



COURT OF CRIMINAL APPEAL

JUDGE

H.H. CHIEF JUSTICE SILVIO CAMILLERI LL.D.

Today : 16th December 2016

Appeal No: 59/2016

The Police

(Inspector Frank A. Tabone)

vs

~ OMISIS ~

The Court:

1. Having seen the charges brought in the Court of Magistrates (Gozo) against the appellant ~ OMISIS ~, holder of Maltese Identity Card Number ~ OMISIS ~, of having on the 26th March, 2014 at the Victoria Police Station, Victoria, Gozo at around 14:45hrs;

1. With the intent to harm a certain ~ OMISIS ~ accused such person before a competent authority with an offence of which she knew such person was innocent;

2. And also with having on the same date, time and place and circumstances fraudently caused any fact or circumstance to exist, or to appear to exist, in order that such fact or circumstance may afterwards be proved in evidence against ~ OMISIS ~ with the intent to produce such person to be unjustly charged with or convicted of any offence;

2. Having seen the judgement of the Court of Magistrates (Malta) as a Court of Criminal Judicature of the 27th January, 2016, whereby the Court, after having seen article 101 and article 110(1) of the Criminal Code, acquitted the accused of the second charge brought against her, but found her guilty of the first charge and condemned her to thirteen months imprisonment which by application of article 28A of Chapter 9 of the Laws of Malta were suspended for two years (2).

The Court explained to the accused the consequences at law if she commits a crime within the operation of the judgement.

Finally, in order to protect the identity of the children mentioned in this judgement, the Court ordered that the name and details of ~ OMISIS ~ and his children, as well as the name and details of the accused are not published in any means of communication whatsoever.

3. Having seen the appeal application of ~ OMISIS ~, filed in the registry of this Court on the 12th February, 2016, whereby she requested this Court:

(a) to reconfirm that part of the judgement of the 27th January 2016 of the Court of Magistrates (Gozo) as a Court of Criminal Judicature where

the Court did not find appellant guilty of the second charge brought against her;

(b) to cancel and revoke in its entirety that part of the same judgement wherein appellant was found guilty of the first charge brought against her and consequently to acquit her of the same charge.

Alternatively and should this Court of Appeal still confirm the finding of guilt in relation to the first charge, to reform that part of the judgement relating to the punishment which was imposed either by having the term of imprisonment and the operative period of the suspended judgement reduced or else by substituting the suspended sentence with an order or orders issued in terms of article 7 and/or article 22 of Chapter 446 of the Laws of Malta and this taking into consideration the facts relative to this particular case as expounded upon in the appeal.

4. Having seen all the acts of the proceedings and the exhibits, and having heard the parties' submissions.
5. The facts of the case may be summed up as follows:

On the 26th March 2014 the appellant reported at Victoria Police Station in Gozo that her two minor children had repeatedly insisted that they did not want to go with their father. She also alleged that her minor son had told her he wanted to go with a knife to his father and to tie him up with a rope and that he wanted to become a policeman when he grew up in order to send his father to jail. In her report the appellant added that her minor daughter also refused to go with her father because he used to touch her improperly while she was dressed. The police investigated the appellant's allegations which led to the appellant being charged as aforesaid.

6. Appellant's grievances consist substantially of the following:

(1) The first court was wrong where it concluded that the Prosecution had proved its case beyond a reasonable doubt as regards the first charge since the intentional element required for a finding of guilt under article 101 was completely lacking;

(2) Without prejudice to the first grievance, when taking into account the peculiar circumstances of this case the first Court had imposed a rather excessive punishment and the first Court should have taken cognizance of the fact that the appellant was practically a first time offender and had acted as she did simply because she wanted to protect her daughter.

Having considered:

7. The first grievance concerns the merits of the first charge of which the appellant was found guilty while the second grievance addresses the punishment which was imposed by the first Court.

8. The first grievance is essentially grounded on the allegation that the first Court made a wrong assessment of the evidence produced. The court's jurisprudence on this kind of grievance is well established in the sense that this Court will not disturb the evaluation of the evidence made by the first court except for serious reasons in such a way that this Court will revise that evaluation only in cases where the first court could not have reasonably reached the conclusion it did reach on the basis of the evidence produced before it.

9. In the light of what has been just stated concerning this Court's approach to the evaluation of evidence carried out by a court of first

instance, this Court in this case finds itself in a rather difficult position simply because the nature of the first court's evaluation of the evidence produced before it in so far as the finding of guilt of the first charge is concerned is not clearly laid out in the first court's judgment. In fact, apart from a brief statement of the facts as they result from the deposition of Inspector Melvin Camilleri, the "considerations" of the first court consist almost exclusively in a textual reproduction of the testimony given before it by the said Inspector Camilleri without any remarks or comments thereon. This was then followed by the first court's conclusion that, after hearing the testimony of the witnesses, including that of the accused, and after taking note of the documents exhibited and submissions made, it considers that the Prosecution has proved its case beyond a reasonable doubt as regards the first accusation.

10. This Court, therefore, must make its own assessment of the evidence produced in order to decide on the reasonableness or otherwise of the the conclusion reached by the first court as regards the first charge of which it found the appellant guilty.

11. It should be pointed out at the outset that what is in issue is not whether the appellant accused ~ OMISIS ~ before a competent authority with an offence of which he was innocent but whether the appellant accused ~ OMISIS ~ before a comptent authority with an offence of which she knew he was innocent. Therefore, the prosecution must prove beyond reasonable doubt that the accused knew that her husband ~ OMISIS ~ was innocent of sexually abusing of their minor children. Moreover the prosecution must also prove beyond reasonable doubt that her accusation was accompanied with the intent to harm the accused in the sense of exposing him to the possibility of criminal proceedings and punishment. The knowledge on the part of the accuser

of the innocence of the person accused must be certain¹ since the accuser may have grounds for believing or at least suspecting him to be guilty of the offence charged and in filing the report would therefore have used, and not abused, a right competent to him at law².

12. From the acts of the proceedings it results that the report made by the accused to the police was based upon the allegations which were made by ~ OMISIS ~ and by her ~ OMISIS ~. These two minor children were interviewed by Inspector Melvin Camilleri³ but the interview was not audio-visually recorded and no such registration was exhibited in court so that the court could make its own assessment of whatever the children said and of their conduct during the interview. Nor were the children produced to give evidence even if *via* a video conference. The only evidence of what they said is indirect by way of the testimony of Inspector Melvin Camilleri and others.

13. Antoinette Camilleri, for example, testified that the children, mainly ~ OMISIS ~, had made some mention of her father sometimes improperly touching her during access visits⁴. Silvana Calleja, a social worker, also testified to the same effect that ~ OMISIS ~ had told her that her father used to improperly touch her, although according to the social worker ~ OMISIS ~'s version had not been consistent⁵. It is noteworthy that Silvana Calleja interviewed ~ OMISIS ~ during a surprise visit to her school without the knowledge of the accused and in the latter's absence. Again there is no audio-visual evidence of this interview.

14. The accused also offered her testimony. She testified in English. It is very regrettable that her command of the English language is

¹ Prof. A. Mamo, Notes on Criminal Law, Revised Edition 1954-1955, p. 55

² Ibid p. 54

³ Fol 5-10; see also Inspector Camilleri's report fol 11-15

⁴ Fol 22-23

⁵ Fol 45

manifestly lacking. So much so that the transcription of her deposition is hardly comprehensible and in some places does not even make sense. Nevertheless, no interpreter was appointed in order that the witness could speak her native language which would certainly have enabled her to be more articulate and enable her to express what she wanted to say more intelligibly and with greater precision.

15. In her testimony, to the extent that the Court could understand it, the accused says that her children did not want to visit their father and she insisted with them that they should do so because he was their father. This she did until her daughter once told her that her father used to touch her on her back side. At first she thought that her husband was just playing with her daughter but when her daughter continued to allege that her father had repeatedly touched her in an improper way she started to seek help and advice from various people including her son's teacher who reported the matter to the school's headmaster. A guidance teacher from the school then also got in touch with her and advised her to report the matter and to talk to her lawyer. Eventually she was advised to also involve the agency Appoġġ and got in touch with a certain Sarah Debono who asked her whether she wanted to go and the accused answered "yes", "I want help". Eventually she reported the matter to the police.⁶

16. The accused's husband categorically denies that he ever sexually abused his children or improperly touched them. And the Court has no reason not to believe him. The fact remains, however, that his children, at least ~ OMISIS ~, had repeatedly alleged that he had improperly touched her. She might not have been truthful in what she said, which is quite likely, since Inspector Melvyn Camilleri, who is a qualified investigative psychologist⁷, testified that both children manifested

⁶ Fol. 56 - 61

⁷ Fol 8

parental alienation all throughout the interview with them in that the child belittles and insults the father on an ongoing basis which could also be the result of indoctrination by the other party.

17. The fact that the children might have been untruthful in their allegations against their father, however, does not exclude that their allegations could have given their mother cause to suspect that their father had indeed indulged in unlawful acts in their regard. It is also true that the children might have been influenced by the animosity which the accused showed against their father but the fact remains that they did make the allegations they made and it cannot be excluded that because of those allegations the accused was given cause to suspect that the father might have acted inappropriately towards the children.

18. ~ OMISIS ~ does mention an incident when his daughter wanted to go out on the balcony which he interprets as an attempt by his wife to incriminate him in sexual abuse against their children⁸ but once again there is nothing to exclude that the mother was genuinely concerned about her children especially since earlier that day she had filed her report against him about the alleged sexual abuse based on her children's allegations.

19. Reference was also made by Inspector Melvin Spiteri to what he said was told to him by the child ~ OMISIS ~ to the effect that while the father was improperly touching her "the father had red pornographic eyes" and that the child told him that her mummy had told her what this meant. Due to the fact, however, that there is no audio-visual record of ~ OMISIS ~'s interview, there is no faithful transcription of what she said, and she was never produced to be heard by the court, not much can be inferred from this circumstance. The accused did try to give an explanation of the phrase used and in her testimony mentions a mask

⁸ Fol 50-51

and red eyes as well as dust and a possible infection but does not use the word “pornographic” in her explanation and therefore, once again, no firm conclusions can be drawn from her testimony in respect of this circumstance.

20. After having examined in detail the state of the evidence produced before the first court, therefore, this court is of the firm opinion that it cannot be reasonably concluded that the prosecution proved beyond reasonable doubt according to law that when the appellant filed her report against ~ OMISIS ~ with the police she knew that he was innocent of the offence about which she reported him. Consequently, since an essential element of the offence in question has not been proved according to law the appellant cannot be found guilty of the first charge and must be acquitted thereof. The Court therefore holds the first grievance to be well founded and consequently there is no need to address also the second grievance concerning the punishment imposed by the first court.

21. Therefore, the Court allows the appeal filed by the appellant ~ OMISIS ~, revokes that part of the judgment appealed from where the first court found the appellant guilty of the first charge and condemned her to thirteen months imprisonment which by application of Article 28A of Chapter 9 of the Laws of Malta was suspended for two (2) years, as well as where the first court explained to the accused the consequences at law if she commits a crime within the operation of the judgment, and instead finds the appellant not guilty of that charge and acquits her thereof and frees her from any punishment; confirms the rest of the judgment appealed from and thereby frees the appellant from all charges and punishment.

(sgn) Silvio Camilleri

Chief Justice

(sgn) Silvana Grech

D/Registrar

True Copy

For Registrar