



**IN THE COURTS OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE**

MAGISTRATE DR SIMONE GRECH LL.D.

Sitting of 4th June 2019

**The Police
(Inspector Alfredo Mangion)**

vs

Michael James Ebzery

The Court,

Having seen the charges laid against Michael James Ebzery, holder of Australian Passport Number PA5441600 being charged with:

“having on 31st July 2018 between 16:00hrs and 16:30hrs at the Grand Hotel Excelsior, Floriana and on these Islands;

1. Committed a non-consensual act of a sexual nature on the person of Luke Azzopardi (Id.133701L) which act does not, in itself, constitute any of the crimes, either completed or attempted, referred to in articles between 198 and 206 of Chapter 9 of the Laws of Malta and this is in breach of Article 207 of Chapter 9 of the Laws of Malta.”

Having seen all the documents exhibited;

Having heard all evidence produced;

Having seen the consent of the defendant for summary proceedings,

Having seen the reading out of the articles sent by the Attorney General whereby the Attorney General laid down that from the preliminary investigation, there might result an offence under the provisions of :

(a) Articles 207, 251A of the Criminal Code Chapter 9 of the Laws of Malta;

- (b) Articles 382A, 383, 384, 385, 386 and 412C of the Criminal Code, Chapter 9 of the Laws of Malta; and
- (c) Articles 17, 31 and 533 of the Criminal Code, Chapter 9 of the Laws of Malta.

Having heard that the accused had no objection on his part that his case be tried summarily during the sitting of the 25th February 2019.

Having seen the note of final submissions presented by Prosecution;

Having heard the final submissions being made by the defence;

Considers.

Evidence

Statement of accused given on 1st August 2018

In his statement made on 1st August 2018, the defendant stated that he is not married and has no children. He stated that he was on vacation in Malta and was staying at Hotel Excelsior. He continued that he had come to Malta with his partner Alex. He stated that he knew Luke Azzopardi as a waiter at the Hotel Excelsior. He explained that he arrived in Malta on the 25th July 2018. He continued that on the 31st July 2018, he spoke to Luke Azzopardi at the beach area in the afternoon and he had asked Azzopardi to suggest any place where he could have a good time. The defendant explained that Azzopardi had mentioned a place with the name Michelangelo in St Julians and Azzopardi wrote the name on a piece of paper.

The defendant clarified that he was referring to a gay club and that before he asked Luke Azzopardi for his suggestions, he had asked Azzopardi if he was gay due to his gay identification bracelets. The defendant confirmed that he was gay and that he knew that Azzopardi was gay as he had a rainbow bracelet and anklet. He continued that he suspected that Azzopardi was gay when he saw these items. He stated that he asked Azzopardi if he was gay as he was wearing gay paraphernalia and Azzopardi had confirmed that he was. The defendant stated that he had confirmed to Azzopardi that he too was gay and Azzopardi had replied by stating that he knew this.

The defendant denied that he asked Azzopardi to meet him. He only asked him which is the best night to visit this club and Azzopardi had replied that the best night was Saturday. The defendant explained that he was at the beach section in the afternoon of the 31st July 2018. He explained that he went to the toilet which is situated in the pool area and there he met Luke Azzopardi. He confirmed that he

spoke to Azzopardi near the hand basins as he was standing there. He stated that Azzopardi had just finished washing his hands.

The defendant admitted that he had kissed Azzopardi on his neck but he denied that he touched his private parts. He said that he said *'hello'* to Azzopardi and commented about the hot weather and other comments about his shift times. Then he continued that he lent in and kissed him on the neck. He explained that whilst he kissed Azzopardi, the latter said no. He insisted that he did not know that Azzopardi was in the toilet, when he decided to go to the toilets. He explained that whilst at the beach area, he had realized that he had no kindle with him so he went to his room to get it. He explained that he returned back to his sunbed and then decided to go to the toilet.

The defendant explained that he did not know that Luke was 17 years. He explained that when he had asked Luke about the anklet and the bracelet, Azzopardi had told him that he was in a relationship and had been so for two months. He explained that he had asked him how old was his partner but he asked in order to make a general conversation with Azzopardi. He explained that Azzopardi told him that his partner was 17 and upon defendant asking him how old was he, Azzopardi had informed him that he was 18. The defendant continued that he was shocked about Azzopardi's age as he looks so much older.

The defendant continued to explain that he informed Azzopardi that he was in a relationship too. He explained that his partner was staying at the hotel with him but at that moment he was in the hotel room as he was unwell. He explained that when he approached Azzopardi in the toilet, he started talking first and then he asked Azzopardi whether he could kiss him. He continued that he kissed Azzopardi on the right side of his neck. He stated that whilst he kissed Azzopardi, Azzopardi said no and he immediately moved back. He explained that Azzopardi told him at that point that he had to go as he had a meeting with the management. Defendant stated that he told Azzopardi that it was ok and *'why not'* but Azzopardi just stood there. He continued that then they started walking together out of the toilet.

The defendant stated that Azzopardi opened the door and let him pass first. He explained that Azzopardi had a smile on his face and he told him *"it's up to you if you want to meet, you know where I am and you know where to contact me."* The defendant stated that he stepped back immediately and he said to Azzopardi *'why not'*. He clarified that he was referring to his reply to his question and that his intention was to kiss Azzopardi if he agreed. He continued that Azzopardi did not answer but just looked at him.

The defendant stated that Azzopardi smiled and waved and he did the same and then both went their separate ways. He denied kissing Azzopardi on his lips. Defendant stated that the day before, he was at the toilet and Azzopardi had come

in and went to a cubicle. He explained that they had spoken near the sink. He denied that he had followed Luke Azzopardi. He stated that he is upset that he offended Azzopardi, as this was not his intention. He fully apologized to Azzopardi. He stated that he had never been arraigned in Court before. He added that what he has said in the statement is the absolute truth.

Inspector Alfredo Mangion testified on the 30th August 2018 wherein he stated that he was on duty on the 31st July 2018 and was informed by WPS 250 that a report had been received by the Valletta Police Station that at the Grand Hotel Excelsior an indecent assault had occurred between an Australian national of 67 years and a 17 year old waiter. The inspector explained that upon his instructions, the defendant was arrested. He stated that he had spoken to defendant on 1st August 2018 in the presence of Dr Giannella Demaco and a written statement was taken by himself.

The inspector stated that from investigations, it resulted that the 2 persons had chatted for the last 2 days about their personal affairs as both had identified each other as gay and the victim had suggested a place where the defendant could go and have some fun. The inspector stated that defendant whom he is recognizing in court, had approached the victim in the toilets and apart from touching Azzopardi, he had given Azzopardi a kiss on his neck. He continued that when the victim stated that he did not want to continue, the defendant had stopped immediately. The inspector explained that he had arraigned defendant on 2nd August 2018 in front of Magistrate Dr Donatella Frendo Dimech and was accused in terms of Article 207 of the Criminal Code. The inspector confirmed Dok AMS which is the statement given by the defendant.

During his cross-examination, the inspector stated that he was the inspector who had investigated the case. He explained that the victim had been spoken to by duty officer WPS 250. The inspector confirmed that when the place where defendant could have some fun, was a gay club. He confirmed that Azzopardi had written on a piece of paper the name and address of a gay club and handed this paper to the defendant. Inspector confirmed that the place where the kiss and touching happened was in the part near the sinks. He confirmed that when Azzopardi said 'no' to defendant, the defendant stopped immediately.

Sam Attard gave evidence on 30th August 2018 where he explained that he is the security and health and safety manager at the Grand Hotel Excelsior. He stated that on 1st August 2018, about 15.30hours, he was informed by his assistant that an incident had happened where a team member of the hotel had been sexually abused by a guest. He went on to explain that he went to talk to Luke Azzopardi and asked what had happened. He stated that Azzopardi had told him that he had gone to the guest restrooms, and when he was washing his hands, a man came from behind, touched his private parts and started to kiss his neck. He continued that Azzopardi told him to stop and Azzopardi rushed out.

Attard continued that as Azzopardi was 17 years old, he informed Azzopardi that he needed to speak to his father. Attard stated that he called Azzopardi's father and after asking him whether he wished to involve the Police, Azzopardi's father stated that he did not wish to involve the police. He continued that Azzopardi pointed the guest to him and he confronted the guest. He said that the guest immediately admitted that he had made sexual advances but that it was consensual. Attard stated that the guest had told him that they were in the restrooms and that he had closed the door behind him, went on Luke Azzopardi and started kissing him and touching him until he stopped when a Chinese looking guest entered the restrooms. Attard said that the guest knew that Azzopardi was gay because the day before he had a bracelet round his ankle which meant that Azzopardi was gay.

Attard stated that Azzopardi had given the guest the address of a gay pub. Attard recognized the defendant as the guest. He stated that he informed the defendant that he had to check out from the hotel and whilst defendant was packing, he received a call from HR wherein he was informed that Azzopardi's father had changed his mind and wanted to file a police report. Attard continued that he then called the Valletta Police Station and they came to the hotel where the officers spoke to Luke Azzopardi and proceeded to arrest the defendant.

Attard explained that his assistant is Charles Grech and he received a call from Azzopardi's superiors. He continued that Azzopardi was shocked and spoke to his superiors and then the superior called the guard room where Charles Grech answered the call and called him. Together they went to talk to them. Attard stated that the guest was residing at the hotel for a week and he had about 5 days left. Upon being asked which door did the defendant say that he closed when he entered the restrooms, Attard stated that it was the main door. He said that in the restrooms, there are the urinals which are not enclosed. He stated that Azzopardi was washing his hands. He stated that in the restrooms there are the sinks, the showers and the toilets which can be closed by separate doors.

In cross examination, he explained that he was not present during the incident but only took the version of the parties. He stated that he did not give any rights to the defendant when he asked him what had happened. He said that he just told the defendant that he had a report about him that he had sexually abused one of the hotel's team members and that defendant had just admitted by saying 'yes'. He stated that he had not explained to defendant what the alleged abuse consisted of. He explained that before he spoke to the defendant, he had spoken to Azzopardi. He stated that he had asked Azzopardi's father if he wanted to take any action. He insisted that a 17 year old is underage. He admitted that he spoke to Azzopardi in front of a colleague, Charles Grech but not in the presence of Azzopardi's father.

Attard stated that he never mentioned to Azzopardi's father whether he knew that his son was gay. He stated that Azzopardi did not tell him that he was gay. He stated that he did not see the rainbow bracelet on Azzopardi. He stated that Azzopardi did not tell him that he had told the defendant that he was gay. He stated that Azzopardi did not mention in front of his father that he was gay.

Attard confirmed that Azzopardi had told him that the incident had happened in the guest restrooms. Staff are not meant to go to the guest restrooms. He stated that Azzopardi did not tell him that this was not the first time when he had gone into the guest restrooms. He agreed that the door of the guest restrooms did not lock and so there was no obstacles for someone else to open it. He confirmed that when one opens the main door of the restrooms, there is an area where one washes his hands, which area is not closed but is open to all. He stated that he made a report for internal purposes.

Attard explained that the defendant co-operated when he was asked to leave. He confirmed that the defendant was at the hotel with his partner.

WPS 250 Amanda-Jane Parascandolo Bunce testified on 10th October 2018 where she stated that on 31st July 2018 at around 5.30 in the afternoon, she received a phone call from the chief security of Grand Excelsior Hotel, Samuel Attard, who informed her that Luke Azzopardi of 17 years, had been sexually assaulted by one of the hotel guests. She stated that Attard had informed her that he had informed Luke Azzopardi's father, Arthur Azzopardi, who had requested that the police be informed and court action be taken.

She continued that she went to the hotel and spoke to the defendant in the presence of Sam Attard. She recognized the defendant as the person she had spoken to. She explained that she did not take the defendant's version of events at that time but proceeded to speak to Luke Azzopardi in the presence of his father. She said that Luke Azzopardi told her that he was working in the pool area as a waiter and that the defendant was his client. She said that Azzopardi told her that defendant had asked some questions as to where could he go to have a good time, as to whether Azzopardi was gay and also asked Azzopardi to give him a comment card so that he could pass some comments on him.

She explained that Azzopardi had told her that he went to the restrooms at around 4.45pm and when Azzopardi was washing his hands, he saw the accused entering the toilet and closing the door. She said that Azzopardi stated that the defendant had approached him, touched his private parts and started telling him that he had a nice beard and chest. She stated that Azzopardi continued telling her that the defendant had put his hands in his shirt, had kissed his neck and then tried to kiss him on the lips. She stated that Azzopardi was shocked and told him nothing and he did not stop him. She continued that Azzopardi told her that when the accused

tried to kiss him on his lips, he took a step back and exited the toilet. She stated that Azzopardi went to inform his manager who in turn informed the chief security and then the chief security informed the police. She explained that the victim's father insisted that action be taken. Azzopardi was taken to the policlinic where he was certified as suffering from anxiety shock.

She testified that she then proceeded to go to the police station where PC 1063 Joseph Mizzi gave the defendant his rights and defendant refused to give his statement and wished to consult with a lawyer. She continued that she informed Inspector Mangion who gave instructions that the defendant remains arrested.

In cross-examination, WPS 250 stated that it was the victim's father who insisted that proceedings be taken. She confirmed that Azzopardi had given a name and address as to where defendant can have a good time and had written the information on a piece of paper. However, she did not know whether this place was a gay club or not. She stated that she had not seen any bracelet on Azzopardi but Azzopardi had mentioned that he had a rainbow anklet on him. She confirmed that she was told that defendant had asked Azzopardi if he was gay and he had confirmed that he was gay.

She confirmed that the toilets where the incident happened was a guests' restrooms. She confirmed that Azzopardi was fully clothed. She stated that Azzopardi had not done anything but then had moved back and left. She stated that Azzopardi had told him that he had at no time tried to stop defendant.

Charles Grech gave evidence on the 19th October 2018 where he stated that he is assistant chief security at the Excelsior Hotel. He stated that on the 1st August 2018 at around 15.30 hours, he was informed that a young male waiter had reported that he had been sexually assaulted in the gents toilets in the marina. He stated that he informed his chief security and together they went to the marina where they found the waiter with red eyes. He explained that he could see that he had been crying. He explained that the chief security took the waiter aside and asked him his age to which question, the waiter replied that he was 16 years. Grech continued that the chief security informed the waiter that his parents had to be informed. He continued that the waiter's parents were called.

Grech said that Azzopardi told them that he was at the marina and a gentleman had approached him from behind when he was washing his hands in the basin and when he turned to face the man, he tried to touch him. He continued that Azzopardi told them that he got scared and left the toilets. He said that at first, they had no reply that the victim's father wanted to involve the police. He explained that the waiter showed them who the guest was and he was lying on a sunbed.

Grech continued that the two of them approached the guest and the chief security told him that he had squeezed the waiter with the basin and tried to sexually assault him. Grech said that the guest denied this and that he had only kissed him in the area near the jawbone and that he wanted to apologize. Grech recognized the guest who is the defendant in this case.

Grech stated that the defendant insisted that the only thing he had done was that he had kissed the victim and that he didn't know that he had annoyed him because he thought that they had become friends and that the boy didn't mind. He said that the defendant wished to apologize. He said that the chief security told him not to apologize but to leave the hotel immediately. Grech said that the accused agreed but when he was packing, they received a message from HR that the parents wanted to involve the police. Grech said that the defendant was informed by the chief security that he had to wait for the police to come.

Grech explained that when they were at the lobby waiting for the police, the defendant stated that he was drinking in the marina and this waiter was serving him all day and thus they had become friends. He said that the defendant stated that he made a move to him as the waiter had a bracelet near his ankle which indicates the diversity. He said that the defendant had informed the waiter that he was gay and the waiter had told him that he was gay too. He continued that the defendant had showed them a name which the waiter had given him of a certain bar in Paceville which belongs to gays. He said that the defendant explained that he and the waiter went to the toilet together and that he was talking to the waiter in the toilet and that the waiter never made any move that he was annoyed. He said that the defendant told him that they had left the toilet together and he even asked the waiter when he was off to which the waiter replied that he was off on Saturday.

In cross-examination, Grech confirmed that the incident happened in the gents' bathroom. He insisted that this bathroom can be used by everyone including staff. He stated that if the waiter in the marina needs to use the bathroom, he could use this bathroom and avoid going up 6 floors to use a bathroom. He confirmed that the bathroom reserved for the staff is in level 3. He stated that there are no security cameras above the doors of the bathrooms or inside the bathrooms. He said that the only camera in the marina is situated near the gate from where you can enter the marina.

Norbert Grixti testified on 19th October 2018 where he said that he is the general manager of Grand Hotel Excelsior. He said that on the 1st August he was informed by the security manager Sam Attard that one of the guests from the hotel had made advances towards one of the hotel's employees, a certain Luke Azzopardi. He said that he left it in the hands of the chief security to take care of the necessary steps as he was an ex-police sergeant. He stated that he ensured that the victim's parents were informed. He said that Sam Attard told him that the victim's

father was not interested in pursuing the matter but then the victim's father changed his mind and thus they called the police. He said that it was Sam Attard who called the police.

He continued that he met with the victim's father at the hotel. He said that Michaela Grixti who is the training manager was with Luke Azzopardi who looked a bit agitated as was his father. He said that he tried to calm them down and he just listened and left it in the hands of the police.

In cross-examination, he stated that there are no CCTV cameras outside the bathrooms or in the vicinity. He stated that there are bathrooms for the staff and bathrooms for the guests. He explained that this bathroom is for guests but it can be used by staff due to the fact that the staff's bathroom is in level 3. However, this bathroom is meant for the guests. He confirmed that Azzopardi still works at the hotel as he is a part timer and an ITS student. He stated that he was not aware that on the day there was a meeting of the waiter with the higher management. He confirmed that to his knowledge, Azzopardi has still the same duties as he had and in the same location.

Michaela Grixti gave evidence on the 19th October 2018 where she specified that she works in the human resources department and currently employed as a training manager. She said that the food and beverage manager on duty called her and told her what is the procedure to be followed in a case of sexual harassment by a guest. She said that the security needed to be involved and she was informed that they had been already involved. She suggested that the victim be taken away from the workplace so that he does not feel overwhelmed and upset. She said that she went to talk to the victim who was upset. She met him in the food and beverage duties office. She explained that she tried to calm him down. He had explained that he was in the bathroom and was touched inappropriately by a hotel guest. She said that she did not know who the guest was but she told the victim that he had done the right thing for coming forward and that the hotel would support him. She confirmed that the victim's name was Luke Azzopardi.

PC 281 Damien McKay testified on 23 October 2018 where he said that he was instructed to escort the defendant whom he recognizes to the lock up in Floriana but as he needed his medication, he was taken to Hotel Excelsior where he met his room-mate Garmin Alexander to whom he explained what had happened. He explained that the defendant was then taken to Floriana policlinic where he was given a prescription for the lock up. Then he was escorted to the lockup from the policlinic.

PC 1063 Joseph Mizzi testified on 23 October 2018 where he said that he had gone with WPS 250 to the hotel Excelsior. He was instructed to take the defendant to the police station in Valletta and to give him his rights. He explained that he did this and gave to the defendant whom he is recognizing a document

with his rights in the English language. He said that apart from giving him the document, he also gave the defendant his rights verbally in the English language. He said that the defendant told him that he wished to speak to the lawyer. He said that the defendant was taken to the hotel Excelsior where he met with his friend. He explained that they informed the defendant's friend about what was happening and the defendant took his pills and then was taken to the policlinic for the pills to be registered. The pills were taken from the defendant's luggage. After the defendant was taken to the lock up at the Floriana Depot.

Arthur Azzopardi gave evidence on 29th November 2018 and he stated that he had encouraged his son Luke to work as a waiter in Excelsior Hotel as he was studying at ITS and he supplied this hotel with certain works. His son was immediately employed with the hotel and his parents were very happy. He stated that at around three thirty or four o' clock, he received a call from the hotel that his son was under shock. He said that when he arrived at the hotel, they received him at the front door of the hotel and he saw the accused sitting down. He recognized the accused in court. The security informed him what had happened. He said that his son was with a person from HR and with the general manager. He was under a severe shock. He said that he stayed at the hotel as the security and the management decided to phone the police. He explained that he stayed with his son near the HR office. He said that they went upstairs to the lobby where they waited for the police, who asked some questions to his son. He said that the police asked his son two or three times what had happened.

Luke Azzopardi gave evidence on 29th November 2019 where he said that he was at work and started taking orders. He met this person who told him that he was giving a good service. He gave this person the drinks he ordered and then went to the bathroom. He said that he was serving by the beach. He stated that he did not know this person before. He had seen him for one day. He recognized the accused as this person. He said that when he was ready from the toilet, he saw this person enter the toilet. He continued that this person closed the door and he turned around. He said that this person asked him to do certain things and he obviously refused.

Azzopardi said that this man told him to go with him and have sex. He explained that he was washing his hands and then he turned around. He was in the part where there are the sinks. He refused and then the defendant came to touch him between his legs and his arms; i.e. in his private parts. He said that the defendant did this several times and he started to touch his chest area. Then a person came in and he turned around to see who came in and it was at that time that he managed to escape. He stated that he escaped, shivering and crying. He stated that defendant touched his neck too. He said that when he was being touched he did not know what to do as he was under shock.

Azzopardi insisted that he kept telling the defendant to stop all the time. He stated that defendant told him that he wanted to do some things with him but he kept refusing but still the defendant kept touching hi,. He stated that when he exited the toilet, he went running and crying. He continued that one of his colleagues saw him and he told him what had happened. The security officers came to him but he kept shivering and crying. He stated that this incident lasted around 10 minutes.

In cross examination, Azzopardi stated that he is gay. He confirmed that when the case occurred, he was in a relationship but defendant had told him not to bother and to have sex with him. He said that he wore a rainbow anklet which the defendant saw. The defendant asked him if he was gay and he confirmed this. He stated that he still wears the bracelet. He stated that he did not remember if accused told him that he was in a relationship too.

Azzopardi denied that he ever saw the defendant's partner sunbathing next to defendant. He confirmed that he had seen defendant for two consecutive days. He admitted that he had given the defendant an address of a gay club he could go to and that he wrote this address on a piece of paper. He confirmed that he had given a comments card to the accused so that he could write comments about him. He stated that defendant had asked him to give him comments card so that he writes down comments about the service. Azzopardi stated that the accused wrote good comments about him.

He continued to state that he went to the guests' restroom. He stated that the staff's toilet is in another level but as there was a lot of work, he could not waste time. He confirmed that when the defendant entered the bathroom, he was washing his hands. He stated that there are a lot of cubicles in the bathroom which had doors and there were also the urinals. He confirmed that the door which the accused closed behind him was not locked. He stated that when the defendant approached him, they were in the part where anyone could enter and that they were not in a cubicle. He confirmed that he and accused were face to face.

Azzopardi stated that the accused tried to kiss him on his neck. He did not notice whether the accused had his kindle in his hand or not. He confirmed that accused did not kiss him on his lips. He explained that he was wearing a normal shirt with buttons, collar and lapels. He insisted that he told the accused not to do these things but he kept on going. He denied that the accused stopped touching him when he was told 'no' by him. He insisted that he moved back but defendant still approached him and it is only when another person came in to use the bathroom, that defendant stopped and he managed to run away.

Azzopardi said that the defendant told him to have some fun and to forget his boyfriend. He stated that he did not remember if he said a word to this. He then replied that he is not remembering whether defendant kissed his neck. He remembers that the defendant approached him and he ran away. He insisted that

defendant kept touching him between his legs,, his chest and his neck whilst he kept telling him to stop. He replied that he was scared and didn't know what to do. He insisted that the defendant could not have misunderstood him as he had refused him continually. However, he did not leave until another person came in. He stated that the accused did not hold him in any way to restrict his movement, but he was afraid and did not know what to do.

Azzopardi confirmed that he was fully clothed throughout this incident. He denied that he went out together with the accused. He stated that he just went out and did not say anything to the person who came in the bathroom. He insisted that it was himself who came out of the bathroom first, before the accused. He stated that when he was running, he looked back and saw defendant coming out of the bathroom but defendant went in another direction. Defendant went to where he was before at the beach. He confirmed that from the beach, the toilets are not visible. He insisted that even though it was August, no one entered the bathroom for a whole 10 minutes during which the incident occurred. He stated that he was near the sink closest to the door but he ended up in a corner, even though he was not blocked in any way by defendant.

Doctor Chris Muscat gave evidence on the 11th December 2018 where he confirmed on oath the certificate released by him. He stated that on 31st July 2018 he examined Luke Azzopardi at Floriana Health Centre at around 6.30om. He found Azzopardi in an anxiety state but he had no visible injuries. He ascertained that he was in an anxiety state through the pulse and blood pressure. He said that Azzopardi had told him that he was involved in something like a scuffle and needed a police certificate. He explained that he never saw Azzopardi again.

Defendant chose to give evidence on the 21st march 2019. He stated that he is from Victoria, Australia and is 68 years. He was in Sicily and was recommended to come and visit Malta together with his partner Alex. He had been together with Alex for 35 years and they have a very loving relationship. He stated that he worked as a training and learning development officer for an oil company. He was made redundant and then he worked part time for various other companies until he started volunteering. He explained that he was volunteering in Mater Dei too.

He explained that he was staying together with Alex at the Excelsior Hotel in Valletta. They had arrived on 28th July in mid afternoon. He met Luke Azzopardi on Monday morning. Azzopardi was a waiter and had come over to the sun lounges to ask them whether they wanted a drink. He said that he noticed the he had an anklet and a bracelet on which were in the gay rainbow colours. He said that he told Luke Azzopardi whether he understood that he was wearing gay paraphernalia and he confirmed. He then asked Azzopardi whether he was gay and Azzopardi confirmed this.

He said that during that day, he was served by Azzopardi and at a certain point, Azzopardi asked him if he would fill in a customer questionnaire. He stated that they exchanged a free flowing conversation. He stated that they spoke about relationships and about being gay. He spoke with Azzopardi about working in the heat, and he also asked Azzopardi to recommend him a club where he could have some fun. He confirmed that Azzopardi mentioned a gay club called Michealangelo. He stated that Azzopardi wrote down the name and the address on a piece of paper. Defendant confirmed that when Azzopardi brought the customer questionnaire, he filled it in.

Defendant stated that he talked with Azzopardi about coming out to the world and to his parents. He stated that he had told him he came out at the age of 32 whereas Azzopardi had come out at the age of 18 years. He stated that he told him that he was fearless compared to him. On Tuesday, Alex was unwell and went back to his room. He stated that he went to look around Valletta and then he returned to the hotel and after a while with his partner, went to the beach. He stated that he stayed at the beach but then went to check on his partner. He found him sleeping so he picked up his kindle and went down to the beach again.

Defendant stated that he was reading his kindle at the beach but at a certain point he felt the urge to go to the bathroom. He took his kindle with him to the toilet around the back from the pool. He entered and went to do the business and then when he turned around, he noticed Luke Azzopardi over the sinks. He stated that he told him good day and asked him how he was, with Azzopardi responding that he was fine. He stated that Azzopardi was shaking his hands by the sink. He stated that he walked over to Azzopardi and told him that it was hot outside and that he still had no hat on his head. He stated that he mentioned no hat as he had discussed the day before the issue that the waiters did not wear hats. He stated that he put his hand on his chest to feel the shirt and thought that the shirt was not too thick. It was at this point that he leant into Azzopardi and said to him, '*may I kiss you*'. As he leant in, Azzopardi turned to his left and said no, but it was already done. The kiss had went from the cheek where it was supposed to go, to the neck.

The defendant stated that when he went to kiss him, Azzopardi moved slightly to his left and that is why the kiss ended on his neck. He stated that it was an instant shock when he heard '*no*' and immediately he stepped back. He stated that he asked to kiss him out of sheer pride of what Azzopardi had achieved his coming out at 18. He stated that it was a bit like a well done. He stated that he felt foolish as he had misread Azzopardi. He had misread his body language. He stated that he thought that there was a nice easy friendship between them. He stated that he stepped back out of his space and said '*why not*'. Azzopardi's answer was that he had to go to a meeting and thus he told him ok. At that point, a man came in and both him and Azzopardi left the bathroom together. He stated that he went out first, and then Azzopardi followed. He continued that he told him that if he wanted to chat he knew where he was.

Defendant denied that he touched Azzopardi's private parts. He stated that he would never jeopardize his relationship with his partner for the sake of an incident like this. He stated that he has never had any issues with the police in any country. He insisted that he asked to kiss Azzopardi, as he was so proud of him coming out at 18. He stated that he only kisses Alex on the lips. He stated that he asked Azzopardi whether he could kiss him, out of politeness. He stated that when he asked to kiss Azzopardi, he had already started to bend over and Azzopardi had turned to the left and said no.

Alexander Gassman testified on the 30th April 2019 where he explained that he restores heritage gardens. He is 63 years and he was on holiday with his partner, Michael. He stated that he had lived with his partner for 36 years. He arrived in Malta on 28th July and was staying at the Hotel Exclesior in Valletta. He stated that they were attended to by both male and female staff but there was one particular man who was very polite to them, and this person was Luke Azzopardi. He explained that Michael had noticed that Luke Azzopardi wore a fabric anklet in the gay colours. He stated that he was surprised that he could display these colours in a five star international hotel. He stated that he recalls the conversation exchanged between Michael and Azzopardi wherein it was confirmed that all of them were gay. He stated that Azzopardi must have realized that he and Michael were gay as they were putting suntan lotion on each other and laughing like a couple. He stated that Michael chatted with Azzopardi but he simply rolled over as he is not a chatty type. He stated that Azzopardi brought a questionnaire to be filled in about the service.

He described the uniform the waiters wore as consisting of camel shorts and floral shirts. He stated that both remarked that it was terribly hot and that the staff should wear a hat. He stated that during the last day at the hotel, he was unwell and stayed in his room whilst Michael went to Valletta and then later on, went to the beach. He explained that when he was waken, he found Michael in extreme stress who told him that he had been misunderstood. He stated that two security men budged into the room and the taller one was very aggressive and shouted that they had to leave. He said that he had no idea what was happening and then the police arrived and arrested Michael.

He stated that he rang the Australian High Commission and after explaining her what had happened, sent him someone with an envelope with the names of legal people who could be contacted. He stated that he met with Dr Demarco and the lawyers took charge of the case. He explained that Michael is generous and caring. He continued to state that Michael is a volunteer and helps with AIDS patients and did also charity works for the local catholic church. He confirmed that in Malta, Michael is doing voluntary work too. He said that Michael had made friends with a couple where the young man has been diagnosed with cancer. He stated that Michael was with the Franciscan Order studying to become a friar.

He described Michael as a tactile person and that it was hard for Michael to come out. It was very difficult for Michael to inform others of his relationship with him.

Considers :

As to the law,

Section 207 of the Criminal Code reads as follows:

*'Whosoever shall be guilty of any non-consensual act of a sexual nature which does not, in itself, constitute any of the crimes, either completed or attempted, referred to in the preceding articles of this sub-title, shall, on conviction, be liable to imprisonment for a term from three to seven years:
Provided that in the cases referred to in article 202, the punishment shall be increased by one degree.'*

In the decision bearing the names **Police vs X** decided on the 13th May 2009 by this Court as diversely presided, it was stated:

"According to the Italian writer Antolisei (F. Manuale di Diritto Penale Parte Speciale I pagine 440 et)

'Il codice Zanardelli, conformemente alla tradizione e alla dottrina allora dominante, ravvisava l'atto di libidine in ogni estrinsecazione dell'istinto sessuale che non fosse diretta al congiungimento carnale.....

Il codice vigente,ha abbandonato questo criterio, adottando quello oggettivo della natura dell'atto e considera 'atto di libidien' lo sfogo dell'appetito di lussuria diverso dalla congiunzione carnale. Rientrano, pertanto, nella figura criminosa in aprola tutte le manifestazioni dell'istinto sessuale, e cioe' tutte le forme in cui puo estrinsecarsi la libidine, escluso il coito, il quale, secondo l'opinione prevalente, come abbiamo visto, comprende ogni forma di congiunzione carnale.

L'elemento materiale del delitto consiste nel compimento dell'atto di libidine, il quale puo' assumere le forme piu' svariate, dal semplice palpamento alle piu' aberranti anomalie. E' necessario, pero', in ogni caso un cotatto corporeo, senza che occorra che questo sia al nudo o riguardanti direttamente gli organi genitali....

Con la realizzazzione dell'atto di libidine il reato e' consumato, non essendo necessario che il soggetto sia pervenuto a soddisfare la sua concupiscenza (emission seminis) Un solo atto e' sufficient per concretare il delitto,

Quanto all'atto psichico basta a concretare il dolo la volonta' di compiere atti di libidine con la coscienza del carattere libidinoso dei medesimi e della violenza o abusivita' del comportamento.

The Kiss

E' opportune ora esaminare la dibattuta questione della responsabilita' penale per il bacio. Al riguardo va osservato che, concorrendo le condizioni in generale richieste per il delitto in esame (costrizione o abuso), nel bacio ricorrer' questo reato quando la modalita' dell'azione e le circostanze che accompagnano ne rivelino il carattere libidinoso e non semplicemente quella di una manifestazione di affetto o di simpatia.'

On much the same lines about the kiss the judgement in 'The Executive Police versus Spiru Silvio' (12th March 1960 Court of Criminal Appeal per Judge Harding) where it was stated:

'The kiss must have been a violent one and it should be given in circumstances which show that it was just a molestation but with a libidinous intent.' (See also the judgements: *'The Executive Police versus E/L25606 Leading Steward Victor Dalmas' 13th May 1961 (Court of Criminal Appeal) Page 963* and *'The Executive Police versus Gerald Cassar' of the 18th July 1959 (Court of Criminal Appeal).'*

As the law stands in view of the amendments brought about by Act XIII of 2018, this offence is now described as a non-consensual act of a sexual nature. From reading the relative provision, it emerges that the elements required for this offence to subsist are:

- i. There must be an act of a sexual nature;
- ii. The act must be non-consensual.
- iii. There must be the required intentional element of perpetrating a non-consensual act of a sexual nature.

As to the Facts

The Court has differing versions of the events: the version of the complainant given to this court and other versions of the complainant given to other third parties who all gave evidence before this court and the version of the defendant as described in his statement to the Police and as reconfirmed during his testimony.

The Court makes it clear that the fact that one has contradictory versions does not mean that the Court should automatically acquit. It is the duty of this Court to weigh the evidence carefully and in the event that it feels morally convinced that one version is more reliable than the other, then it should take that version into account and proceed with the judgement.

When the court evaluates the evidence brought forth, it is not satisfied that the version given by the alleged victim is the correct one.

First of all, the version given by the victim was not a consistent one. The Court took note of all the different versions which were given as to what allegedly happened. It heard what was reported to the chief security Sam Attard, to his assistant Charles Grech, to WPS 250 and to the training HR manager. It is true that what these witnesses reported, consisted of the version that was allegedly told to their respective selves by the alleged victim. However, the Court is of the opinion that with every version being given by the alleged victim, the incident started to be blown up with other details and elements continued to be added by the alleged victim with every version of events that he narrated to the several officers and persons he spoke to immediately after the alleged incident happened.

Even the alleged victim himself when he testified in court was not consistent in his testimony. He alleged that he was touched on his neck but then at another point in his testimony that he does not remember whether he was kissed on his neck. He stated that he continually insisted that the accused should stop and at the same time, did not know what he answered the defendant when he was asked allegedly to forget his current boyfriend.

Secondly, the Court deems it highly unlikely that at such a busy time, the guests' restroom would have been a place where such an act could have taken place. The place was accessible to all and it is highly unlikely that such an act would have been carried out at such a time. It is also highly unlikely that the whole incident lasted ten minutes and that during these whole ten minutes, no one entered into the said bathroom.

Thirdly, the alleged person who entered into the restroom and who thus could have been a third party witness to the alleged incident, was never brought forth by the prosecution to corroborate the alleged victim's version.

Fourthly, the alleged victim had the opportunity to scream or inform this third party who entered upon the alleged incident about what was happening, but when asked, the victim simply stated that he just exited quickly.

On the other hand, the defendant's version was always the same and identical to that given *a tempo vergine*. The defendant always denied that he touched the alleged victim's private parts and that he asked whether he could kiss the alleged victim. The defendant always outlined that the moment it was made clear to him that the alleged victim did not consent to be kissed, he stepped back and stopped his actions.

The Court is of the opinion that the kiss on the neck which was given, did not constitute a sexual act. The alleged victim did not need to struggle to set himself

free. He explained on oath that he was not obstructed in any way by the accused and his movements were not at all restricted.

The details of the kiss reveal that this was a very simple one which ended on the alleged victim's neck due to the fact that as the accused was leaning over, the victim turned his body and said no with the result that the accused ended kissing the neck of the alleged victim instead of the alleged victim's cheek.

The accused immediately stopped when he understood that the alleged victim was not giving his consent to being kissed.

Moreover, the intention of the accused for kissing the alleged victim was clearly explained by the accused in his testimony. He insisted that he was full of admiration for this young person who had 'come out' at such a young age as opposed to him who had 'come out' at a more mature age. The Court has not been convinced by the prosecution that the defendant had the necessary *mens rea* required for this offence to subsist. The Court gave weight also to the fact that as soon as the accused understood that his action of giving a kiss was misinterpreted by the alleged victim, he immediately stopped.

Consequently, the Court finds that the prosecution did not prove beyond any reasonable doubt that apart from this kiss which the accused admits to have given the alleged victim, there were any other acts, including the touching of private parts by the accused. Having heard all the evidence, the Court is convinced that all that occurred was the giving of a kiss which was meant to be on the cheek but ended up being given on the neck, and that the minute the accused realized that the alleged victim did not consent to being kissed, he immediately stepped back and stopped his actions.

Further considers

As regards article 251A of the Criminal Code referred to by the Attorney General, the court notes that as outlined by the Court of Criminal Appeal in the case decided on the 7th December 2001 in the names **Police vs Michael Carter**:

“Meta, invece, ir-rinviju għall-gudizzju jsir skond is-subartikolu (3) tal-Artikolu 370 (u allura wiehed qed jittellem fuq għall-anqas reat wiehed, fost daww imputati, li huwa ta' kompetenza tal-Qorti Kriminali), in-nota ta' rinviju għall-gudizzju tassumi rwol simili għal dak ta' l-att ta' akkuza quddiem il-Qorti Kriminali. Fin-nota ta' rinviju għall-gudizzju skond l-Artikolu 370(3) ma jistghux jizdiedu reati li dwarhom ma tkunx saret il-kompilazzjoni; l-Avukat Generali, naturalment, jista' jnaqqas reat jew reati u anke jzid skuzanti. Bhal fil-kaz tal-att ta' akkuza, jekk fin-nota ta' rinviju għall-gudizzju taht l-imsemmi Artikolu 370(3) l-Avukat Generali jakkuzax lil xi hadd bhala awtur ta' reat, il-Qorti tal-Magistrati, wara li tkun akkwistat

ilkompetenza bil-kunsens ta' l-akkuzat (Art. 370(3)(c)), tista' ssibu hati ta' tentattiv ta' dak ir-reat, jew ta' reat iehor anqas gravi izda kompriz u involute f'dak ir-reat, jew bhala komplici f'dak ir-reat. In fatti din it-tielet ipotezi kien il-punt principali fis-sentenza ta' Seisun et. (cioe` li l-Qorti tal-Magistrati, wara rinviju ghall-gudizzju skond l-Artikolu 370(3), tista' ssib lill-akkuzat hati bhala komplici flok bhala l-ezekutor materjali; ghandu jinghad ukoll, pero`, li f'din is-sentenza din il-Qorti, diversament presjeduta, ma jidhirx li apprezzat iddifferenza bejn rinviju skond l-Art. 370(3) u rinviju skond l-Art. 433(5)). Issa, fil-kaz in dizamina, l-Avukat Generali rrinviya mhux skond l-Artikolu 433(5) izda skond l-Artikolu 370(3); ghalhekk ma jistax jippretendi li l-Qorti Inferjuri setghet issib lill-appellat hati ta' xi reat iehor, salv, naturalment, dak li ghadu kif inghad dwar it-tentattiv, ir-reat anqas gravi izda kompriz u involut, u l-komplicita`."

The charges brought against the accused related only to Article 207 of the Criminal Code. Article 251A was never mentioned as a charge. Moreover, without prejudice to the above principle, even if for argument's sake the Court examined the evidence brought forth in the light of Article 251 A of Chapter 9 of the Laws of Malta, it results that this provision has not been proven. Such an offence requires a course of conduct which has certainly not been proven in this case.

Conclusion

The Court, after considering sections 17, 31, 207, 251A, 382A, 383, 384, 385, 386, 412C and 533 of Chapter 9 of the Laws of Malta is not finding the defendant guilty of the charges laid against him and is acquitting him of all charges.

Dr Simone Grech
Magistrate

Karen Falzon
Deputy Registrar