COURT OF CRIMINAL APPEAL

JUDGES

HIS HONOUR JOSEPH SAID PULLICINO, B.A.(HONS), LL.D.
– CHIEF JUSTICE
HONOR CARMEL A. AGIUS, B.A., LL.D.
HONOR NOEL V. ARRIGO, LL.D.

Sitting of Tuesday, the 30th October, 2001

Case Number

Bill of Indictment No. 7/99

The Republic of Malta

vs

Jurgen Sixt

This is a judgment disposing of the appeals lodged by the Attorney General and the accused respectively against a judgment of the Criminal Court delivered on the 31st of July, 2000.

The judgment appealed from reads as follows:-

> "The Court,
>
> Having seen Bill of Indictment number 7 of 1999;
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> Having seen the note of the 13 September, 1999 whereby the accused raised a number of preliminary pleas and pleas as to

the admissibility of evidence, and also indicated the witnesses and produced documents and other exhibits which he intends to use at the trial;

Having seen the additional note of the accused, filed on the 14 September, 1999, whereby he produced an additional document, and also indicated another witness; in the said note the accused also requested that this Court appoint the witness indicated — a certain Herbert Conrad — as a "translator/interpreter of documents exhibited in the German Language";

Having seen the note filed by the Attorney General on the 20 December, 1999, indicating the proof intended to be established by a number of prosecution witnesses; having seen also the note filed by the accused on the 30 December, 1999 indicating the page number, in the record of committal, where the deposition of a number of witnesses as well as certain documents can be found;

Having seen the minutes registered in the various sittings, and in particular those registered during the sittings of the 17 December, 1999 and 28 January, 2000;

Considers:

1. The Court is first going to deal with the matter raised by counsel for the accused during the sitting of the 17 December, 1999. At one point during this sitting, after that counsel for the accused, Dr. Ian Farrugia, declared that the accused was withdrawing the first two preliminary pleas (that is those marked as (a) and (b) in his note of pleas) (The plea marked as (g) was also subsequently withdrawn — see minute of the 28 January, 2000) , said counsel went on to register the following minute: *"Dr. Ian Farrugia for the accused refers to Section 449(5) of the Criminal Code wherein the law provides for this Honourable Court's discretion as indicated by the said provision. This point is being made in the light of the rule that nothing shall be added to the indictment which might render the offence [to] one of a graver character (Section 597(1)). In this respect and as it transpires from the acts of these proceedings, the Bill of Indictment no. 7/99 and the offences therein contemplated, is clearly in breach of the said rule; there is a noticeable difference between the offences indicated by the Attorney General in his act of transmission made in accordance with Section 370(3) paragraph A (folio 990 of the [...] committal proceedings) and the offences which were rendered to ones of a graver character as brought in the indictment 7/99. For all intents and purposes of*

the law this procedural irregularity is being made known to this Honourable Court in a formal way for the relative consideration." There then follows the reply, also in the from of a minute, made by Dr. Mark Said for the prosecution, which reply the Court does not think it necessary to reproduce. What in effect the accused is here requesting is that this Court proceed *ex officio* to take some action in respect of the fact that there is, allegedly, a difference between the offences as indicated by the Attorney General in his note of the 27 July 1999 (fol. 990) whereby he had sent the accused for trial before the Court of Magistrates (Gozo) as a Court of Criminal Judicature, and the offences as subsequently charged in the Bill of Indictment after that the accused had objected to his being tried by the Inferior Court. Accused is alleging that the offences in the said Bill of Indictment are of a graver character than the offences indicated in the aforementioned note. Even if this were so, this Court is not going to intervene *ex officio* at this stage as is being requested. Apart from the fact that Section 597 of the Criminal Code is totally irrelevant to the point that is being made by the accused, at this stage this Court is to decide upon the preliminary pleas raised by the accused and upon the pleas as to the admissibility of evidence raised by the accused or by the Attorney General **as provided in subsections** (2) **and (3) of Section 438 of the Criminal Code;** that is to say, at this stage the only matter for determination by this Court consists of those pleas raised by the accused or by the Attorney General within the time prescribed in those two subsections (saving the exception provided for in the proviso to Section 449(1), which proviso is clearly not applicable in the present instance). This is clear from the wording of subsection (4) of Section 438: the reference to "such pleas" is a reference to the pleas raised by the parties within the prescribed time. Within the prescribed time the accused did not raise any plea of nullity of, or of defect in, the indictment on the ground of the alleged difference between the offences in the note of the 27 July, *1999* and those in the Bill of Indictment which was preferred on the 19 August, 1999. Consequently this Court abstains from taking further cognizance of the point raised by the accused in the minute quoted above.

2. The first plea to be determined is that raised by the accused in his note of the 13 September, 1999, and marked as (c) (As has already been pointed out, pleas (a) and (b) were withdrawn on the 17 December, 1999). This plea reads as follows: *"Without prejudice to [the] aforegoing accused humbly requests that the trial on the said indictment 7/99 be not proceeded with due to a refusal of the court of criminal inquiry, without just*

cause, to hear the evidence requested to be produced by the accused (Section 597(4) of the Criminal Code). In this respect reference is made to the relevant folios *of the acts of committal proceedings and the relative date of the court hearing: Fol.112— 03.01.1997; Fol. 363-364 — 07.01.1997; Fol. 789— 07.04.1998; Fol..883 — 01.09.1998."* According to subsection (4) of Section 597 of the Criminal Code, one of the defects in the record of the inquiry which may lead to the indictment being impugned with the result that the trial is not proceeded with on that indictment, is "the refusal of the court of criminal inquiry, without just cause, to hear the evidence produced by the accused". The Court has carefully examined the folio numbers indicated by the accused and the minutes registered in the relative sittings held before the Court of Criminal Inquiry. During the sitting of the 3 **January, 1997** — to which fol. 112 refers — the accused had requested the court "to appoint a Social Worker/Psychologist to prepare the child for (the] Court environment and this [recte: thus] provide the necessary Psychological security so that the child can give the best evidence possible and shed all the necessary light on the facts of the case". The Court of Criminal Inquiry reserved "the right [sic!] to decide about the request made by the defence at a later stage". Whether or not that court, at a later stage, allowed or dismissed the request made by the accused is really irrelevant for the purpose of the plea under examination. The request for the appointment of a social worker/psychologist was not a request for the production of evidence, whether in the form of an ordinary witness or of an expert witness to be appointed by the court, but simply a request to provide a witness, who was to be produced (by the prosecution) at a later stage of the inquiry, with the necessary assistance, in this case assistance of a psychological nature. In other words, even if the Court of Criminal Inquiry had summarily dismissed the request as minuted, that court would not have been refusing "to hear evidence produced by the accused", but simply refusing to provide a witness with a particular form of assistance. At the sitting of the 7 January, 1997 — fol. 363-364 — after that the accused's wife had given evidence and before the child Maximilian Sixt had given evidence, accused requested the court "to appoint as an expert for the said court to give opinions with regards to examine and give opinion about the Psychological state of the boy and to establish the proness of the veracity of the statements made by the boy; furthermore Dr. Sciriha requests the Court to appoint pediatric surgeon to examine the boy, especially with regards to rectal injuries" (quotation taken verbatim from fol. 363). Now, this was clearly a ~request by the accused for the production of expert evidence.

Counsel for the complainant mother, Dr. Stephen Thake and Dr. Emanuel Mallia, objected to this request; and the Police prosecuting officers, Inspectors Sharon Tanti and Paul Vassallo, associated themselves with the said objection. This Court is not going to reproduce these objections; it will limit itself to state that these objections to the accused's request were confused, confusing and legally untenable. It is no wonder that the Court of Criminal Inquiry, having been totally misled and confused by these objections, dismissed the request of the accused on the ground that the Court of Criminal Inquiry "is only obliged to compile the evidence produced by the police", thus clearly ignoring the provision of subsection (2) of Section 390 of the Criminal Code. In other words, the reason given by the Court of Criminal Inquiry was wrong at law and therefore cannot possibly be "a just cause" for the purpose of subsection (4) of Section 597. It would have been different, for instance, had that court at that stage dismissed the request on the ground that the boy himself had not yet given evidence. It would have been within the competence of the Court of Criminal Inquiry, having heard and seen the boy give evidence, to determine whether or not it was appropriate to appoint a psychologist for the purpose adverted to by the accused; moreover, the evidence of the mother on the alleged rectal penetration by the father of the said boy was, at that stage, that is until the boy had himself given evidence, hearsay evidence; and the first court would therefore have been justified at that stage in refusing to appoint a pediatric surgeon. But, as has already been stated, the reason given by the court was wrong at law. Had the position remained as stated in the minute of the 7 January, 1997, this Court would have had no hesitation in allowing accused's plea under examination. However the matter did not end there. At the sitting of the 7 April, 1998 — fol. 789 — counsel for the accused again requested the appointment of a pediatric surgeon "to examine physically minor Sixt", as well as the appointment of "a psychiatric to examine said minor and to submit independent report and opinions to Court" (again the Court is here quoting verbatim from fol. 789). It is significant to note that even the Attorney General, in his note of referral of the 9 March, 1998 (fol. 786) had requested the court "to appoint a competent expert to advise on the medical situation of Maximilian Sixt". At this last mentioned sitting, that is of the 7 April, 1998, the Court of Criminal Inquiry said that it would decide "on the various demands of the defence or the civil party at a later stage" after obtaining a clarification from the Attorney General as to his request. There then follow two other notes of referral by the Attorney General about which this Court need not go into detail;

the Court simply observes that during the sittings pursuant to these notes of referral (sitting of the 26 May, 1998, fol. 798, and sitting of the 7 July, 1998, fol. 879) the accused, though his counsel, appears to have gone along with the request made by the Attorney General, and in fact requested that the Attorney General clarify or qualify further his request. Eventually the Attorney General, in his note of referral of the 6 August, 1998 (fol. 881), requested the appointment of "a medical and psychological expert to analyse whether the alleged victim bears any consequences that may be reasonably linked to the alleged acts committed by accused on the alleged victim". This request by the Attorney General seems to have met the demands made by the accused. In fact, during the sitting of the 21 August, 1998 (fol. 882), counsel for the accused even suggested the names of possible experts. At the subsequent sitting (of the 1 **September,** 1998, fol. 883), the accused again appears to have gone along with the request made by the Attorney General; his counsel merely "suggested" —but definitely did not request or demand — "that together with the maltese medical experts he will be assisted by german experts in the same field, due to the fact of the german element existing in this particular case" (again a verbatim quote, fol. 883). The Court of Criminal Inquiry dismissed the request for the appointment of German experts alongside the Maltese experts, giving as a reason the failure to see the relevance of the nomination of German experts to assist local experts. That court then proceeded to appoint Dr. Carol Jaccarini to relate verbally to the court whether a medical examination of the alleged victim could reveal or disclose any evidence of the alleged offence; it also appointed as a psychological expert Dr. Alfred Zammit Montebello to examine the minor Maximilian Sixt. In essence, therefore, the request made by the accused for the appointment of experts was met. The dismissal of the "suggestion" that German experts assist the Maltese experts, was, in the circumstances of the case, fully justified. The sitting of the 1 September, 1998 at fol. 883 is the last sitting to which accused refers in his note of pleas in connection with the plea under examination. The Court should not go further than what is actually submitted by the accused. **For these reasons, this plea is being dismissed.**

3. The next plea raised by the accused — marked as (d) — reads as follows: *"Without prejudice to the aforegoing, the issue contemplated under section 59 7(4) of the criminal code is hereby being made also an issue in terms of the plea provided for in paragraph (1) of subsection (1) of article 449 of the*

Criminal Code"~ Paragraph (f) referred to by the accused speaks of any "plea relating to any other point of fact in consequence of which the trial should not take place at the time, or at any future time". As was explained by the Court of Criminal Appeal in its judgement of the 14 September, 1981 in the case ***Ir-Repubblika ta' Malta v. Louis sive Lewis Bartolo,*** the conjunction "or" in the said provision of the law should be given a cumulative and not an alternative meaning; that is to say, for the word "or" one should read the word "and". In the words of the said Court: *"Din il-konkluzjoni temergi wkoll b'mod l-izjed car jekk wiehed jaghti harsa lejn il-ligi kif kienet originarjament fit-test Taljan, fejn l-artikolu korrispondenti ghal dak in ezami (448) kien appuntu jghid* ". . .*sia pel momento, sia in futuro". Minn dan isegwi, ghalhekk, illi l-eccezzjoni kontemplata fl-inciz (f) ta' l-artikolu 46 1(1) (today section 449(1)), trid tkun wahda ta' punt ta' fatt (mhux kontemplat f'xi wiehed mill-incizi precedenti) li minhabba fih il-guri ma ghandux isir la fil-gurnata li ghaliha jkun gie appuntat u lanqas fi kwalunkwe data ohra futura."* Now, according to the accused, the factual basis underlying this plea is the same as that underlying his previous plea — that is the plea under letter (c), which has just been dealt with in paragraph 2 of this judgement — namely the "the refusal of the court of criminal inquiry, without just cause, to hear the evidence requested to be produced by the accused". As has already been stated, although there was an initial refusal by the Court of Criminal Inquiry to hear certain evidence, that court eventually did appoint experts as requested by the accused. Consequently this Court sees no reason why the trial should not be proceeded with, **and consequently dismisses this plea.**

4. The next plea — under letter (e) — reads as foJlows: *"Without prejudice to the aforegoing, pleads the nullity of the bill of indictment 7/99 due to an irregularity in the formulation of the said bill of indictment and/or due to an irregularity in the sub-divisions of the different charges in different counts."* Again this Court feels the need to make reference to the Court of Criminal Appeal's judgement in the Bartolo case, *supra.* In that case, the said Court of Criminal Appeal had made it quite clear that when a plea is raised, the note by which it is raised should clearly specify what the legal or factual basis of that plea is. In the words of that Court: ***"Mhux*** *bizzejjed, ghalhekk, li wiehed fl-avviz semplicement jallega eccezzjoni jew eccezzjonijiet bla ma jispecifika l-motivi precizi li fuqhom qieghed jibbaza dik l-eccezzjoni jew eccezzjonijiet, jew inkella, dak li hu aghar, bla ma l-anqas jispecifika liema eccezzjoni qieghed jaghti."* (emphasis added by this Court). In the present case, this Court finds it difficult to understand what exactly the accused is referring to

when he speaks of “an irregularity in the formulation of the said bill of indictment”. The said indictment contains three counts. In the first count accused is being charged with the continuous offence of aggravated defilement of a minor; in the second count he is charged with the continuous offence of aggravated violent indecent assault (violence being presumed because of the age of the alleged victim, 5. 201(a), Cap. 9); and in the third count he is charged with the continuous offence of carnal knowledge with violence (again the violence being presumed). Apart from what will be said later on (when dealing with the next plea) in connection with the final paragraph of count two (the punishment requested and the section of the law quoted), and apart from the point which this Court will be raising *ex officio* with regard to the continuous nature of the offences under counts two and three, this Court can see no irregularity “in the formulation” of the bill of indictment as a whole, or “in the sub-divisions of the different charges in different counts” which could lead to the nullity of the said indictment. In the course of oral submissions, counsel for the accused, Dr. Ian Farrugia, submitted that the three charges should not be in the order in which they have been presented by the Attorney General, and moreover that one or more counts should be an “alternative” count or counts. Now, this Court will certainly not interfere in the way, that is in the order, in which the Attorney General presents the different charges, under separate counts, in the same bill of indictment. Nor is this Court satisfied that one or more of the charges should be in the form of an alternative count or of alternative counts. The facts as stated in the three counts are not necessarily the same facts; it is quite conceivable that certain facts amount to the offence of defilement, other facts to that of violent indecent assault, and yet other facts to rape. Should it transpire, however, from the evidence in the course of the trial that there is a case for formal or ideal concurrence of offences (also in the light of the first sentence of S. 207) the Court will give the appropriate direction to the jury. As to the point which this Court is raising *ex officio,* this is quite simple: the charges as originally preferred by the Executive Police before the Court of Magistrates (Gozo) as a Court of Criminal Inquiry on the 29 November, 1996 (see pages 3 to 5 of the record of the inquiry) did not refer to rape and violent indecent assault as offences of a continuous nature. Consequently the Attorney General could not, in the bill of indictment, present these offences as being offences of a continuous nature, as this would, in the opinion of this Court, be in violation of the proviso to subsection (1) of Section 435 of the Criminal Code. The Court is therefore *ex officio* making the following changes to the bill of indictment, that is to say in counts two and three, (a) in the paragraphs under the heading “Consequences” and “Charge”, the words from “and further, that said offence is to be deemed a single offence...” to “.....and

were committed in pursuance of the same design." are to be deleted, and (b) in the paragraphs under the heading "Punishment" the reference to Section 18 is also to be deleted. The punishment which can be demanded will, of course, also vary accordingly, but that is a matter which can conveniently be dealt with at the stage referred to in Section 490(1) of the Criminal Code. Apart from these amendments to the indictment, the Court dismisses the plea raised by the accused under **letter (e).**

5. The plea under letter (f) reads as follows: "*Without prejudice to aforegoing, accused pleads the nullity of count number two of the bill of indictment 7/99. Facts as alleged and the consequent charge do not constitute the offence officially brought and as specified by law."* In the course of oral submissions, Dr. Farrugia explained that this plea is to be understood in the sense that whereas the facts in count two refer to violent indecent assault, and whereas the charge is also one of violent indecent assault, there is no reference to Section 207 in the final paragraph but instead there is a reference to Section 198 (rape or carnal knowledge with violence). Accused is, of course, quite right in pointing out this defect, a defect acknowledged also by Senior Counsel for the Republic Dr. Mark Said in the course of oral submissions. The accused could, indeed, also have added that even the punishment demanded by the Attorney General is not commensurate to the charge — but that, as has already been pointed out, is a matter to be dealt with, if at all, at the stage contemplated in Section 490(1) of the Criminal Code. However, the wrong reference to the section of the law does not bring about the nullity of the count under examination; it merely calls for a correction (see also Section 599(2)(3)). Consequently, the Court orders that in the second count of the bill of indictment, in the paragraph under the heading "Punishment", the reference to Section 198 shall be deleted, and there shall instead be inserted a reference to Section 207. Apart from that, the Court **dismisses this plea.**

6. The pleas under letters (h) and (i) may conveniently be taken together. Accused is pleading the inadmissibility of witnesses Margaret Tanner, Juliane Ziegel, Dr. Martin Grundhuber and Dr. Peter Muscat on the ground that these are "expert witnesses" not chosen by the court, as well as on the ground that what they have stated in evidence before the Court of Committal is hearsay evidence; and he is also pleading the inadmissibility of witnesses Klaus Berger, Dr. Peter Paul Jacob and Dr. Joseph Ellis also on the ground that their evidence is hearsay. The Court fully appreciates the preoccupation of the accused with regard to these witnesses. Contrary to what was

stated by Dr. Mark Said in the course of his oral submissions (to the effect that these witnesses, or some of them, were formally appointed as experts), this Court could find no reference in the record of committal to any such appointment. A considerable portion of the evidence tendered by some of these witnesses (e.g. Dr. Peter Muscat, Dr. Jacob, Dr. Grundhuber) is expert evidence, in the sense that the said witnesses are preferring an opinion and not limiting themselves to stating what they observed with any one of their five senses; moreover parts of their testimony is clearly hearsay. This Court makes it quite clear that it will not allow — as it has so far never allowed — either party to criminal proceedings to circumvent in any way, directly or indirectly, the rule which derives from Section 650(2) of the Criminal Code to the effect that in such proceedings the parties may not produce *ex parte* expert evidence. As regards "hearsay evidence", this Court (and the Court of Criminal Appeal) have repeatedly stated that evidence of a statement made to a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement; it is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made (see ***Subramaniam v. Public Prosecutor*** [1956] 1 WLR 956 at 969; see also ***Ir-Repubblika ta' Malta v. Meinrad Calleja,*** Court of Criminal Appeal, 3/5/2000, Indictment Number 21/97). In the light of the above principles, it is clear that if any of these witnesses were not produced to give evidence *viva voce* at the trial, and if the evidence before the court of committal were to be read out in the course of the trial by jury, a lot of editing would have to be effected by the Court. Nevertheless at this stage, and in the light of the note filed by the Attorney General indicating the proof which he intends to make by these witnesses, the Court cannot rule *a priori* any of these witnesses as inadmissible. Medical doctors — whether psychiatrists, psychologists or pediatric surgeons — can certainly give evidence as to what they observed as a matter of fact in the course of the examination of a patient, provided they prefer no opinion as to the possible cause or causes of the fact so observed[1] . Moreover, as has already been observed, whether a particular statement is hearsay or not will very much depend on the proof which the party producing the witness wants to make with that[1] statement; this is something which can hardly be

[1] This rule is, in practice, relaxed in the case of doctors in the hospital casualty department; even though these doctors are not formally appointed as experts they are, in practice, allowed to express opinions, that is draw inferences from what they have observed. In one sense it can be argued that these doctors are implicitly being appointed as experts. In the present case the Court must however bear in mind that all the doctors involved appear to have been privately consulted by accused's wife, and therefore the situation appears to be quite different from that of the casualty department intern or consultant.

determined *a priori* at this stage. For these reasons, and subject to the observations made, the Court **dismisses the** two **pleas regarding the admissibility of the witnesses abovementioned.**

7. The last plea to be determined is that under letter (j). Accused is here pleading the inadmissibility, for the same reasons as stated by him in connection with the plea under letter (h), of a number of documents. The first document to which exception is raised is Dok. PV I at p. 54. Now this document is clearly inadmissible as evidence; the Court cannot imagine any situation in which this document could be read out or given to the jurors, containing as it does a statement (albeit a one-line statement) of what Maximillian Sixt told the examining psychiatrist, and a medical opinion by the said psychiatrist. Another document, or rather set of documents, are Dok. KBI to KB2O. The documents are all in German, a language which, regrettably, this Court does not understand. In their present state these documents can, at most, be considered as irrelevant —if they were read out or given to the jurors, the jurors would be none the wiser as to their contents. Given the fact that the contents are unknown, and given the fact also that they were exhibited by Klaus Berger who is not being *a priori* declared as an inadmissible witness, the Court believes that at this stage there is no legal justification for declaring the said documents as inadmissible. Next, Dok. AAI at fol. 732. This document is inadmissible for the same reasons stated in connection with Dok. PVI. Finally there is the set of documents marked MGI to MGI 5. Most of these documents are unintelligible, and therefore, at this stage, will not be ruled as inadmissible. One document which is, however, in English and intelligible is Dok. MG3 at pages 860, 861. Although the document by and of itself does not amount to admissible evidence — its contents has, as a minimum, to be confirmed on oath by its author — and although the document does contain statements upon the relation of another person, the Court is of the view that it would not be prudent at this stage to declare this document inadmissible, since this document could be used by either party to the proceedings in order to control the evidence of the witness Grundhuber. Consequently, the Court allows this plea only with **reference to Documents PVI and AAI, but dismisses the said plea with regard to the other documents, that is with regard to Dok. KBI to KB2O and MGI to MGI5.**

8. Finally, as to the request made by the accused, in his additional note of the 14 September, 1999, for the appointment

> or confirmation of the appointment of Herbert Conrad as translator and/or interpreter, this is certainly not a "plea" to be decided at this stage. The Court reserves the right to appoint its own translator or interpreter when and if the need arises.
>
> And in this way disposes of all the pleas raised b the accused and orders the continuation of the case".

The Attorney General filed an application of appeal against the said judgment on the 1st of August, 2000, praying this Court to modify and reform the said judgment by confirming that part which rejected and disposed of all pleas raised by the accused, while revoking and annulling that part of the same judgment which, on a point raised ex officio by that Court, ordered the deletion from counts 2 and 3 of all words relating to the offences being described as offences of a continuous nature, together with any reference to Section 18 of the Criminal Code, as well as directing that the punishment requested by the Attorney General be varied accordingly.

Accused Jurgen Sixt lodged his appeal by means of an application filed on the 2nd August, 2000, by which he prayed this Court to reform judgment of the First Court as follows:-

a) Revoke the decisions delivered by the Criminal Court in paragraphs (1) wherein that Court abstained from taking cognisance of the point raised by the accused in the minute of the 17th December, 1999, and (2) wherein the said Criminal Court dismissed the accused's plea marked (c) where no trial was to be proceeded with due to a breach of article 597 (4) of the Criminal Code and instead admit such pleas at law and decide accordingly;

(b) Confirm the remaining parts of the decision appealed from.

This Court will deal first with the appeal of the Attorney General.

The submissions of the Attorney General are as follows:-

1) The fact that the Attorney General chose to present the offences contained under counts two and three of the Bill of Indictment as being offences of a continuous nature, was definitely within his legitimate right and prerogative to do so and could never be considered to be in violation of section 435 (1) of the Criminal Code.

2) This is all the more so once the restrictive prohibition under the said Section is merely to the effect that the Attorney General may not include in the indictment any charge for any offence not founded on the inquiry.

3) There should be no doubt whatsoever that in the present case the charges for the offences founded on the inquiry were, amongst others, those of rape and violent indecent assault.

4) It was never indispensable, for the purposes of the said section 325 (1) of the Criminal Code, that in the charges originally profferred by the Executive Police before the Court of Criminal Inquiry, those two offences should have been presented and described as offences of a continuous nature. What was indispensable was that those charges be proferred and presented in the manner they were profferred and presented.

5) Indeed, according to the Attorney General, section 18 of the Criminal Code defines what amounts, at law, to a continuous offence. Our Courts have always and consistently retained that whether an accused is to be charged with the commission of a series of offences of the same type and nature, as amounting to a continuous offence or not, is the sole prerogative of the Prosecution.

6) Should the Prosecution opt for such a charge included in a bill of indictment, the legal validity thereof, can never be dependant on whether that charge for the offence in question is, of is not, founded on the inquiry. The legal validity thereof, on the other hand, is definitely dependant on whether the offence itself, even if short of being presented and described as a continuous offence, is, or is not, founded on the said inquiry.

7) The Attorney General submits also that once the correct position at law should be as explained supra, there can never be any possibility of a violation of section 597 of the Criminal Code. So much so that even the Court of the First Instance outright rejected such a possibility invoked by the Defence Counsel as can be gathered from page two of the judgment delivered.

In the context of the submissions of the appeal lodged by the Attorney General, this Court examined the entire proceedings of the Inquiry as well as the legal argument developed by the Court of First Instance in its judgment and totally agrees with the conclusion reached by that Court in the judgment appealed against. The arguments that are being brought forward by the Attorney General in support of his appeal have no legal foundation. He cannot legally submit successfully that he had

the option to charge the accused in one way before the Magistrates' Court and, in another way, in the Bill of Indictment. This is in itself contradictory and there is not a single apparent reason why, if the continuity of the offence/s resulted from the inquiry, this was not included in the referral to the Magistrates' Court.

As it is, this Court agrees completely with the conclusion reached by the First Court as well as with the exercise of its discretionary power to raise the matter ex officio. The Attorney General's appeal is therefore being dismissed.

As regards the appeal lodged by the accused, as already stated, this is limited to two parts of the judgment of the First Court. The different submissions are going to be dealt with separately. In the first place accused refers to paragraph 1 of the judgment of the First Court where in it was decided that the Court was abstaining from taking cognisance of the point raised by him in the minute of the 17th December, 1999, since no plea of nullity of, or defect in, the indictment had been raised within the prescribed time. Appellant submits that as to the position at law, with regard to the time limits prescribed by art. 438 of the Criminal Code, he fully agrees with the Criminal Court's position as stated in its judgment. However, with all due respect, he disagrees as to the interpretation and/or application of the terms of art. 449 (5) by the First Court.

His submission is that procedurally, his minute of the 17th December, 1999, was raised and brought to the attention of the Criminal Court for its relative consideration, in view of the fact that the issue, being one of public order and public policy, deserved to be met by the Criminal Court's discretion in terms of art. 449 (5) of the Criminal Code and as a natural consequence of the fact that the offences of the Bill of Indictment are of a graver character than the offences indicated in the note or act of referral by the Attorney General dated 27th July, 1999, to be found at page 990 of the records of the inquiry. According to appellant the Criminal Court was procedurally bound to declare ex officio the nullity of the bill of indictment.

In essence, the Court, after examining paragraph 1 of the judgment of the First Court appealed against, which came to the conclusion to abstain from taking further cognisance of the point raised by the accused in the minute of the 17th December, 1999, is comprehensive of all that needed to be stated in regard from a legal point of view. This Court feels that it would be repeating unnecessarily if it added anything to what was considered by the First Court in its decision in that there is absolutely no question at all of the applicability of Section 597 or of 449 (5) of the Criminal Code in relation to his submission, once no proper

plea was raised within the prescribed time, as ably explained by the First Court in its judgment.

The second submission of appellant refers to paragraph 2 of the judgment of the First Court with which he feels aggrieved. This paragraph deals with the plea raised by him, namely that the trial on Indictment 7/99 could not be proceeded with due to a refusal by the Court of Criminal Inquiry, without just cause, to hear the evidence requested to be produced by him.

In support of his submission, appellant submits the following:-

a) At the sitting of the 7th January, 1997, (fol 363-364 of the committal proceedings) accused requested, inter alia, that appointment of "...an expert for the said court to give opinions with regards to examine and give opinion about the psychological state of the boy and to establish the poness of the veracity of the statements made by the boy...." Appellant submits that it is to be noted and emphasized that the demand made by him was specific. Notwithstanding this specific request, the Court of Crimial Inquiry, by a decree of the 1st September, 1998, appointed "As regards a psychological expert.....Dr. Alfred Zammit Montebello.....to examine the alleged victim Maximilian Sixt".

Appellant submits that it transpires, therefore, that contrary to what the Criminal Court decided – "In essence.....the request made by the accused for the appointment of experts was met" – the Court of Criminal Inquiry actually failed, without just cause to appoint and bring forth as evidence, the proof specifially requested by the accused.

Appellant further submits that a quick examination of the report submitted by Dr. Alfred Zammit Montebello clearly shows that no examination of the veracity of the statements made by the boy was made. Precisely no direction to this effect was given by the Court of Criminal Inquiry, which in turn brings about a breach of the law under acticle 597 (4) of the Criminal Code.

The Court, after having examined the records of the case, subsequently and in particular the relative part of the decision of the First Court, comes to the conclusion that this part of the appeal is almost vexatious. Appellant wants to convince this Court that the appointment of Dr. Zammit Montebello by the First Court and his examination excluded *a priori* and *durante* the relevant question of the trustworthiness of the child in his statements. This is untenable, does not follow logically, and as a result this could not turn the tables of this appeal in favour of

appellant. There is no need to add anything to what was decided by the First Court in pargraph 2 of the judgment appealed against.

As a result accused's appeal will also be dismissed.

For the foregoing reasons the Court disposes of the two appeals by dismissing them both. Records of the case are being sent back to the Criminal Court for the continuation of the case.

Dep/Reg

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