



## **Court of Criminal Appeal**

Hon. Mr. Justice Dr. Giovanni M. Grixti LL.M., LL.D.

**Appeal Nr: 360/2015**

**The Police**

**(Inspector Louise Calleja)**

**vs**

**Omissis**

Today the 29 of October 2018

The Court,

Having seen the charges brought against Omissis, holder of Maltese identification card number X, before the Court of Magistrates (Malta) as a Court of Criminal Judicature, with having in San Gwann, Gzira and in other localities on these Islands, in 1997 and in the preceding months and years, by several acts committed, even if at different times, which constitute violations of the same provision of the law, committed in pursuance of the same design:

1. By lewd acts, defiled minor AB, (by order of this Court complainant's name shall hereinafter appear as AB) , who had not reached the age of twelve and which crime was committed by an ascendant;

2. Committed violent indecent assault on the same minor AB;
3. Committed an offence against decency or morals, by any act committed in a public place exposed to the public.

The Court was also requested to apply the provisions of article 412C et sequitur of the Criminal Code and issue a protection order taking into consideration the type of charges and the circumstances of a domestic (household) member;

Having seen the judgment of the Court of Magistrates (Malta) as a Court of Criminal Judicature delivered on the 26th June, 2015, whereby the Court found the accused guilty of the first charge brought against him and condemned him to four (4) years imprisonment, upheld the accused's plea of prescription in relation to the second and third charges and consequently declared the action relating to the said charges as extinguished;

In terms of Section 412C of the Criminal Code the Court hereby issued a Protection Order for a period of two (2) years where the persons protected are *ommisis* and her family.

In order to protect the identity of the victim the Court ordered that the name and details of the victim and her family and friends as well as the name and details of the accused are not published in any means of communication whatsoever;

In terms of Chapter 518 of the Laws of Malta the Court ordered the Registrar of the Civil Courts and Tribunals to add the name of the accused on the Register established in the said Act and to this effect it was ordered that the Registrar of the Civil Courts and Tribunals be notified with a copy of this judgement;

Having seen the appeal application presented by Omissis in the registry of this Court on the 7<sup>th</sup> July, 2015 whereby this Court was requested to vary the said judgment by confirming the declaration that the criminal action in regard to the second and third offences is time-barred and reversing the declaration of guilt and consequent punishment with regard to the first offence or, alternatively, varying the judgement with regard to the punishment;

Having seen the updated conduct sheet of appellant, presented by the prosecution as requested by this Court;

Having seen the grounds of appeal as presented by the appellant Omissis;

Having heard submissions by learned counsel to appellant and the Attorney General;

Having seen the records of the case;

Considered:

1. That this appeal is with regard to the first charge brought against the accused before the Court of Magistrates (Malta) for which he had been found guilty, namely that of defilement of a minor below the age of twelve years. Appellant felt aggrieved by the judgment of the first Court in that it did not take into consideration the facts of the case regarding the plea of prescription and also that the punishment meted out is not warranted. Appellant's objection with regard to his

plea of prescription is twofold, namely that the alleged crime is time-barred by the lapse of 10 years and in any case, if the first Court were correct in applying a 15 year time-bar, the evidence brought forward by the prosecution was not sufficient to prove that the alleged acts happened within that time-frame as alleged by complainant;

2. The facts of this case are not contested by applicant who has shown remorse in his actions but he strongly contends that they took place on dates different than those alleged by the prosecution and the complainant. Appellant is a relative of complainant who, during a family outing on a boat removed his swimming trunks in the presence of the minor or as appellant would have it, swam in the nude in her presence due to some form of irritation. On other occasions he would touch the minor inappropriately over her clothing while playing with his sons and other family members in a game which required a blindfold. The minor had informed her mother who in turn confronted appellant, her brother, who admitted the wrong doing but the family did not want to file charges. After many years following the minor's coming of age, complainant decided to file a report with the police which gave rise to these proceedings;

3. Appellant's first contention, therefore, is that the crime with which he has been charged is barred by the lapse of 10 years and not 15 years as decided by the First Court. [In its judgement the first Court erroneously indicated that the accused was invoking the 15 year prescriptive period]. At this juncture it would be pertinent to point out some very relevant points. Complainant filed her report with the Police in December 2010 when she was 25 years old and the prosecution filed the relevant charges against the accused in February 2011, that is on the threshold of the lapse of a stretch of 15 years from the last day of the offences. The events allegedly took place between 1996 and 1997 when complainant was 10 or 11 years old (the difference between the two ages is another point of contention). Complainant's

mother, who became aware of the offences when they were last committed, that is when the child was ten or eleven years old, and who in accordance with article 542 of the Criminal Code is one that can lodge a formal complaint in lieu of her child, decided not to request proceedings against the accused. It was only 7 years after she attained the age of 18 that complainant decided to file a report with the police;

4. The first issue with which this Court is now seized is whether the crime under article 203 is time barred by the lapse of ten years or fifteen years. In our legal system, unless otherwise stated in any other provision of the Criminal Code and except in the case of contraventions, or in any other law or provision of law, a crime is time barred by the lapse of a given time depending on the amount of time of imprisonment for that particular crime. Article 688 (c) states that the criminal action is time-barred by the lapse of 10 years for crimes liable to imprisonment for a term of less than nine years but not less than four years. The preceding subarticle provides for a period of fifteen years in respect of crimes liable to imprisonment of less than twenty years but not less than nine years;

5. The charge of corruption of minors under article 203 is liable to a term of imprisonment of not more than three years with or without solitary confinement, however, since AB was under twelve years of age at the time, the term of imprisonment shall be that between three and six years.

6. The latter term of imprisonment still falls within the time-bar of 10 years. However, as the complainant explained that the alleged act of corruption was not a singular occasion but one which she sustained over a period of time, the prosecution opted for a charge under article 18 of the Criminal Code which, (before an amendment by Act XIII of 2018) states:

**18. Where the several acts committed by the offender, even if at different times, constitute violations of the same provision of the law, and are committed in pursuance of the same design, such**

**acts shall be deemed to be a single offence, called a continuous offence, but the punishment may be increased by one or two degrees.**

7. In accordance with Article 31, an increase by one degree of the term of imprisonment for the alleged crime as proffered against the accused translates into four years to nine years and an increase by two degrees translates into five to twelve years and it is within the discretion of the Court which degree to apply. Now, appellant is not in agreement with the judgement of the first Court on this plea of prescription in so far as the crime should have been time-barred with the lapse of 10 years and not 15 years since article 203 proviso provides for a punishment of imprisonment from three years to six years. Appellant's argument is based on his interpretation of article 689 of the Criminal Code which reads as follows:

**689. For the purposes of prescription, regard shall be had to the punishment to which the offence is ordinarily liable, independently of any excuse or other particular circumstance by reason of which the offence is, according to law, liable to a lesser punishment; nor shall any regards be had to any increase of punishment by reason of any previous conviction.**

The words "**ordinarily liable**" are at the centre of the argument not only of the accused but also of judgements of this Court throughout the years namely that in calculating the time required for prescription to set in, it is the amount of imprisonment stipulated for that crime without any increase that may be made according to law;

8. Appellant's argument is not vexacious in that it was accepted by our Courts in the *Il-Pulizija vs Lorenzo sive Lorry Cuschieri - App Krim 271/92 - 30.10.2001*. Indeed jurisprudence on this matter is not settled even though it seems that recent judgements are not in favour of the argument propounded by appellant. In the case *Il-Pulizija vs Carmelo Pulis et 354/2011* decided by the Court of Criminal Appeal on the 13 November 2012, the Court examined the issue *in funditus* and

made reference to them, the most recent case of *Il-Pulizija vs Carmel Vella* decided by the Court of Criminal Appeal on the 6 of January 2012 which in turned had made reference to copious case law and authors;

9. It is evident that there are two schools of thought on this matter which in turn demonstrates that such a fundamental issue is not yet settled at law and needs to be to rest by the legislator as it can no doubt lead to prejudice to any of the parties in such cases where the issue of time-bar is at the heart of the matter. This Court observes that in the *Lorenzo Cuschieri* case which is one concerning the crime of fraud, both the defendant and the Attorney General referred to a wealth of judgements dating back to 1900 with regard to prescription and continuous offences. The task at hand, according to the Court was as to decide whether the continuous offence has a separate legal identity distinct from the crime proper for the purposes of prescription. It eventually found that the continuous offence is not an autonomous one distinct from the crime proffered against the accused but a legal fiction which has a bearing on an indeterminate punishment following a finding of guilt of the individual crimes;

10. **The Continuous Crime under Article 18 of the Criminal Code** is said to have been drafted for the benefit of the accused in that a person will answer to one crime rather than a multiplicity of crimes were they made with the same purpose and are in breach of the same provision of law. Answering for all crimes as one crime means that the accused is given the punishment for one of the crimes and not for each individual crime but increased by one or two degrees according to the Court's discretion. Reference is made to *Lectures in Criminal Law* by Prof. Anthony J Mamo - Old University at pp 179 *et seq.* accurately tracing the origins of this article and citing eminent authors such as Carrara, Maino, Impallomeni, Crivellari and others. Indeed, Francesco Antolisei in his works *Manuale di Diritto Penale (Parte Generale -1994* a pg 478 *et seq.* states:

**La figura del reato continuato sorse per opera dei pratici italiani del Medioevo, i quali la escogitarono per mitigare il severissimo trattamento stabilito dalla legislazione comunale per i delitti dello stesso tipo, ripetuti più volte. Concordemente ammessa dalla dottrina precedente alla legislazione attuale e riconosciuta in modo espresso dal codice Zanarelli, tale figura era stata abbandonata nel Progetto preliminare del codice Rocco, ma venne ripristinata nel Progetto definitivo in seguito alle insistenti e vive preoccupazioni che se erano manifestate per l'eccessivo rigore a cui la soppressione avrebbe dato luogo.**

11. Notwithstanding that, as has been held, the concept of continuous offence in Article 18 was created for the benefit of the accused, it also comes at a heavy price for the same accused. Through this legal fiction, an accused can be charged for a string of offences in breach of the same provision of law which took place over a period of time, indeed years and this on the basis of the date of the last known crime allegedly committed. If, for the sake of argument, a person has been committing the same crime against the same person or property punishable with imprisonment of two years for the past ten years but is only apprehended a few weeks before the prescriptive period of the last committed crime, that accused may be asked to answer for all the crimes committed during the last ten years. What of the situation where one or all of the alleged crime is not proved except for the last crime committed where, therefore, the accused must answer for a crime punishable with a further two degrees when in fact the other crimes have not been proven? Article 18, therefore, which is a privilege granted only to the prosecution and cannot be requested by the accused in search for a lesser punishment, can disadvantage the accused by bringing together all past acts or omissions which would have otherwise been time-barred;

12. Added to this prejudice, the accused is now subject to an indeterminate increase in punishment by two degrees, which as explained above in this case can be increased from six years for the



original crime up to twelve years. The latter increase also has the effect of committing an accused to trial for a crime which, on its own, would have been time-barred. The accused is furthermore prejudiced by the fact that prescription is based on an uncertain punishment which may or may not be applied by the Court at its discretion. This brings to mind the caution raised by Sr. Anthony Mamo in the work cited above at page 178:

**Finally, the doctrine of continuous offence, was, as we have already seen, devised by the practical jurists in order to mitigate the punishment which would otherwise be due to the offender in respect of his severe violations. Viewed against this historical background this doctrine is thus a benefit granted to the offender, and must not therefore, in any circumstances, according to many authorities be turned to his disadvantage.** [emphasis of this Court]

13. Indeed, the continuous offence can also be detrimental to the accused in that it is no longer possible to produce witnesses or evidence in defence thereof for those crimes which would otherwise have been time-barred. In the case under review, appellant alleges that complainant decided to file her complaint against him at the age of 25 and after her parents decided to keep the matter within the family when she was 10 or 11 years old, only because she did not manage to extort a sizeable amount of money from him. Accused contends that were it not for the legal fiction under Article 18, the crime would have been time barred and he would not have been subjected to these proceedings which, according to him, were hurriedly presented days before the setting in of the prescriptive period increased by the said article;

14. In Trattato Di Diritto Penale Italiano - Vol III, p 487, para 651, Manzini concludes as follows:

**Poiche' la continuazione delittuosa non e' una circostanza aggravante, bensì un ipotesi di concorso meramente ideale di reati, cose' l'aumento del triplo per la continuazione stessa non deve considerarsi ai fini della prescrizione (cassazione 27/01/1993, Giust. Pen, 1993, II, p. 313; 18/03/1992, Annali di dir.**

**e proc. pen., 1932, p.696), ma il-termini prescrittive deve esser stabilito con riferimento a ciascun reato concorrente nella detta continuazione, avvertendo che, per l'estinzione del reato continuato, e necessario che il-termini prescrittivo sia decorso in relazione a tutti I reati nella continuazione”.**

15. This Court tends to agree with the arguments brought forward by appellant not, however, with the cautions as will hereunder be made. The first part of Article 689 is clear and unequivocal in that for the purposes of prescription regard shall only be had to the punishment for which the crime is **ordinarily** subject. The second part is not as clear, has given rise and will give rise to further uncertainties unless it is clearly amended by the legislator. Clarity of legislation is essential for the obvious reasons including the right of a child on attainment of majority who should be further protected by the legislator especially in this age where allegations such as that under review are unfortunately commonplace. On attainment of majority a person should have the right to file a complaint against an individual against any alleged wrongdoing by a third party or one of the parents where the said parents remained passive in the knowledge of such wrongdoing. Such is the case prevalent in article 208B(6) of the Criminal Code which unfortunately only refers to prostitution of a child. It is up to the legislator whether to create the so called historical crime present in foreign legislations or to set a prescriptive period to run from attaining the age of 18;

16. In conclusion, this alleged crime was subject to a maximum of six years imprisonment and therefore time-bared after the lapse of 10 years. Since the last crime was committed, as accepted by the accused between 1996 and 1997 it was time barred in 2006 or 2007 and no longer prosecutable therefrom;

17. Having reached its decision on the first grievance, this Court finds no reason why it should consider the other grievances raised by appellant and abstains from taking further cognizance thereof.

18. Consequently, this Court upholds the appeal and therefore **reforms** the judgement of the first Court by **confirming** that part by which the accused was found not guilty of the second and third charge; **revokes** that part through which accused was found guilty of the first charge and condemned to a term of imprisonment of four years, revokes the order made under Article 412 C of the Criminal Code; declares the accused not guilty of the first charge and releases him from any punishment therefrom;