More specifically, all of the applicants consistently claimed that neither they nor their counsel had been given sufficient access to the prosecution evidence after the pre-trial investigation had been completed and before the trial commenced, nor had they enjoyed such access after the trial had commenced, despite their repeated complaints to that effect. The Court reiterates that the right to an adversarial trial under Article 6 § 1 of the Convention means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Various ways are conceivable in which national law may meet this requirement. However, whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment on them (see Brandstetter v. Austria, 28 August 1991, §§ 66-67, Series A no. 211). Article 6 § 3 (b) guarantees the accused “adequate time and facilities for the preparation of his defence” and therefore implies that the substantive defence activity on his behalf may comprise everything which is “necessary” to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility of putting all relevant defence arguments before the trial court and thus of influencing the outcome of the proceedings (see Can v. Austria, no. 9300/81, Commission report of 12 July 1984, § 53, Series A no. 96; Connolly v. the United Kingdom, no. 27245/95, Commission decision of 26 June 1996; and Mayzit v. Russia, no. 63378/00, § 78, 20 January 2005). The facilities which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself for the purposes of preparing his defence with the results of investigations carried out throughout the proceedings (see C.G.P. v. the Netherlands, no. 29835/96, Commission decision of 15 January 1997, and Foucher v. France, 18 March 1997, §§ 31-38, Reports 1997-II). The issue of the adequacy of the time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case.*

“ ...

“188. *The Court reiterates that the principle of equality of arms, as one of the fundamental elements of the broader concept of a fair trial, requires each party to be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his opponent (see Nideröst-Huber v. Switzerland, 18 February 1997, § 23, Reports 1997-I). That right means, inter alia, the opportunity for the parties to a trial to present their own legal assessment of the case and to comment on the observations made by the other party, with a view to influencing the court’s decision (see, mutatis mutandis, Lobo Machado v. Portugal, 20 February 1996, § 31, Reports 1996-I, with further references). The requirement of equality of arms, in the sense of a “fair balance” between the parties, applies in principle to both criminal and civil cases ; in criminal cases a lesser degree of latitude is allowed for any deviations from that requirement*



(see *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, §§ 32-33, Series A no. 274).

“ ...

“196. At the outset, the Court notes that the prosecution's case was based to a large degree on numerous witnesses whose pre-trial statements were produced in court. However, it appears that all of these witnesses were called to testify at the trial and that, in principle, the applicants were given an opportunity to question them. As to the defence witnesses, it is true that the Assize Court allowed the examination of only some of the witnesses requested by the defence, but refused to call all of the persons whom the defence sought to examine. While Article 6 § 3 (d) of the Convention is aimed at ensuring equality in criminal proceedings between the defence and the prosecution as regards the calling and examination of witnesses, it does not give an accused person an unlimited right to obtain the attendance of witnesses in court. The domestic law may thus lay down conditions for the admission and examination of witnesses provided that such conditions are identical for witnesses on both sides. Similarly, the domestic court is free, subject to compliance with the terms of the Convention, to refuse to call witnesses proposed by the defence, for instance on the ground that the court considers their evidence unlikely to assist in ascertaining the truth (see *X v. Austria*, no. 4428/70, Commission decision of 1 June 1972). Having regard to the available material, the Court finds that it has not been clearly shown how any of the witnesses whom the Assize Court refused to examine would have been able to assist the applicants' defence against the specific accusations put forward against them.

“ ...

“200. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. It must be examined in particular whether the applicants were given the opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see *Khan*, cited above, §§ 35 and 37, and *Allan*, cited above, § 43). Where the reliability of evidence is in dispute the existence of fair procedures to examine the admissibility of the evidence takes on an even greater importance (see *Allan*, cited above, § 47, and *Bykov v. Russia [GC]*, no. 4378/02, § 95, ECHR 2009-...).

“Fil-kawza “**Klimentyev vs Russia**” li kienet deciza mill-Qorti ta` Strasbourg fis-16 ta` Novembru 2006 l-ilment tal-applikant kien illi huwa sofra vjolazzjoni tad-dritt tieghu ghal smigh xieraq ghaliex ma kienx inghata l-oppportunita` li jezamina r-rapporti tal-esperti tal-qorti. F`dik il-kawza il-Qorti Ewropea ma kenitx sabet vjolazzjoni ghaliex il-ligi domestika kienet taghti l-oppportunita` lill-akkuzat li jezamina dawk ir-rapporti u ghalhekk kien nuqqas tal-applikant li ma hax dik l-oppportunita`. Il-Qorti qalet hekk :-

“95. The Court recalls that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see e.g. *Jespers v. Belgium*, no. 8403/78, Commission decision of 15 October 1980, Decisions and Reports (DR) 27, p. 61; *Foucher v. France*, judgment of 18 March 1997, Reports of Judgments and Decisions 1997-II, § 34; *Bulut v. Austria*, judgment of 22 February 1996, Reports of Judgments and Decisions 1996-II, p. 380-381, § 47).

“96. On the facts, the Court observes that the case for the prosecution rested, *inter alia*, on a number of expert reports (technical, medical, graphological and other) ordered by the prosecution during the pre-trial stage of proceedings in 1995 and 1996. Four out of more than sixteen decisions ordering such reports were served on the applicant with delays ranging from two to three and a half months, whilst the remaining twelve decisions were served within a month from the respective dates of their delivery (see paragraphs 34-37 in the summary of facts). The applicant principally argued that the late notification of these decisions had effectively deprived him of the possibility to participate in the ordering of the expert examinations and that the subsequent admission of the respective expert examinations had been in breach of Article 6.

“97. Having regard to the circumstances of the case, the relevant domestic law and the parties' submissions, the Court cannot subscribe to the applicant's argument. To begin with, the Court observes that at the time of service of these sixteen decisions both the applicant and his counsel were officially informed about the procedural rights of the accused, including the right to challenge an expert, seek the appointment of a particular person as an expert, adduce further questions, be present during the expert examination in person and make any comments and be informed of expert conclusions (see paragraph 37 above). The applicant and his counsel had an unrestricted opportunity to make related requests and motions in writing and, indeed, there is no indication in the case-file that any of the requests of the defence were turned down as belated or otherwise inadmissible. On the contrary, the authorities granted and implemented all of the applicant's requests in this respect. Moreover, there is nothing in the case-file to suggest, and indeed the applicant has not alleged that he was unable, personally or with the assistance of his defence counsel, to study the impugned expert examinations beforehand, contest them throughout the trial and appeal proceedings or avail himself of his rights under Sections 89 and 290 of the Criminal Procedure Code by requesting the trial court to order additional or repetitive expert examinations.

“Ikkunsidrat :

“VIII. Risultanzi

“Fis-sentenza taghha tat-30 ta' Settembru 2011 fil-kawza “J.E.M Investments Ltd v. Avukat Generali et” il-Qorti Kostituzzjonali qalet hekk –

*“id-dritt ghas-smigh xieraq ma jiggarrantix il-korrettezza tas-sentenzi fil-meritu izda jiggarrantixxi biss l-aderenza ma` certi principji procedurali (indipendenza u imparzjalita` tal-Qorti u tal-gudikant, audi alteram partem u smigh u pronuncjament tas-sentenza fil-pubbliku) li huma konducenti ghall-amministrazzjoni tajba tal-gustizzja. Il-funzjoni tal-Qorti, fil-gurisdizzjoni Kostituzzjonali taghha, m`hijiex illi tirrevedi s-sentenzi ta` Qrati ohra biex tghid jekk dawn gewx decizi `sewwa` jew le, izda hija limitata ghall-funzjoni li tara jekk dawk is-sentenzi kistrux il-Kostituzzjoni jew il-Konvenzjoni Ewropea.*

“Ighidu Harris, O`Boyle & Warbrick fil-ktieb **“Law of the European Convention on Human Rights”** (Tieni Edizzjoni – 2009 - OUP) illi **in linea ta` principju** *the Court (u cioe` l-ECHR) allows States a wide margin of appreciation as to the manner in which national courts operate ... A consequence of this is that in certain contexts the provisions of Article 6 are as much obligations of results as of conduct, **with national courts being allowed to follow whatever particular rules they choose so long as the end result can be seen to be a fair trial.** (enfasi ta` din il-Qorti) [ara pag 202]. U jkomplu li **in some contexts a breach of Article 6 will only be found to have occurred upon proof of “actual prejudice” to the applicant** (enfasi ta` din il-Qorti) [ara pag 204]*

“Ir-rikorrent qiegħed jilmenta illi bil-fatt illi ma kienx inghata l-opportunita` li jressaq jew li jkollu ghajnuna esperta sabiex jirribatti r-rapport tekniku tal-espert kalligrafu nominat mill-qorti sehhet lezjoni tad-dritt tieghu għal smigh xieraq kif tutelati bil-Kostituzzjoni u bil-Konvenzjoni.

Fi procedimenti civili, l-ammissibilita` bhala prova tal-opinjoni ta` espert ex parte kienet introdotta bl-emendi għall-Kap 12 li kienu saru bl-Att XXIV tal-1995. **L-Art 563A** jaqra hekk :-

“(1) *Meta persuna tissejjah bhal xhud, l-opinjoni taghha fuq kull kwistjoni rilevanti li dwarha hi kwalifikata taghti xiehda bhala espert, ghandha tintlaqa` bhala xiehda biss jekk, fil-fehma tal-qorti, dik il-persuna jkollha l-kwalifiki mehtiega dwar dik il- kwistjoni.*

“(2) *Meta persuna tissejjah bhala xhud, dikjarazzjoni ta` opinjoni li ssir minnha fuq kull kwistjoni rilevanti li dwarha mhijiex kwalifikata taghti xiehda bhala espert, jekk din ix-xiehda tinghata b`mod li jinghadu fatti rilevanti li jkunju jew konstata personalment minnha, ghandha tkun ammissibbli bhala prova ta` dak li dik il-persuna tkun hemm ikkonstatat.*

“(3) *L-opinjoni mogħtija minn persuna skond id-disposizzjonijiet ta` dan l-artikolu ghandha tkun mingħajr pregudizzju għad-disposizzjonijiet ta` l-artikolu 681 u għas-setgha tal-qorti li tahtar perit skond id-disposizzjonijiet ta` l-artikolu 646.*

“Disposizzjoni simili ma tirrizultax fil-Kap 9. Il-hatra ta` periti hija regolata bl-Art 650 sa 657 tal-Kap 9. Il-Kodici Kriminali (ghad-differenza tal-Kap 12) ma jsemmi xejn dwar prova kostitwita mill-opinjoni ta` espert *ex parte*. L-istess Kodici lanqas ma jaccenna ghall-possibilita` tal-hatra ta` periti addizzjonali. Billi jipprevali l-principju illi *ubi lex voluit dixit*, din il-Qorti tghid illi ladarba fil-Kap 9 ma hemmx riferenza, il-prova permezz ta` espert *ex parte* u l-hatra ta` periti addizzjonali huma eskluzi fi procedimenti penali.

“Fis-sentenza taghha tat-13 ta` Mejju 2011 fil-kawza “**Il-Pulizija vs Daniela Mercieca**”, il-Qorti tal-Appell Kriminali qalet hekk :-

*“In kwantu ghax-xhud Mario Buttigieg din il-Qorti ma hix ser tiehu konjizzjoni tal-opinjoni espressi minnu peress li dan ma jirrizultax li kien xi espert nominat mill-Qorti u anzi jirrizulta li kien gie nominat ex parte minn u fl-interess tas-socjeta` assicuratrici Gasan Mamo Insurance li taghha kien impjegat u li kellha bhala klient taghha lil Joseph Saliba.*

“Fis-sentenza taghha tas-16 ta` Gunju 2011 fil-kawza “**Il-Pulizija vs Paul Micallef**” il-Qorti tal-Appell Kriminali qalet hekk :-

*“Dwar **it-tieni aggravju** fis-sens li ma saritx l-ahjar prova dwar il-valur tal-hamiema li nqatlet l-imputat ghandu ragun. L-unika prova f`dan ir-rigward kien Marco Farrugia, il-President tal-Federazzjoni tat-hamiem tal-giri izda dan gie prodott ex parte minn Victor Agius u ma giex nominat espert mill-Qorti u ghalhekk l-istima tieghu tal-valur tal-hamiema in kwistjoni ma tistax tigi accettata. Meta si tratta ta` stima ta` valur ta` oggett bhal dak hawn in kwistjoni fejn hemm element qawwi ta` spekulazzjoni involuta li mhux necessarjament tikkorrispondi mal-valur naturali tal-oggett hi aktar impellenti li l-istima ssir minn persuna bil-garanziji necessarji ta` indipendenza u imparzjalita` li jista` jipprovdi persuna esperta nominata mill-Qorti. Dan ma sarx u ghalhekk din il-Qorti ma hix ser toqghod fuq l-istima li ghamel ix-xhud imsemmi.*

“Qabel ma tesprimi ruhha dwar l-ilment tar-rikorrent fil-procediment tal-lum, il-Qorti sejra tikkummenta dwar xi sottomissjonijiet li saru mir-rikorrent.

“Ir-rikorrent ighid a fol 290 illi huwa kien ghamel talba sabiex Dott Giuliana Scerri Ferrante tigi appuntata bhala espert kalligrafu *ex parte*. Kif diga` rajna qabel (**II. Fatti**) l-affarijiet mhux hekk graw. Ir-rikorrent qatt ma ghamel talba f`dan is-sens, anke ghaliex proceduralment huwa ma setax jaghmilha. Dak li ghamel huwa li ddikjara li l-ahhar xhud tieghu kienet proprju Dottor Scerri Ferrante.

“Imprecizjoni ohra tar-rikorrent hija meta jsostni li l-Ewwel Qorti ddikjarat maghluq l-istadju tal-provi tad-difiza minkejja l-protesti tad-difiza. Dak allegat mir-rikorrent mhux riskontrat fil-verbal tas-seduta tat-3 ta` Dicembru 2009. Infatti ghalkemm dakinhar il-Qorti tassew ghalqet il-provi tal-akkuzat, u f`dik is-seduta, ir-rikorrent ma kienx assistit, ma tirrizulta l-ebda protesta jew ilment da parti tar-rikorrent ghall-fatt li l-Ewwel Qorti ghalqet il-provi tieghu.

**“Wara li qieset bir-reqqa kollha l-fatti u c-cirkostanzi ta` dan il-kaz, il-Qorti ma ssibx li bil-mod kif gabet ruhha l-Ewwel Qorti mar-rikorrent kien hemm lezzjoni tad-dritt tieghu ghal smigh xieraq kif tutelat bil-Kostituzzjoni u bil-Konvenzjoni.**

“Il-Qorti tghid dan abbazi tas-segweni konsiderazzjonijiet :-

“Fis-seduta tal-1 ta` Dicembru 2008 quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti Strutturja (fol 101 u 102), il-Prosekuzzjoni talbet in-nomina ta` espert kalligrafu biex janalizza l-genwinita` o meno tal-firma tal-account holder li tidher fuq numru ta` cheques. Il-Qorti laqghet t-talba u hatret lil Martin Bajada bhala espert ghal dak l-iskop.

“Fis-seduta tat-12 ta` Jannar 2009 (fol 126), l-espert Martin Bajada xehed, ipprezenta r-relazzjoni tieghu quddiem il-Qorti u kkonferma l-kontenut taghha bil-gurament.

“Ghalkemm ir-relazzjoni kienet ipprezentata propju dakinhar tat-12 ta` Jannar 2009, id-difensur tal-akkuzat ghazel li jaghmel il-kontroezami tal-espert tal-Qorti. U kif jirrizulta kemm mit-traskrizzjoni tad-deposizzjoni (ara fol 128 u 129) kif ukoll mill-verbal tas-seduta, il-kontroezami intemm f`dik l-udjenza u l-akkuzat b`ebda mod ma talab li jzomm riservat kull kontroezami ulterjuri.

“Fl-istess seduta, il-Prosekuzzjoni ddikjarat li ma kellhiex aktar provi. Kif appena r-relazzjoni kienet mahlufa, kienet prontament inserita fl-atti tal-kawza.

“L-atti tal-kawza kienu dejjem ghad-disposizzjoni tal-akkuzat. Ir-relazzjoni tal-espert kienet ghad-disposizzjoni tar-rikorrent sa mit-12 ta` Jannar 2009. Huwa ben evidenti pero` li ghalkemm l-akkuzat kien edott bil-konkluzjonijiet tal-espert, huwa naqas milli jiehu kopja tar-relazzjoni ghall-fini tad-difiza tieghu.

“Din hija konkluzjoni ta` l-Qorti li pero` hija sostnuta mill-assjem tal-fatti.

“Infatti fis-seduta tas-26 ta` Ottubru 2009 (fol 197) id-difiza ddikjarat illi kien fadlilha xhud wiehed u cioe` l-PL Giuliana Scerri Ferrante. Mill-verbal tal-udjenza, ma jirrizultax x`kien l-oggett tal-prova li ried jaghmel l-akkuzat bix-xiehda ta` Dott. Scerri Ferrante.

“Fl-udjenza tat-3 ta` Dicembru 2009, il-Qorti vverbalizzat illi qabel il-hin tas-seduta Dott Scerri Ferrante dehret u nformat lill-Qorti li dwar il-fatti tal-kaz ma kien taf xejn, pero` kienet avvicinata mill-imputat biex hija tezemina l-atti u taghmel rapport dwar il-firem mertu ta` dawn il-proceduri.

“Ghal din il-Qorti dan ifisser li certament sat-3 ta` Dicembru 2009, u allura ghal hdax-il xahar shah) l-akkuzat kien naqas li jghaddi kopja tal-atti tal-kawza (inkluza r-relazzjoni) ighaddiha lil Dott Scerri Ferrante sabiex taghtih il-fehma taghha.

“Ghal xiex kienet se ssarraf dik il-fehma r-rikorrent baqa` ma spjegax car u tond fil-procediment tal-lum meta l-Qorti tqis illi l-kontroezami tal-espert tal-Qorti kien diga` nghalaq, u l-eventwali opinjoni ta` Dott Scerri Ferrante ma kenitx tikkostitwixxi prova fil-procediment penali.

“Rinfaccjata mid-dikjarazzjoni tal-akkuzat stess illi l-ahhar xhud tieghu kienet Dott Scerri Ferrante u rinfaccjata mid-dikjarazzjoni tal-istess Dott Scerri Ferrante li ma kienet taf xejn dwar il-kaz, il-Qorti tal-Magistrati ghalqet il-provi tal-akkuzat.

“Fic-cirkostanzi partikolari ta` dan il-kaz, din il-Qorti ma ssibx li d-decizjoni tal-Qorti tal-Magistrati kienet lesiva ghad-dritt ta` smigh xieraq tar-rikorrent.

“Il-kawtela tal-Qorti f`dik l-istess udjenza – kif del resto jidher car illi kienet fl-udjenzi kollha – hija manifesta wkoll mill-fatt illi ghalkemm f`dik l-udjenza *l-imputat iddikjara li ghas-seduta tal-lum mhux qieghed jesigi l-assistenza ta` l-avukat tieghu*, u ghalkemm il-Prosekuzzjoni u l-parte civile ghamlu s-sottomissjonijiet finali tagghom, il-Qorti halliet il-kawza *ghas-sentenza ghall-11 ta` Jannar 2010 fid-9.00 a.m. b`dan li l-imputat ghandu zmien sat-18 ta` Dicembru 2009 biex jaghmel nota ta` sottomissjonijiet tieghu jekk jixtieq*.

“Fil-fatt l-imputat ipprezenta nota ta` osservazzjonijiet fit-22 ta` Dicembru 2009.

“Ghalkemm fis-7 ta` Dicembru 2009, l-imputat ipprezenta rikors (fol 257) fejn talab lill-Qorti sabiex tissospendi l-prolazzjoni tas-sentenza u tawtorizzah biex iressaq bhala xhud lil Dr Giuliana Scerri Ferrante billi skond l-imputat dik kienet xhud indispensabbli sabiex ikollu smigh xieraq, ghalkemm b`digriet taghha tad-9 ta` Dicembru 2009 (fol 260) il-Qorti tat lill-imputat gimgha zmien min-notifika tad-digriet lil Dr Chris Cardona biex jindika x`hinu l-iskop tax-xiehda ta` Dr Scerri Ferrante u dan in vista ta` dak verbalizzat fl-udjenza tat-3 ta` Dicembru 2009, kien biss fl-udjenza tal-11 ta` Jannar 2010 fejn l-akkuzat (sprovvist mill-avukat tieghu) *ddikjara li huwa xtaq lil Dr Giuliana Scerri Ferrante bhala espert biex tezamina l-atti u taghti l-opinjoni taghha dwar il-firem mertu ta` dawn il-proceduri*. Li jfisser li ma kien inbidel propju xejn minn dak illi sehha fl-udjenza tat-3 ta` Dicembru 2009.

“Ghalhekk il-Qorti cahdet it-talba tal-akkuzat kif dedotta fir-rikors tas-7 ta` Dicembru 2009, halliet il-kawza ghas-sentenza ghat-18 ta` Jannar 2010 u tat is-sentenza dakinhar.

“F`dan ir-resokont kapillari tal-fatti tal-kawza, il-Qorti terga` ssostni li ma ssib l-ebda ksur tad-dritt fundamentali tar-rikorrent.

“Ighidu Harris, O`Boyle & Warbrick fil-pagna 251 tal-ktieb “**Law of the European Convention on Human Rights**” (op. cit.) –

*“The right to a fair hearing supposes compliance with the principle of equality of arms. This principle, which applies to civil as well as criminal proceedings requires each party to be given a reasonable opportunity to present his case*

*under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. In general terms, the principle incorporates the idea of a fair balance between the parties.*

“Il-Qorti ma ssibx illi fil-konduzzjoni tal-procediment penali, ir-rikorrent kien ipprivat mill-opportunita` ragonevoli li jiddefendi ruhu mill-akkuzi dedotti kontra tieghu jew tqieghed fi zvantagg fil-konfront tal-kontroparti. Il-perit tekniku inhatar mill-Qorti tal-Magistrati skond il-ligi. Hadd ma kkontesta l-kompetenza tieghu. Lanqas l-indipendenza jew l-imparzjalita` tieghu. Ghalkemm kien hemm rapport ta` espert tal-Qorti, l-ahhar kelma baqa` tal-Qorti u meta esprimiet ruhha fis-sentenza taghha l-Qorti kienet rigoruza fl-osservanza tal-Art 656 tal-Kap 9.

“Din il-Qorti mhijiex tarax *actual prejudice* fil-mod kif il-qrati penali ordinarji ttrattaw mar-rikorrent. Anzi din il-Qorti tghid illi dawk il-qrati ttrattaw mar-rikorrent korrettement u skond il-ligi, u fl-agir taghhom ma ghamlu xejn lesiv ghall-jedd tar-rikorrent ghal smigh xieraq kif protett mill-Kostituzzjoni u mill-Konvenzjoni.

“Fis-sentenza taghha tal-5 ta` Novembru 2013 fil-kawza ‘The Republic of Malta v. Ana-Maria Beatrice Ciocanel’ il-Qorti tal-Appell Kriminali (komposta kollegjalment) qalet hekk –

*“it is a well established principle that as a rule questions relating to fair trial are to be addressed upon an assessment of the trial as a whole and that it is only at the conclusion of such trial that a proper assessment of whether there has been a fair trial can be made.”*

“Din il-Qorti hija tal-fehma illi fil-procediment kollu – mill-bidu sal-ahhar – illi r-rikorrent kellu quddiem il-qrati penali ordinarji kien rispettati bis-shih id-dritt tieghu ghal smigh xieraq.”

## L-Appell

6. Dan hu bazat fuq tlett aggravji li, peress li huma konnessi, ser jigu trattati f'daqqa: [1] li l-ewwel Qorti kellha ssib ksur tad-drittijiet fundamentali tal-attur, kontemplati fl-Artikoli precitati; [2] li l-ewwel Qorti qieset ir-rimedju mitlub mill-attur bhala wiehed ta' natura strettament procedurali penali mentri fil-fatt u fid-dritt ir-rimedji mitluba kienu ta' natura kostituzzjonali; [3] li l-ewwel

Qorti tat interpretazzjoni zbaljata tal-garanzija tas-smigh xieraq naxxenti mill-principju fundamentali tal-*equality of arms* bejn id-difiza u l-prosekuzzjoni.

7. L-attur ikompli jelabora hekk fuq l-aggravji tieghu:

“...il-ksur tal-*equality of arms* sehh precizament filwaqt meta l-imputat hass il-bzonn li r-rapport tal-perit kaligrafu jigi ezaminat minn espert *ex parte* u dan sabiex id-difiza tkun fil-pozizzjoni ezatta tal-Qorti li kienet ser tiggudika jekk l-imputat jispiccax il-habs jew le fejn jikkoncerna t-taghrif tal-metodologiji uzati mill-perit imqabbad mill-Qorti u dan sabiex l-ezami tar-rapport da parti tad-diviza tkun reali, effettiva u allura sabiex titpogga fil-pozizzjoni l-izjed vantaggjuza biex tasal hija stess ghall-konkluzjoni [gusta]”

“.....[l-attur] talab li hu jitpogga fil-pozizzjoni li jkollu t-taghrif tekniku kollu necessarju ghad-difiza tieghu bhallikieku hu u l-avukat difensur tieghu kienu edotti mit-teknika u l-procedura skond is-sengha tax-xjenza kalligrafika li fil-fatt ma kienux. Huwa dan id-dritt fundamentali tad-difiza li gie lez meta l-Qorti [tal-Magistrati] arbitrarjament u minghajr ebda raguni valida iddecidiet li hesrem mhux biss tichad li r-rapport kalligrafiku jkun examinat minn espert *ex parte* tad-difiza, izda ghaddiet minnufih li tiddikjara li l-provi tad-difiza kienu ghaluqin meta dan ma kienx il-kaz. Il-konsegwenzi kienu fatali ghall-imputat, stante li mhux biss ma setax imompli d-difiza tieghu sew izda lanqas biss seta' jkollu t-taghrif necessarju ghad-difiza tieghu stante li hu u l-avukat tieghu kienu sprovvisti ghal kollox minn kwanukwe element tekniku fil-materja ta' ezami kaligrafiku.”

“L-appellant kien sab ruhu bil-bibien kollha tad-difiza maghluqin bid-dikjarazzjoni tal-Qorti [tal-Magistrati] ta' l-eghluq tal-provi tieghu, minkejja li x-xhud [Dr. Juliana Scerri Ferrante] li setghet ezaminat ir-rapport kaligrafiku bhala prova *ex parte* ghad-difiza kienet prezenti seduta stante meta l-istess Qorti [tal-Magistrati] cahdet it-talba diretta tal-imputat sabiex ix-xhud tinghata l-permess li tezamina r-rapport u tixhed u sussegwentement ghaddiet biex tiddikjara fl-istess seduta l-gheluq tal-provi tad-difiza.

“...kien jehtieg li l-ewwel Onorabbli Qorti taghmel kjarifika ohra dwar in-natura tal-azzjoni *de quo* u cioe' li tiehu in konsiderazzjoni in-natura partikolari tal-prova li l-qorti penali cahdet milli ssir. Perit tekniku huwa ta' importanza kbira fil-bilanc ta' provi rikjest minn sistema '*adversarial*' ..... Ir-rizultanzi li johorgu minn rapport redatt minn perit tekniku jikkostitwixxu f'ghajnejn il-Qorti prova, izda prova intiza li tghin il-Qorti b'mod oggettiv dwar xi haga jew materja teknika.



“[skond l-artikoli precitati] .....l-akkuzat ghandu jinghata..... kull opportunita` li mhux biss jkollu access ghar-rapport, izda li jkollu that l-awtorita` tal-Qorti l-istess ezami tal-perit tekniku ezaminat minn persuna li jkun jista` jifhem lill-akkuzat dak li jikkontjeni b`mod li hu jkun jista` jifhem l-impatt li r-rizultanzi tal-istess rapport jsta` jkollhom fuq il-prezunzjoni ta` l-innocenza tieghu.”

“..... hu ried ikollu access reali, effettiv u a portata ta` persuna teknika tal-kontenut tar-rapport. Ic-cahda da parti tal-Qorti penali ghalhekk inkwinat l-accessibilita` tar-rapport lill-akkuzat daqsliekieu kient ghall-grazzja tal-argument cahdet li r-rapport jigi muri lill-akkuzat ghal kollox.....”

8. L-attur jiccita s-segwent i bran mill-ktieb *Theory and Practice of the European Convention on Human Rights*<sup>3</sup>.

“If there did not exist **an aequate and proper opportunity** for the accused to question the witness, his conviction cannot solely or mainly be based on the testimony of the latter.”

9. L-attur ikompli jghid li r-rapport peritali kien l-unika prova oggettiva u allura centrali “*fuq x`hiex kien ibbazat l-impjant akkuzatorju kontra tieghu ta` frodi*”. Jghid li x-xhieda tal-espert *ex parte* mitlub minnu kienet mhux biss necessarja sabiex l-attur jifhem l-implikazzjonijiet tar-rapport peritali tar-rapport, imma kienet tkun ukoll ghall-beneficju tal-Qorti “*biex tasal ghall-konkluzjonijiet oggettivi u gusti dwar jekk ghandhiex tigi meghluba il-prezunzjoni tal-innocenza...*”.

10. Jghid ukoll:

“..... l-istess Qorti dehret li ghagget fil-konkluzjoni li waslet ghaliha u cioe` li l-process tal-ezami tar-rapport peritali seta` jigi maghluq minghajr ma l-akkuzat jkollu l-opportunita` li jjehu l-opinjoni ta` espert *ex parte* dwar l-istess rapport u

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<sup>3</sup> P.Van Dijk & G.JH Van Hoof

## Kopja Informali ta' Sentenza

b'hekk gie miffiefes l-integreta' tal-process 'adversarial' shih fejn jidhol il-principju tant fundamentali ta' l-equality of arms fil-garanzija tal-fair trial."

"..... Is-semplici fatt li qorti penali kienet cahdet anke l-opportunita` lill-espert ex parte biex jassisti l-akkuzat jikkonferma dawn il-rizultanzi, fih innifsu jikkonsisti vjolazzjoni tal-principju tal-equality of arms. L-akkuzat ghandu jkollu d-dritt li jezamina u jikkontradici kwalunkwe prova quddiem il-qorti penali li setghet tippregudika l-prezunjoni tal-innocenza fil-konfront tieghu."

11. Ghar-ragunijiet fuq esposti l-attur qed jitlob li din il-Qorti tvarja s-sentenza appellata billi tirrevokaha fejn cahdet it-talbiet tieghu, u minflok, tilqa' t-talbiet tieghu fuq indikati u taghtih rimedju opportun, bl-ispejjez taz-zewg istanzi kontra l-intimat.

12. Min-naha tieghu l-intimat, ghar-ragunijiet esposti fir-risposta tieghu, qed jitlob li l-appell tal-attur jigi michud u li s-sentenza appellata tigi konfermata, bl-ispejjez taz-zewg istanzi kontra l-attur.

13. Fis-succint l-intimat jghid: li hu ma jaqbilx mal-verzjoni tal-fatti kif esposti mill-attur; li l-attur inghata opportunita` shiha sabiex jiddefendi ruhu, u ghalhekk ma sofra ebda "*actual prejudice*" fir-rigward; li l-akkuzat m'ghandux dritt jimponi fuq il-Qorti li tahtar espert maghzul minnu stess; li mhux minnu li l-attur kien gie impedut milli jezamina r-rapport tekniku u wkoll ma giex impedut milli jaghmel kontro ezami lill-perit tekniku; li l-attur ma xejjinx il-kredibilita` u/jew il-konkluzjoni tal-espert nominat mill-Qorti u ghalhekk ma kienx hemm il-htiega li jigi nominat espert iehor; li meta gie mahtur il-perit tekniku z-zewg partijiet, l-akkuzat u l-prosekuzzjoni kienu proceduralment fl-istess pozizzjoni fis-sens li kien gie mahtur espert tekniku indipendenti, u ghalhekk ma jistax

jinghad li ma kienx hemm *equality of arms* f'dan ir-rigward; li l-Qorti tal-Magistrati ma kienitx marbuta mal-konkluzjoni tal-espert tekniku nominat minnha; li allegata vjolazzjoni ta' smigh xieraq kellha tigi ezaminata wkoll fid-dawl tat-totalita` tal-proceduri; li f'materja ta' smigh xieraq il-proceduri ghandhom jitqiesu fit-totalita` taghhom; u li mhux minnu li l-ewwel Qorti ma ttrattatx il-kaz bhala wiehed ta' natura kostituzzjonali izda ezaminat ir-rimedju mitlub bhala wiehed strettament procedurali u ta' natura penali.

### **Konsiderazzjoni tal-Qorti**

14. Fl-ewwel lok il-Qorti tosserva li f'dawn il-proceduri l-attur mhux qed jitlob dikjarazzjoni ta' nullita` ta' xi dispozizzjoni espressa tal-ligi penali, izda qed isostni li d-dritt tieghu ghal smigh xieraq gie miksur "bis-sentenzi" moghtija fil-konfront tieghu mill-Qorti tal-Magistrati u mill-Qorti tal-Appell Kriminali. Mir-rikors tal-appell tieghu johrog car li dak li skont l-attur ikkostitwixxa vjolazzjoni tad-dritt tieghu hija c-cahda tal-Qorti tal-Magistrati li tisma' ix-xhieda ta' Dr. Giuliana Scerri Ferrante bhala espert *ex parte* mressqa minnu. Isostni li ghaldaqstant hu kien gie mxekkel fid-difiza tieghu ghax ma kienx inghata l-opportunita` li jiddefendi ruhu b'mod adegwat, bir-rizultat li gie vjolat fil-konfront tieghu d-dritt fundamentali fuq indikat.

15. Fit-tieni lok, din il-Qorti tosserva li m'hu minnu xejn li l-ewwel Qorti ttrattat ir-rikors kostituzzjonali tieghu mil-lat strettament ta' procedura penali, u li dik il-Qorti *"tat interpretazzjoni zbaljata tal-garanzija tas-smigh xieraq"*.

16. Mis-sentenza jirrizulta car u manifest li l-ewwel Qorti ezaminat il-kaz fl-isfond tal-principji ta' smigh xieraq u ghamlet ir-referenza necessarja ghal dak li huwa ammissibbli, jew ahjar mhux ammissibbli fil-ligi procedurali penali. Di fatti fis-sentenza appellata dik il-Qorti ghamlet gabra tad-dottrina u ccitat b'mod estensiv kazistika tal-Qorti Ewropea dwar il-kuncett ta' smigh xieraq fejn dan il-kuncett gie trattat u spjegat fic-cirkostanzi ta' dawk il-kazijiet.

17. Bazikament johrog car li l-principju tal-*equality of arms* jesigi *inter alia* li kull parti f'kawza jkollha l-opportunita` ragjonevoli li tipprezenta l-kaz taghha, inkluza l-fakolta` li tressaq xhieda, taht kundizzjonijiet li l-ebda parti ma tkun *"at a substantial disadvantage"* vis-a-vis l-parti l-ohra; li kull parti jkollha l-opportunita` u z-zmien adegwat biex tipprepara u torganizza d-difiza taghha b'mod approprijat u minghajr restrizzjoni; li kull parti jkollha l-opportunita` li tezamina d-dokumenti, inkluzi rapporti ta' periti nominati mill-Qorti, ezebiti fil-kawza u wkoll tezamina x-xhieda prodotti mill-parti l-ohra; u b'mod generali, li r-restrizzjonijiet imposti mill-ligi domestika ma jwasslux sabiex parti ssofri *"actual prejudice"* b'mod li d-dritt taghha ghal smigh xieraq jigi vjolat.

18. Fil-meritu jigi osservat li mill-provi jirrizulta li meta fil-11 ta' Jannar 2009 il-perit tekniku nominat mill-Qorti tal-Magistrati pprezenta r-rapport tieghu, dan gie inserit dak il-hin stess fl-atti tal-kawza, u d-difensur tal-attur, allura akkuzat, ghamel il-kontro ezami lill-istess perit tekniku. Meta spicca l-kontro ezami tieghu, l-attur naqas milli jaghmel rizerva ghal kontro ezami ulterjuri.

19. Minn dak inhar l-attur baqa' passiv fir-rigward ta' dan ir-rapport sakemm fis-seduta tas-26 ta' Ottubru 2009 informa lil dik il-qorti li kien *"baqghalu bhala xhud lil PL [illum dottoressa] Giuliana Scerri Ferrante"*<sup>4</sup>. In vista ta' din id-dikjarazzjoni da parti tal-attur, il-Qorti tal-Magistrati iddifferiet il-kawza ghat-18 ta' Novembru 2009 *"biex tixhed il-PL Giuliana Scerri Ferrante, u ghat-trattazzjoni"*.

20. Fl-udjenza tat-3 ta' Dicembru 2009 l-attur ikkonferma lil dik il-Qorti li l-imsemmija Dr. Giuliana Scerri Ferrante ma kienet taf xejn dwar il-fatti tal-kaz, pero` kienet giet avvicinata minnu sabiex din tezamina l-atti u taghmel rapport dwar il-firem meritu ta' dawn il-proceduri. In vista ta' dan, il-Qorti tal-Magistrati iddikjarat maghluqa l-provi tad-difiza u ordnat li ghas-seduta li jmiss issir it-trattazzjoni. Dik il-Qorti tat bhala raguni wara dan id-digriet li hi *"ma tarax il-lok li Dr. Giuliana Scerri Ferrante tixhed f'dawn il-proceduri u in vista tal-fatt li diga` gie nominat espert kaligrafu mill-Qorti u li diga` ipprezenta r-rapport tieghu u anke gie kontro ezaminat mill-konsulent tal-imputat.."*.

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<sup>4</sup> Fol.197.

21. Din il-Qorti taghmel is-segweni osservazzjonijiet.

22.[a] Meta l-Qorti tal-Magistrati innominat espert tekniku biex jassistiha fl-aspett tekniku tal-kaz li kellha quddiemha, iz-zewg partijiet, l-akkuzat u l-prosekutur, kienu proceduralment fl-istess sitwazzjoni, stante li l-espert nominat mill-Qorti kien persuna imparzjali u indipendenti mill-partijiet, kif trid il-ligi. Di fatti hadd mill-partijiet ma kkontesta la l-indipendenza tieghu u lanqas il-kompetenza tieghu.

23. Ghalhekk sa dak l-istadju l-attur ma kellu ebda ilment. Kien biss wara li gie ipprezentat ir-rapport tekniku li l-kontenut tieghu sar maghruf liz-zewg partijiet. Inoltre, il-Qorti tal-Magistrati ippermettiet li fl-istess udjenza l-espert tekniku jigi kontro ezaminat, tant li d-difensur tal-attur ghamel il-kontro ezami tieghu f'dik l-udjenza.

24.[b] L-attur jghid li r-raguni wara t-talba tieghu sabiex il-Qorti tal-Magistrati tisma' lix-xhud tieghu bhala espert *ex parte* kienet *"li hu ried li jkollu access reali, effettiv u a portata ta' persuna teknika tal-kontenut tar-rapport"*. Ukoll, jghid li hu ried li *"jitpogga fil-pozizzjoni li jkollu t-taghrif tekniku kollu necessarju ghad-difiza tieghu"* u wkoll li x-xhieda tal-espert *ex parte* kienet *"mhux biss necessarja sabiex l-attur jifhem l-implikazzjonijiet tar-rapport peritali, imma kienet tkun ukoll ghall-beneficju tal-Qorti"*.

25. Din il-Qorti tosserva li dan il-parti tal-aggravju huwa manifestament infondat u jirrazenta l-fieragh, ghas-segventi ragunijiet:

26. Minn meta gie pprezentat ir-rapport tekniku u gie inserit fil-process fil-11 ta' Jannar 2009 l-attur, allura akkuzat, kellu l-fakolta` li jezamina l-kontenut tar-rapport, anke kieku ried, bl-assistenza ta' espert fil-kaligrafija sabiex ifhiemu l-kontenut tieghu. Ghalhekk, kuntrarjament ghal dak minnu allegat huwa, minn dik id-data 'l quddiem kellu fil-fatt u fid-dritt "*access reali, effettiv u a portata ta' persuna teknika*" li setghet taghtih it-taghrif kollu necessarju ghad-difiza tieghu. Kif tajjeb osservat l-ewwel Qorti, huwa kellu hdax-il xahar sabiex jipprepara d-difiza tieghu fir-rigward. Izda minflok ma pprova jikkonfuta r-rizultanzi teknici, anke billi jitlob l-awtorizzazzjoni tal-Qorti tal-Magistrati li jikkontro ezamina lill-espert tekniku ulterjorment fuq l-aspetti teknici tar-rapport wara li jkun ikkonsulta mal-espert tieghu, fl-udjenza tat-3 ta' Dicembru 2009 huwa informa lil dik il-Qorti li ried iressaq lill-imsemmija xhud bhala espert ex parte, liema talba giet michuda mill-Qorti ghax m'hijjex ammissibbli skont il-ligi.

27. Rigward is-sottomissjoni tieghu li tali xhud kienet tkun ta' beneficju wkoll ghall-Qorti tal-Magistrati, din il-Qorti tosserva li, ladarba l-attur ma kkonfutax il-kostatazzjonijiet u konkluzjoni tar-rapport tal-perit tekniku meta kellu l-opportunita` li jaghmillu l-kontro ezami, u ladarba ma tqajjem ebda dubju dwar il-korrettezza teknika tar-rapport, l-ewwel Qorti ma kellhiex raguni valida ghalfejn tfittex oltre mill-kontenut tar-rapport maghmul tal-espert nominat

minnha. Dan apparti li opinjoni ex parte ma kienet tiswa xejn lil Qorti ghaliex fis-sistema taghna tali opinjoni ma hix legalment ammissibli. Li kieku dik il-Qorti deherilha li kien hemm ragunijiet serji li jalimentaw f'mohh dik il-Qorti xi dubju dwar il-korrettezza tal-kontenut tar-rapport tekniku, hija kellha l-fakolta` li titlob kjarifika mill-espert nominat minnha, u jekk ikun hemm bzonn, anke tinnomina espert iehor. Izda f'dan il-kaz dan ma kienx mehtieg.

28. Kif korrettament sottomess mill-intimat, jekk l-attur deherlu li r-rapport tal-espert tekniku kellu xi nuqqasijiet, huwa seta' jattakkah bil-mezzi provduti fil-ligi u/jew jitlob lill-Qorti koncernata tappunta espert iehor indipendenti sabiex jirrelata fuq il-materja in kwistjoni. Izda tali talba ma saritx u lanqas irrizulta n-necessita` ghal tali nomina addizzjonali, stante li l-attur ma rnexxielux jixhet dubju fuq il-kredibilita` tal-espert jew jipprova li kien hemm ragunijiet serji li jdaghjfu l-konkluzjoni tal-espert.

29. Hija f'waqtha l-osservazzjoni li, ghalkemm il-Qorti tal-Magistrati, cahdet it-talba ghall-produzzjoni ta' xhud biex jaghti opinjoni ex parte, l-attur, apparti li kien ghamel il-kontro ezami tal-espert, inghata l-awtorizzazzjoni li jaghamel nota ta' sottomissjonijiet kif fil-fatt ghamel.

30. F'din in-nota, konsistenti f'disa' pagni, jirreferi ghar-rizultanzi peritali fi tlett paragrafi li fihom jikkritika l-metodologija uzata mill-espert. Jghid li, filwaqt li hu fatt maghruf li *surfaces* differenti jistghu jwasslu ghal varjazzjoni fil-firem



tal-istess persuna, l-espert naqas li jiehu kampjuni differenti b'varjazzjoni bit-tvalja u minghajr tvalja kif ukoll fuq il-bank tal-kcina tal-parti civili, li kien tal-irham, u dan sabiex ikun jista' jipprofondixxi l-ezami tieghu.

31. Fir-rapport tieghu l-espert jghid li fl-1 ta' Dicembru 2008 id-difiza kienet issuggeriet li kwalunkwe ezami tal-firem ghandu jiehu kont tal-fatt li l-firem fuq ic-cekkijiet saru fuq tvalja. Min-naha tieghu l-espert osserva li kieku l-firem fuq ic-cekkijiet saru fuq it-tvalja l-effett ta' dak kien ikun wiehed ghal kollox differenti minn kif qieghed jirrizulta fuq ic-cekkijiet, u kkonkluda li *“mill-analizi li sar fuq wara tac-cekkijiet jirrizulta li kemm il-kitba kif ukoll il-firem fuq ic-cekkijiet saru fuq wicc lixx”*<sup>5</sup>. L-espert kien gie kontro ezaminat mid-difensur tal-attur fuq dan il-punt, u fost konsiderazzjonijiet ohra, l-espert xehed li *“kieku kellu xi dubju kien ikun il-kaz li jiena niehu kampjuni ohra b'varjazzjoni bit-tvalja jew minghajr tvalja dejjem biex inkun nista' inkompli napprofondixxi l-ezami tieghi, pero` dan ma kienx il-kaz ghax ir-raguni ghal hesitation kienet cara mill-ewwel”*.

32. Dawn huma l-elementi ta' prova fir-rigward li kellha l-Qorti tal-Magistrati quddiemha meta waslet ghad-decizjoni taghha. Dik il-Qorti ma hassitx li kien il-kaz li taghti inkarigu ulterjuri lill-espert taghha, jew tinnomina espert iehor indipendenti, kif lanqas saret talba f'dan ir-rigward mill-attur li minflok, ried li l-espert inkarigat minnu jixhed u jaghti l-opinjoni tieghu.

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<sup>5</sup> Fol. 133.

33.[c] L-attur jghid li l-Qorti tal-Magistrati “*arbitrarjament u minghajr ebda raguni valida iddecidiet li hesrem mhux biss tichad li r-rapport kaligrafiku jkun ezaminat minn espert ex parte tad-difiza, izda ghaddiet minnufih li tiddikjara l-provi tad-difiza maghmulin meta dan ma kienx il-kaz..*”. Fir-rigward din il-Qorti tosserva li rrizulta manifest li mhux minnu li l-Qorti tal-Magistrati cahdet lill-attur milli jinkariga minn rajh espert fil-qasam tal-kaligrafija sabiex jezamina r-rapport peritali u jidderigi lill-attur. Dak li ghamlet l-imsemmija Qorti kienet li ma ppermettietx li x-xhud tieghu jaghti opinjoni fuq ir-rapport tekniku prezentat, liema xhieda hija inammissibbli fil-procediment penali.

34. Ukoll, m’huwiex minnu li dik il-qorti cahdet it-talba tieghu arbitrarjament, izda dik il-Qorti cahdet it-talba ghar-ragunijiet specikament indikati minnha fl-istess digriet tat-3 ta’ Dicembru, u cioe` li dik il-Qorti diga` kellha r-rapport tal-espert tekniku indipendenti u kompetenti nominat minnha, u inoltre dan l-espert kien diga` gie kontro ezaminati mid-difensur tal-attur.

35. Jidher li l-attur donnu nesa’ li fil-verbal tal-udjenza tas-26 ta’ Ottubru 2009 huwa kien iddikjara li x-xhud li kien baqghalu jtella’ kienet l-imsemmija Giuliana Scerri Ferrante, tant li l-Qorti tal-Magistrati f’dik l-udjenza iddifferiet il-kawza ghas-smigh ta’ dan ix-xhud u ghat-trattazzjoni, u ma jirrizultax mill-verbal li l-attur kellu xhieda ohra xi jressaq.

36. Ghalhekk m'hu minnu xejn li fit-3 ta' Dicembru 2009 il-Qorti ddikjarat il-provi maghluqa *“arbitrarjament”* u *“hesrem”* minghajr raguni valida. Hija ghalhekk ukoll manifestament fiergha dik il-parti tal-aggravju li fiha l-attur jghid li l-Qorti tal-Magistrati *“ghagklet fil-konkluzjoni.... li l-process tal-ezami tar-rapport peritali seta' jigi maghluq minghajr ma l-akkuzat ikollu l-opportunita` li jiehu l-opinjoni ta' espert ex parte”* ghax il-provi juru mhux biss li l-attur kellu 11-il xahar sabiex jiehu l-opinjoni ta' espert fil-qasam tal-kaligrafija, izda juru wkoll li f'dawk il-11-il xahar huwa baqa' passiv u ma ghamel xejn.

37. Din il-Qorti tirmarkha wkoll li l-Qorti tal-Magistrati kellha d-dmir li tara li l-process penali ma jittawwalx aktar min-necessarju, u ma thallix lil parti jew ohra tiddilunga biex il-kawza titwal inutilment. Huwa opportun li jigi senjalat li, ghalkemm fl-udjenza tat-3 ta' Dicembru 2009 li fiha saret ukoll it-trattazzjoni mill-prosekuzzjoni u mill-parti civili, u ghalkemm f'dik is-seduta l-attur kien iddikjara li *“ghas-seduta tallum mhux qed jezigi l-assistenza tal-avukat tieghu”* dik il-Qorti, filwaqt li ddifferiet il-kawza ghas-sentenza, xorta wahda tat lill-attur il-fakolta` li fi zmien prefiss minnha jaghmel nota ta' sottomissjonijiet.

38. Fid-dawl tal-press l-ilment tal-attur li hu ma kellux access *“reali u effettiv” [sic]* ghar-rapport tekniku, li hu ma kellux it-taghrif necessarju ghad-difiza tieghu, li *“sab ruhu bil-bibien kollha tad-difiza maghluqin”* u li ma kellux *“an adequate and proper opportunity for the accused to question the witness”* huma fattwalment insostenibbli, u l-provi juru proprju l-kuntrarju.

39. Finalment din il-Qorti tosserva li r-rapport tekniku ma kienx l-unika prova li kellha quddiemha l-Qorti tal-Magistrati meta waslet ghad-decizjoni taghha. Fis-sentenza taghha dik il-Qorti osservat li Rita Borg, il-parti civili, kienet konsistenti fil-verzjoni taghha kemm fil-verzjoni li tat lill-pulizija kif ukoll dik li tat quddiemha. Inoltre, wara li dik il-Qorti osservat li Rita Borg *“giet konfortata fil-verzjoni taghha mill-konkluzjonijiet tal-espert kaligrafu li kkonferma dak li allegat Borg”* osservat ukoll li wara li hi *“kellha l-opportunita` tara l-komportament kemm ta' Rita Borg kif ukoll tal-imputat waqt li taw id-depozizzjoni tagghom, m'ghandha l-ebda ezistazzjoni li taghti kredibbilita` lill-verzjoni moghtija minn Rita Borg fl-intier taghha”*. Dan juri li, ghalkemm il-Qorti tal-Magistrati fid-decizjoni taghha hadet in konsiderazzjoni bhala wiehed mill-element ta' prova li kellha quddiemha r-rapport tekniku, dik l-istess Qorti kienet ukoll semghet u osservat kemm lil Rita Borg u kemm lill-attur jixhdu quddiemha, elementi ta' prova ohra li wassluha ghad-decizjoni li *“minghajr ezistazzjoni”* taghti kredibbilita` lill-verzjoni ta' Rita Borg.

40. Ghalhekk, minn ezami tal-proceduri penali mehuda fit-totalita` tagghom ma jistax validament jinghad li l-attur ma kellux smigh xieraq f'dawk il-proceduri.

41. Ghaldaqstant l-aggravji huma manifestament infondati u qed jigu michuda.

**Decide**

Ghar-ragunijiet premissi, tichad l-appell u tikkonferma s-sentenza appellata, bl-ispejjez kollha a kariku tal-attur appellanti. U peress li, il-Qorti hi tal-fehma li l-appell kien wiehed frivolu u vessatorju tordna li l-attur appellant ihallas spejjez addizzjonali lir-Registratur tal-Qrati fis-somma ta' seba' mitt euro (€700) taht il-paragrafu 10 tat-tariffa A mehmuza mal-Kap. 12.

**< Sentenza Finali >**

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