MALTA

COURT OF CRIMINAL APPEAL

HON. MR. JUSTICE
JOSEPH GALEA DEBONO

Sitting of the 27 th September, 2007

Criminal Appeal Number. 88/2007

The Police
(Insp. L. Calleja)

vs.

Kingsley Wilcox

The Court,

Having seen the charge brought against the appellant Kingsley Wilcox before the Court of Magistrates (Malta) as a Court of Criminal Judicature of having, during 2005, on these islands, by several acts committed by him, even if at different times, which constitute violations of the same provision of the law, committed in pursuance of the same design:
a) whilst knowing that he suffers from, or is afflicted by, any disease or condition as may be specified in accordance with sub article (3) and in Legal Notice 137 of 2005, in any manner knowingly transmitted,

communicated or passed on such disease or condition to the Maltese minor girl, and the third girl, not otherwise suffering from it or afflicted by it;
b) under the same circumstances transmitted, communicated or passed on the same disease to the Maltese minor girl, and the third girl, through imprudence, carelessness or through non-observance of any regulation by himself when he knew, or should have known that he suffers therefrom or is afflicted thereby;
c) in January 2005, by several acts, even if committed at different times, which constitute violations of the same provision of the law, and were committed in pursuance of the same design, defiled the Maltese minor girl, then still a minor.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 23rd February, 2007, whereby, after the Court saw Sections 18, 244(A) (Sic!), 203, 17, 20, 23, 31 of Chapter 9, section 3 of Legal Notice 137 of 2006, (Sic!) condemned him to a term of imprisonment of five years from which the period accused spent in preventive arrest is to be deducted.

Having seen the application of appeal filed by appellant on the 6th March, 2007, wherein he requested this Court to revoke the appealed judgement by which he was found guilty of the charges brought against him, condemned to five years imprisonment and had Section 23 of the Criminal code applied against him, and to acquit him from all charges and punishments.

Having seen the records of the case.

Having seen that appellant listed seven grounds of appeal in his appeal application which are briefly the following:-

1. that although the judgement of the first court indicated that appellant was being found guilty under section 244A (1) and being acquitted from the charge under section 244A(2), this is not made clear in the operative part of the judgement. Besides the first court found appellant guilty of

the crime under Section 244 of the Criminal Code which deals with the administration of dangerous substances, a crime which was never part of the merits of the case.

2. The appellant was guilty of a continuous offence when the crime of transmitting an infectious disease is an instantaneous offence and once a disease is transmitted to a person, it cannot be re-transmitted again. In this case there is only sufficient proof of the sexual encounters between appellant and the third girl in January 2005 , though vaguely it was not denied that they had sexual encounters later on as well . Now in January 2005, Legal Notice 137 of 2005 was not yet promulgated . So at that stage Section 244A of the Criminal Code could not be violated. Later encounters could not have led to the commission of the crime as subsection (1) of Section 244A states that the crime cannot be committed if the recipient is already infected. There is also no proof that subsequent encounters led to an infection, as there is a probability that there will be no transmission of HIV if the necessary precautions are taken and therefore later sexual encounters are not necessarily equivalent of acts of transmitting HIV. If that were the case these two persons who are now married, would have to be monitored for further breaches of section 244A of the Criminal Code.

3. Without prejudice to the second ground of appeal , the first Court's conclusion that he had infected three females is also fallacious, particularly with respect to the middle aged Maltese woman who had had other sexual relationships and could therefore have infected appellant herself. In fact appellant was not charged with infecting this middle aged Maltese woman

4. The finding of the first Court that he had knowingly and voluntarily transmitted the disease to the three females is also fallacious. The SMS which the first Court said proved that he was aware of this condition, but even if he were aware of this at the time the SMS was sent, it does not necessarily mean that he was aware of it at the time he had relations with the third girl. However he had informed both the minor Maltese girl and the third girl that he was HIV positive before he had sexual intimacies with them but it later transpired that both girls at the time had no

idea what this meant. If he performed sexual acts with a condom appellant could not have had the will and the foresight of the event, that is the anticipation of the transmission of the infection. If the third girl got infected through oral sex with appellant, then this was because appellant had not been informed by the doctor that HIV could also be transmitted through oral sex, and therefore he cannot be deemed to have acted imprudently or carelessly, and section 244A(2) requires that the condition is transmitted knowingly and voluntarily, as required by section 244A (1).

5. When the relative law came into force in May 2005 , appellant could not have re-infected the third girl, whether knowingly or out of culpa . No imprudence has been imputed to appellant, and no non-observance of the regulations has been proved in his regard. Therefore he cannot be found guilty of breaching section 244A (2). With regard to the minor Maltese girl, one can never tell whether she got infected by appellant or not. Although she denied having had sex with other persons prior to her relationship with accused, her evidence is not credible and she stands contradicted on this point by other evidence.

6. That appellant cannot be found guilty of the crime of defiling the minor Maltese girl, because according to case law for the crime to subsist it must be proved that the alleged victim was exposed to some sexual acts for the first time. Given that she had sexual intercourse with a certain Kurt, she cannot have been defiled. This witness is not credible when she denies having had previous sexual relations. Appellant could only have defiled this minor if he had sex with her in 2004 and not when he repeated the same acts in 2005.

7. Appellant only realised that the minor was not yet 18 years of age after a hot discussion about getting married and after that they did not have any sexual relations. Therefore he did not have the necessary *mens rea* that should accompany the *actus reus*. Her behavior in planning and booking of a hotel, her story of having had sex with Kurt and her invitation to appellant to have sex with her led appellant not to suspect that she was still a minor. Moreover a prison term for an act that would not

have been an offence a few months later would be draconian.

Having seen appellant's previous criminal conviction sheet filed by the Prosecution on this Court's order;

Having heard submissions by learned Counsel for the Prosecution and Defence Counsel;

Having taken note of Prosecuting Counsel's declaration that the judgement of the first Court is flawed because it found accused guilty of the first two charges when it is obvious that these charges are alternative ones and that accused could not have been found guilty of both. However the punishment awarded by the first Court fitted into the parameters of the law as applicable to the first charge and was therefore correct.

Having also noted Prosecuting counsel's submissions that actual knowledge by the accused of the victim's age is irrelevant in the case of the charge of defilement of minors and that with respect to the first charge one does not have to act "maliciously" to be guilty of this crime but what the law requires is that the accused has acted "knowingly" (xjentement). Furthermore all hypothesis mentioned by defence counsel were of a factual nature and not of a legal nature and these had been dealt with in great detail by the first Court in its judgement. Therefore there were no reasons why the reasonable conclusions reached by the learned Magistrate should be disturbed by this Court.

Now duly considers,

That with regard to the first ground of appeal submitted by appellant, appellant is correct in pointing out a number of errors in the First Court's judgement when it referred to the charge under which he was being found guilty. The judgement starts off correctly by listing article 244A (1) and (2) as the relevant articles mentioned by the Attorney General in his note of referral for the appellant to be tried by the first Court and also when stating the operative date when this article came into effect with regards to HIV and

AIDS. However on the same page as the last reference to the correct articles, the First Court went on to state that :

"The Court is thus of the opinion that Kingsley Wilcox is guilty as charged under sections 18 and 244(1) of Chapter 9 , having also seen Legal Notice 137 of 2005."

Now as appellant rightly points out, section 244(1) deals with an entirely different offence from the ones listed by the Attorney General. This was obviously a *lapsus computetri* made by the First Court which was however immediately rectified by the following sentence wherein it referred to section 244A (1) and went on to elaborate on the phrase "*knowingly transmits",* which is only found in sub section (1) of section 244A.

Unfortunately however, in the final and operative part of its judgement, the First Court again referred to the law in question wrongly when it stated:

"*Thus finds Kingsley Wilcox guilty of the crimes deducted (Sic!) in sections 18,* ***244*** *of Chapter 9 Legal Notice 137 of 2006 (Sic!) and section 203 of Chapter 9."*

It then went on to state that :

"With regards to the punishment, has seen section 18, ***244(A)*** *…."*

Now section 244(A) does not exist as such and only section 244A is to be found in the Code and besides this section has two sub sections (1) and (2) which contemplate two different offences with a considerable difference in the punishment applicable to each of them, and as the Prosecution agrees, appellant could not have been found guilty of both offences at the same time.

To cap it all, the reference to Legal Notice 137 of 2005 is also incorrect as this is quoted as section 3 Legal Notice 137 of **2006** ! This legal notice has no section 3 and contains only one paragraph with five sub-headings (a) to (e) and was issued and promulgated in 2005.

These unwarranted and absolutely unnecessary errors on the part of the First Court, apart from detracting from the quality of an otherwise detailed judgement, are in breach of section 382 of the Criminal Code, which spells out the requirements of the judgement of the Court of Magistrates.

Now it is established case law that if the First Court mentions the wrong sections or regulations of the law, as happened in this case, this brings about the nullity of the judgement. (vide. Criminal Appeal : **"Il-Pulizija vs. Joseph Farrugia**" [28.5.1987] and others.)

Besides in the operative part of the judgement the First Court did not state expressly what crime it was finding appellant guilty of, i.e. whether one under subsection (1) or that under subsection (2) of article 244A and this can only be surmised by implication from what the court had stated earlier on in its judgement. Assuming that the First Court only intended to find appellant guilty as charged under subsection (1), according to established case law, the First Court's judgement should have stated the facts of which he was being found guilty and the charges under which he was being found guilty and those from which he was being acquitted. If the judgement did not state anything about a particular charge, that judgement would be null. (vide Criminal Appeals. "I**l-Pulizija vs. Generoso Sammut**" [13.10.2004] , **"Il-Pulizija vs. Piju Gafa'"** [18.4.1959] ; "**Il-Pulizija vs. Francis Aquilina**" [26.11.1960]; "**Il-Pulizija vs. Frans Portelli"** [3.3.1992] and others) and this nullity can be raised even "*ex officio*" by the Court of Criminal Appeal. (**"Il-Pulizija vs. Emmanuel Zammit"** [16.1.1986] and others.)

In the circumstances therefore this Court has no option left but to declare the judgement of the First Court null and will therefore proceed to decide the case on the merits as it is entitled to do in terms of section 428 (3) of the Criminal Code. In this case this Court is not bound by subarticle (7) of article 428 of the Criminal Code. Other grounds of appeal contained in appellant's application will

be dealt with as submissions to be taken into consideration.

Having considered;

That the facts of the case, which were reviewed in considerable detail by the First Court in its judgement, were briefly the following. Appellant, a Nigerian who had come to Malta on a visa purportedly to work for Afro Promotions Limited but whose visa had expired, had had a brief sexual relationship with a Maltese middle-aged woman in the summer of 2004. When this woman felt unwell and was subjected to medical tests, she was diagnosed as being HIV positive. The Health Authorities managed to trace down the appellant as a possible sexual contact and he also tested HIV positive. He was duly informed of his condition on the 27th. September, 2004 by the medical authorities.

At the end of December 2004, appellant struck up a relationship with a seventeen year old Maltese girl and lost no time in preliminaries and was soon having sexual intercourse with her. This girl booked a room in the Bay Street hotel for a week together with another Maltese girl who worked with her as a shop assistant in a supermarket and the two of them asked the appellant to join them in their room where they enjoyed each other's company, sleeping in the same bed together, having three-way kissing sessions and where appellant had sex with the minor. This situation lasted until the minor realised that appellant was two-timing her with her girl friend and the relationship between the minor and appellant ended in January 2005.

Appellant then turned his full attention to her girlfriend and kept up his relationship with her for a number of months until they eventually got married.

Shortly after having had this sexual relationship with appellant, in February, 2005, the minor girl realised that she was suffering from a condition in her private parts and was tested for various sexually transmitted diseases. At

that time however she did not test HIV positive. However, when she repeated the tests in October, 2005, she tested HIV positive and the Health Authorities tracked down appellant as a possible contact and when his then current sexual partner - the minor's girl friend - was medically examined, she also tested HIV positive. At this stage the police were asked to intervene and prosecute appellant under the offences listed in article 244A (1) and (2) and for defilement of minors.

Having considered :

That section 244A of the Criminal Code recently introduced by Act III of 2002, in sub section (1) makes it a crime for a person who, whilst knowing that he suffers from , or is afflicted by, any disease or condition as may be specified in accordance with sub section (3) in any manner, knowingly transmits , communicates or passes on such disease or condition to any person not otherwise suffering from it or afflicted by it. In sub section (2) the law creates the crime of who, under the same circumstances, transmits, communicates or passes on the same disease through impudence, carelessness, or through non-observance of any regulation by himself, when he knows or should know that he suffers therefrom or is afflicted thereby.

In subsection (3) thereof, the law enables the Minister responsible for Justice to specify the diseases or medical conditions to which said new section applies by means of notice in the Government Gazette. Legal Notice 137 of 2005, published on the **17th. May, 2005,** specifies *inter alia* : (a) Human Immunodeficiency Virus Infection (HIV) and (b) Acquired Immune Deficiency Syndrome (AIDS) as diseases or conditions to which article 244A of the Criminal Code applies.

Now it is obvious that once the condition of HIV was specified by Legal Notice in May 2005, whether it was or was not appellant who infected the middle-aged Maltese woman in the summer of 2004 and the Maltese minor girl in December 2004 and January, 2005 , is not material to

the issue as at the time the law prohibiting such transmission of HIV had not yet come into force. So appellant could never be found guilty of knowingly transmitting the HIV condition to the Maltese minor girl and, for all that matters, to the middle-aged woman as his relationship with these two had ended long before the 17th. May, 2005, when the law became operative viz-a-viz HIV. This was in fact also the correct conclusion reached by the First Court.

The situation of the third alleged victim is however different. It results that this girl who had started her relationship with appellant in early 2005, continued having sexual relations with him on a regular basis after May 2005, when the law became operative.

Having examined the records of the case, it is clearly and unequivocally established that appellant was made aware of his condition as early as September, 2004 and despite this he had no qualms having sexual relations with at least two girls. He states however that he always used condoms when having sexual intercourse and that he told the third girl of his condition. This latter statement is not corroborated by the third girl as she testified that appellant only told her about his condition when she too was diagnosed as HIV positive in October, 2005. Although this girl, who is very partial to appellant as she was still seeing him regularly and having relations with him when she first testified in late 2005 and is now his wife, states that appellant always used condoms, thereby contradicting what she had earlier told the police investigators, it is a known fact that this condition can still be transmitted despite the use of condoms especially if the condom is damaged or comes loose during intercourse. This girl also explains somewhat emphatically that she could have acquired this condition by using the same blades used by appellant to shave herself, but the medical evidence tendered in the case shows that this mode of transmission as most unlikely.

Having considered all the details and circumstances of the case, which have not been included in the above

summary of events, this Court is satisfied beyond any reasonable doubt - as the First Court apparently was as well - that appellant was fully aware of his condition as HIV positive when he kept up his sexual relationship with the third girl after the 17th. May 2005 .

However appellant submits that as he had had sexual relations with the third girl prior to the 17th May, 2005, when the Legal Notice was published, there is no evidence to show that, if he infected the third girl, this was after that date. He argues that he could have infected her before that date and therefore there would be no offence. He also argues that a person can only be infected once with this disease.

From an examination of the very lengthy medical evidence tendered before the first court, it does not seem that this point was addressed in the various examinations-in-chief and cross examinations of the many doctors who gave evidence. Nor did the first Court feel the need to appoint medical experts to determine when this third girl was first infected and whether if she was already infected once, she could be infected again.

It therefore does not result to this Court when the third girl was infected the first time, i.e, before or after the law creating the offence came into force and whether, if she was already infected before the 17th. May, 2005, she could have been infected again with the same condition by appellant after that date. Faced with this uncertain situation, this Court cannot state without reasonable doubt that the offence took place after the law became applicable and therefore cannot find the accused guilty of same.

Having considered;

That with regard to the second charge of defilement of the minor Maltese girl, it is admitted by appellant that he had full sexual relations with her during December, 2004 and January 2005. It results from this girl's birth certificate that she was still seventeen years of age at the time. However

appellant submits that he was not aware that the girl was still a minor and that if he had defiled her in December, 2004, she was already defiled when he had sex with her in January 2005 - the only period which can fall under the parameters of the date mentioned in the charge and consequently he could not be found guilty of having defiled this girl in the year 2005 as charged. Furthermore this girl had already had another boyfriend before she had relations with him.

With respect to the first submission, from the evidence it results without any doubt that appellant was aware of the minor girl's age when he was having sex with her in January, 2005, as there had been a discussion in which she told him that he would soon be 18 and they could then get married.

Furthermore, even if accused's allegation that he was not aware of the age of the victim when he had sexual relations with her, were true, this is irrelevant. As regards the formal or intentional element in the crime of defilement of minors, contemplated in Section 203(1) of the Criminal Code, it is sufficient that the perpetrator is aware that he is committing lewd acts in the presence of the minor. **Prof . Mamo** (Notes on Criminal Law (Part II) 1953 p. 230) states that: *" the age of the victim is an objective fact and cannot be controverted by any evidence of opinion. The accused must be assumed to have acted at his own risk and peril."*

Nor can appellant successfully argue that he was labouring under a mistake of fact either. Under Maltese Law for a mistake of fact to afford a good defence it is necessary that the mistake be both essential **and inevitable,** i.e. such that it could not have been avoided by the exercise of reasonable care. In this case, even if he were to be believed that he was not aware of the minor girl's age, had appellant bothered or tried to build some sort of relationship with the victim prior to going to bed with her, he might have been able to ascertain her age. Clearly he was more interested in finding an outlet for his

sexual appetite than in getting to know his partner better before indulging in lewd acts with her.

Having also considered;

That with regard to appellant's submission that the minor girl could not have been defiled because she already had had sexual experiences with a third person prior to having relations with appellant, and that she already had sexual relations with appellant himself in December, 2004, the position under our Law is as follows. Although this question had raised considerable controversy among continental text writers and divergence in judicial practice, our Courts, probably considering the extreme difficulty, if not absolute impossibility of deciding in any case that a minor is so utterly defiled and to be beyond hope, have consistently held that previous defilement, whatever its degree, does not exclude the crime (vide Criminal Appeal : **"The Police vs. Schembri"** [11.10.1948] as quoted by Prof. Sir. A Mamo Notes on Criminal Law - Part II, (1953) p. 265 -266). Paraphrasing MAINO , Prof Mamo states that :-

"Between the two extreme doctrines, the one that excludes the crime whenever the minor is already defiled and the other that admits such crime irrespective of the previous defilement, MAINO himself suggests a middle way- 'It is an inquiry which has to be made in each case by those who have to judge and notwithstanding the difficulties and uncertainties inseparable from such an inquiry, we hold that this is the most correct solution, having regard to the spirit and the letter of the law, thereby avoiding the two extreme views, the one which makes the crime subsist whatever the previous defilement of the minor and the other which excludes the crime whenever the victim is not new to sexual practices, without caring to ascertain whether his defilement is yet capable of being aggravated by fresh acts, thus leaving exposed as easy prey to the lust of others mere children fallen, often without fault of their own, on the road to vice, but who might yet be reclaimed if others did not take the

advantage of their inexperience or foolishness to complete their ruin.' (Luigi Maino - ***Commento al Codice Penale Italiano,*** *UTET (Torino) 1924, Vol. III, para 1476, p.189)*

This extract from Maino has been quoted with approval by this Court in more recent cases in the Criminal Appeals: **"The Police vs. John Buttigieg"** [12.9.2005]; and "**The Police vs. James Demanuele"** [2.10.2000} wherein it was held that the fact that a minor has had sexual relations with a previous partner or partners, prior to having the sexual relations which are the merits of a particular case, does not necessarily mean that the victim is already so defiled and corrupted that he or she cannot be further defiled by the lewd acts practiced by the defendant.

In the **Buttigieg** case this Court presided over by Chief Justice V. De Gaetano held that :-

"Il-kaz prezenti, fil-fehma tal-Qorti, mhux il-boghod hafna minn dak ravvizat fl-ahhar parti tal-kwotazzjoni mill-MAINO, u cioe' ta' tfajla li, minhabba l-inesperjenza u l-vulnerabilita' tal-karattru taghha, inqabdet f' cirku fejn ohrajn setghu jabbuzaw facilment minnha, bil-korruzzjoni tkompli tizdied u taggrava ma' kull att ta' abbuz. Is-socjeta' tkun qed tonqos gravement, anzi b' mod atroci, li kieku ma taghtix il-protezzjoni taghha, anki permezz tas-sanzjonijiet penali, lil min jinqabad f' sitwazzjoni simili….. Din il-Qorti ma tirravvizax fil-vittma dak il-grad estrem ta' korruzzjoni qabel … b' mod li hija ma setghetx tkompli tigi korrotta b' dak li sehh fl-imsemmija data. Ghalhekk dan l…-aggravju qed jigi respint."

In this case it does not result that the minor had been defiled by the previous boy friend with whom at most she admits to have done some necking and pecking but had not had sexual intercourse with him. So this submission is also unfounded as far as the facts go. Furthermore even if appellant, as he himself admits, had intercourse with the minor in December, 2004, this Court is not satisfied that this girl could not have been further defiled by the same

acts committed by appellant a few days later in January, 2005. Clearly appellant had whetted the minor's sexual appetite and she went back for more to the extent of taking up a room in Bay Street Hotel for furthering her sexual adventure, which must of necessity have increased and not lessened her defilement.

As such these submissions cannot be upheld from the legal point of view and this Court has no reasonable doubt as to appellant's guilt of the second charge proffered against him.

Now therefore this Court disposes of this appeal as follows:- It declares the judgement of the First Court null because it referred to the wrong articles of the law referring to the charges under which appellant was found guilty and because it did not state clearly of what charges appellant was being found guilty and of which he was acquitted and, after proceeding to decide the case anew on the merits, finds appellant not guilty of the first charge i. e. of having, whilst knowing that he suffered from, or was afflicted by, any disease or condition as may be specified in accordance with sub article (3) in any manner, knowingly transmitted, communicated or passed on such disease or condition to a minor girl and a third girl not otherwise suffering from it or afflicted by it and of the second charge of having, under the same circumstances, transmitted, communicated or passed on the same disease through impudence, carelessness, or through non-observance of any regulation by himself, when he knew or should have known that he suffered therefrom or was afflicted thereby and acquits him from these first two charges. Finds the accused guilty of the third charge of having in January, 2005, by several acts, committed even if at different times, which constitute violations of the same provision of law and which were committed in pursuance of the same design, by lewd acts defiled the minor girl in question and after having seen sections 203 (1) 18, 31 and 533 of the Criminal Code, in view of the grave nature of the case, sentences appellant to a term of imprisonment of four (4) years and six (6) months, from which any time spent in preventive custody only in

connection with this case, has to be deducted. It also orders appellant to pay to the Court Registrar the sum of Lm141.31c being the total expences paid to the court-appointed expert, within fifteen days and if this amount or any part thereof is not paid, such sum shall be converted to a further term of imprisonment according to law.

The Court further orders that the names of the three women referred to in the judgement are not to be divulged in any media reports or on internet.

< Final Judgement >

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