

In the Court of Magistrates (Malta)

As a Court of Criminal Judicature

Magistrate Dr. Claire L. Stafrace Zammit B.A. LL.D.

The Police

[Inspector Roxanne Tabone

[Inspector Paul Camilleri]

vs

Ahmid Rabu

Comp. No: 92/2020

Today, 23rd May 2022

The Court;

Seen charges against accused Ahmid Rabu holder of Italian Identity Card number AT4678578 being charged with having on the 19th November 2019 and in the previous months and years in the Maltese islands:

- 1. He made or produced or permitted to be made or produced any indecent material or produces, distributed, disseminated, imported, exported, offered, sold, supplied, transmitted, made available, procured for himself or for another, or showed such indecent material of person under age which is vulnerable person within the meaning of Article 208AC(2). Art 208A of Chap 9 of the Laws of Malta.**
- 2. Also during the same period of time he acquired, knowingly obtained access through information and communication technologies to, or was in possession of, any indecent material which shows, depicts or represents a person under age which person is a vulnerable person within the meaning of Article 208AC(2).**

The Court was also requested to issue a treatment order in terms of article 412(D) of Chapter 9 of the Laws of Malta, during the case and in the event of guilt.

Having heard all evidence produced;

Having seen the articles of the law as listed by the Attorney General by means of a note dated the fifth (5th) of July of the year two thousand and twenty one (2021) whereby guilt is being requested under the hereunder articles of the law:-

- (a) Articles 208A(1), 208AC(1)(b), 208AC(2)(a) of the Criminal Code, Chapter 9 of the Laws of Malta;
- (b) Articles 208A(1B), 208AC(1)(b), 208AC(2)(a) of the Criminal Code, Chapter 9 of the Laws of Malta;
- (c) Articles 208B, 209A, 17, 31, 412D, 532A, 532B and 533 of the Criminal Code, Chapter 9 of the Laws of Malta.

Having heard accused not objecting to these proceedings being tried and decided by this Court as summary proceedings after the articles of the law were read out to him;

Having considered

That from the testimony of prosecuting officer Inspector Paul Camilleri it emerged that the accused had a prison sentence by a local court whereby he was apprehended in Malta illegally and when he was being placed in prison and a search was made through his belongings, the prison wardens discovered some suspicious powder and his mobiles were therefore examined by an expert appointed through a magisterial inquest. This expert was Mr. Keith Cutajar. From this analysis it transpired that the accused had some illicit footages depicting child pornography and therefore the vice squad from the Malta Police was asked to intervene.

The Inspector stated that when the accused was interrogated by himself and Inspector Roxanne Tabone, he stated that the video of a male person having anal sexual intercourse with a baby was sent to him two (2) years back and he thought that he had deleted it. He had confirmed that the video which they showed him and stated above was the only video of the type he possessed.

It later transpired through Mr. Keith Cutajar's analysis that the accused was in possession of another video depicting child pornography which analysis can be found in the acts of the magisterial inquest related to the possession of alleged illicit substance which later on turned out not to be such.

Having seen the transcription of the statement of the accused Ahmid Rabu dated the twenty first (21st) of February of the year two thousand and twenty (2020) (fol 201);

Having heard prosecuting officer Inspector Roxanne Tabone who confirmed that the accused was apprehended by the police in Malta illegally and was found to be in possession of alleged illicit substance and a lot of mobile phones. She also stated that from the Magisterial Inquest it transpired that there was a video on an SD Card and on the cloud system and these were in possession of Ahmid Rabu. This video depicts a male person having sexual intercourse with a baby who was still wearing a nappy. This baby was seen crying and trying to get away from the male person. She also stated that the accused was then spoken to after all his rights were given to him and after he consulted with Dr. Josette Sultana.

He had denied possessing any child pornography but when witness showed him this video the accused admitted that he had that video about two (2) years back but he remembers that he had deleted it.

The Court also heard the testimony of court expert on IT Keith Cutajar whereby he explained that the alleged content was found in two particular evidence types: one is a cloud-based extraction on a Whatsapp system (MB05). This piece of evidence was a Samsung phone colour blue. Another piece of evidence was a phone LG in black and this video was found in the actual chip specifically on the SD Card which was inserted and installed in the actual phone. He also states that this extraction was made through the forensic suite known as “oxygen” and the cloud extraction was made by direct dumping from the system with the name “RabMajej” and the number is +393510061254.

As regards the video found on the cloud the witness explained under cross-examination that the accused had access to these videos even on the cloud. He may be required to wait a few seconds for them to load from the server. As the owner of the phone he had access to them.

The expert explained further the mechanism of the cloud. He explains that in this case there is an image which is being transferred from one location to another, from one content to another as a message and in order to be fully deleted, it needs to be deleted from both accounts. He states that in this particular case, it can be either that the user did not bother to delete the image or he deleted it but in reality is still there because the other party did not delete it in the first place. He believes that the material was sent to the accused but he couldn't conclude when it was sent or when it was deleted by the user if so.

The Court once again heard expert Keith Cutajar wherein he was appointed a second time to download the videos depicting child pornography and printing stills of them (Dok KC2). These stills depict the video in specific intervals of almost every second. He states that these videos were classified under the Copine Scale¹

¹ The COPINE Scale is a rating system created in Ireland and used in the United Kingdom to categorise the severity of images of child sex abuse, and thus use in the sentencing of offenders in a UK court of law. The sentencing guidelines from the Sentencing Council should be applied in determining mode of trial for cases involving indecent photographs or pseudo-photographs of children. In looking at the nature of the material the Sentencing Council has categorised such material into five levels of seriousness with level five being the most serious.

Level one: Images of erotic posing, with no sexual activity;

which is the scale used in this type of field to classify child pornography.

The expert was once again thoroughly cross-examined by defence lawyer insisting on the actual deletion of the video by accused and in fact the expert rebuts that:-

“In this particular instance I don’t agree because there are 2 specific instances of the images where they are extracted, let me explain for both of them. The cloud one which is a what’s app extraction, what’s app works as a point to point which means a phone stores the data and the other one stores the data as well. If I am analyzing the first phone and the owner deletes the data from this phone it is very difficult for me to get that data. Why? Because all, basically what I need to do is to analyze the second phone.

Level two: Non-penetrative sexual activities between children, or solo masturbation by a child;

Level three: Non-penetrative sexual activity between adults and children;

Level four: Penetrative sexual activity involving a child or children, or both children and adults;

Level five: Sadism/Torture or involving the penetration of, or by, an animal. (UK Database – Sex offenders register)

It's not residing on a cloud server somewhere. In this particular case I have extracted the phone directly so the phone the data was there, that's the first instance. The second one is data extracted directly from the chip set of the phone which is not cloud based it is directly on the phone itself. In that particular instance again the data was there. Now if the user tried to delete it, didn't see it any longer but basically the data wasn't deleted was still on the phone . . .

. . . .In this particular instance the data extracted was pretty much straight forward so I didn't need to undertake elaborate process in order to extract. Actually I wasn't looking for these type of images in the original process which I've done. I've done an extraction, a normal extraction, I was browsing for certain content due to the nature of my previous appointment and the software hits out on certain contents which is found, which it finds and hilights them separately and this is where, why we are here.

. . . . The pictures because there are a number of pictures where found on the phone itself.

. . . .

Which means that the user was aware of these images in some way or another. He received them, he downloaded them or they were downloaded automatically but he didn't delete the images remained there. That is, that is my point and that's why I've answered your previous question

. . . .

Yes but he has control on the deletion so yes he doesn't have control of what is being received.

. . . .

No in the case of cloud extraction what's app in specific once you delete them they are totally deleted. They are what we call, there is a forensic process of the . . . on the

memory itself. So the data once you delete them again on a what's app cloud extraction, on what's app cloud instance once you delete them they are removed once and for all.

...

In this case I didn't do any data recovery so to speak, I didn't do any processes of that sort. All I have done is extracted data from the phone".

Having heard the evidence of the accused Ahmid Rabu whereby he confirmed that he was apprehended in Malta because of false documents. He confirmed that he had come to Malta three (3) or four (4) months before he was arrested and before that he was in Italy. He confirmed that he had received the video which the prosecution had shown him in his interrogation while he was still in Italy which was about three (3) years before he came to Malta. He did not remember on which application he received the video but he says that after he saw the video he deleted it. He in fact confirmed all the answers given to the prosecuting officers on the

day of the interrogation although it is not clear whether he was given the right at the time to have a lawyer present at interrogation but in any case he confirmed on oath all his answers.

Having heard oral submissions of defence and seen written submissions of prosecution;

Having considered

That the accused Ahmid Rabu is being charged with offence under Article 208A of Chapter 9 of the Laws of Malta which states that:

(1) Any citizen or permanent resident of Malta whether in Malta or outside Malta, as well as any person in Malta, who makes or produces or permits to be made or produced any indecent material involving or showing persons under age or produces, distributes, disseminates, imports, exports, offers, sells, supplies, transmits, makes available, procures for oneself or for another, or shows such indecent material shall, on conviction, be liable imprisonment for a term from twelve months to five years.

(1A) The offence in sub-article (1) shall be punishable with imprisonment for a term from two to eight years, with or without solitary confinement, in each of the following cases:

(a) when the offender wilfully or recklessly endangered the life of the person under age;

(b) when the offence involves violence or grievous bodily harm on such person;

(c) when the offence is committed with the involvement of a criminal organisation within the meaning of article 83A(1).

(1B) Any person who acquires, knowingly obtains access through information and communication technologies to, or is in possession of, any indecent material which shows, depicts or represents a person under age, shall, on conviction, be liable to imprisonment for a term from not exceeding three years."

Section 208AC of Chapter 9 also states that:

(1) The punishment for the offences referred to in articles 204, 204A to 204D, both inclusive, 208A(1) to 208AB, both inclusive, shall be increased by one to two degrees where anyone or more of the following circumstances results:

(a) where the offence involved the use of violence or results in harm to the physical or mental health of the person;

(b) where the person under age is a vulnerable person within the meaning of sub-article (2) . . . ;

Then sub-article (2) qualifies what is a vulnerable person that is:

“For the purposes of this article a vulnerable person means:

(a) any person under the age of fifteen years; . . . ”.

In this case it is clear that Article 208A(1) does not apply since nowhere in these proceedings it was proven that the accused in any way produced, distributed, disseminated, imported, exported, offered, sold, supplied, transmitted or procured for himself or for someone else such pornographic material depicting minors and as such this Court is not going to dig deeper into this charge. The

evidence given by the court expert Keith Cutajar is very clear about this.

The issue at matter is that emerging from Article 208A(1B) which makes even simple possession of such pornographic material depicting minors illegal. Of course such possession of this illegal material has to be knowingly and the simple possession without the knowledge is a defence.

But in these proceedings the prosecution managed to prove beyond reasonable doubt the possession of illicit material depicting vulnerable human beings by accused. The manage to prove that the accused had in fact viewed such videos out of his own admission but he claims that the video shown to him of the baby in the nappy that he had deleted it once he viewed it. However he did not recall exactly after how much time he deleted it nor the exact details of who sent it to him. He also denied having other pornographic material depicting minors where in fact court appointed expert found more material depicting a very young girl. This material is preserved in the report drawn up by the said court

expert and is found in Documents KC1 and KC2. The devices where this illicit material was downloaded are the following:-

- MB04 phone Zephir Rock
- MB05 phone Samsung blue
- MB10-CLOUD01 Cloud extraction
- MB08-SD01 microSDHC card 4GB

That in these type of cases relating to possession of illicit pornographic material depicting minors, the defence of the deletion of the alleged material is often used in courts of Law even in foreign courts such as in the UK, Scotland, New Zealand and Australia.

However in the view of this Court not every defence can be taken into account. It is easy for the accused to say that he deleted the alleged material and stop at that. Such defence to be credible must be based on facts that can be scientifically proven. After all these proceedings are based on the proof that emerged from the downloading of such material from the court expert showing beyond reasonable doubt the possession of accused of such

material and therefore any defence put forward by the accused needs to be equally substantiated.

It is true in criminal law that whilst prosecution needs to prove its case beyond reasonable doubt, defence needs only to instill a doubt but this doubt has to be based on reasonableness and not just a mere declaration by the accused which declaration is unfounded.

The fact that such videos might have been received in a different country by no means nullifies such offence as the accused was found in possession of such illegal material in Malta and Article 208A(1B) caters for this situation as well.

It is also evident that the videos in question (which stills are exhibited in report marked Doc KC2) clearly show persons under age and clearly under the age of 15 years having sexual activities with adult males. On this point of the proof of minors reference is being made to the **Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote, 25.X.2007)** where the term “minor” in reference to

Article 20 relating to possession of child pornography, is defined as:

“For the purpose of the present article, the term “child pornography” shall mean any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes.”

Therefore, it is clear that the prosecution does not need to prove the age of the minor depicted in the illegal image but if the person appears to be a minor/child, this is enough proof.

As regards possible defences in the United States for instance the defence lawyer will need to show a lack of intent, that the possession occurred through a glitch or virus or that the individual had no knowledge that any files of a minor in a sexual situation were on the computer. An expert witness is often an important factor in these cases to help prove a lack of intent or knowledge.

The lawyer will have to use evidence of the computer and the intentions of the defendant as proof. However, he or she will also

need to rebut the evidence of the prosecution. This could lead to a character witness testifying about the behavior and activity of the defendant to support the valid argument the defence lawyer gives. Therefore, even in foreign jurisdictions not any kind of allegation by accused is enough, it has to be somewhat backed up by other evidence.

Having considered

That although the accused Ahmid Rabu cannot be held liable for the first charge brought against him, this Court is convinced without a doubt that he is to be held liable for the second charge brought against him since the prosecution manage to prove beyond reasonable doubt the unlawful and wilful possession of such child pornographic material. In these proceedings it was shown that such pornographic material was downloaded from two different devices as said further up in this judgment, namely in the Cloud and in the SD Card that were found in the possession of the accused. These had more than one video of child pornography clearly depicting one of the parties as children under the age of fifteen (15) years.

As regards the punishment, this Court treats these offences as very serious and therefore should not be taken lightly and that is why an effective punishment of imprisonment is going to be imposed even though it can impose other forms of punishment.

On the above basis and upon seeing Articles 31, 208A(1B), 208AC(1)(b), 208AC(2)(a) of Chapter 9 of the Laws of Malta finds the accused **Ahmid Rabu** guilty of the second (2nd) charge and condemns him to a punishment of eighteen (18) months effective imprisonment whilst acquitting him from the first (1st) charge since this was not proven.

Furthermore and upon seeing Article 533 of Chapter 9 of the Laws of Malta the accused Ahmid Rabu is being condemned to the payment of expenses relating to court experts (Dok KC2) nominated in these proceedings amounting to one hundred seventy-two Euros and fifteen cents (€172.15).

Furthermore and on the basis of Chapter 518 of the Laws of Malta orders that the name of the accused be put on the Registry set up on the basis of this Act and consequently orders a copy of this

judgement to be notified to the Registrar of Courts for the necessary annotation.

Ft./Dr. Claire L. Stafrace Zammit B.A. LL.D.

Magistrate

Benjamina Mifsud

Deputy Registrar