



**COURT OF MAGISTRATES (MALTA)  
AS A COURT OF CRIMINAL JUDICATURE**

**MAGISTRATE DR.  
LAURENCE QUINTANO**

Sitting of the 13 th May, 2009

Number 242/2007

**The Executive Police  
(Inspector Jesmond Borg)**

**versus**

**X**

The Court

Having seen the charges laid against X, 17 years old, son of the late Abera and Weda, born in Adis Ababa, Ethiopia on the 12<sup>th</sup> August 1989, currently residing at Liedna House, Liedna Street, Fgura and holder of ID Card Number for irregular immigrants 06 VV12

Being charged with

(a) Having on the 19<sup>th</sup> March 2007, at around 10.00 pm, whilst at Liedna House, which is situated at Liedna Street, Fgura, committed a violent indecent assault on the person

of M.B. and in breach of Article 207 of Chapter 9 of the Laws of Malta;

(b) Having, on the same date, time, place and circumstances, without a lawful order from the competent authorities, and saving the cases where the Law authorizes private individuals to apprehend offenders, arrested, detained or confined M.B. against the will of the same, or provided a place for carrying such arrest, detention or confinement and which offence is aggravated as M.B. vs compelled to do an act or submit to a treatment which is injurious to the modesty of her sex and in breach of articles 86 and 87(1)g) of Chapter 9 of the Laws of Malta;

(c) Having on the same date, time, place and circumstances, whilst at Liedna House, which is situated at Liedna Street, Fgura, through violence, compelled another person, that is, M.B. to do, suffer, or omit anything and in breach of article 251(1) of Chapter 9 of the Laws of Malta;

The Court was also requested to apply article 383 of Chapter 9 of the Laws of Malta.

Having noted the Court's decree that the proceedings should be in English (page 3), the 'Not guilty' plea filed by the defendant (page 5), documents A and B which relate to the identity of the defendant, the conviction sheet of the defendant (Document C), the appointments made for a translation of all the records from Maltese into English (page 11), the appointment of Wedeb Desira to translate from English into Ethiopian and vice versa (page 11), the declaration made by the defence to exempt the Prosecution from summoning PC 1284 As witness of the statement, the declaration made by M.B. (Doc. JB page 19), the statement made by the defendant (Doc. JB 2 page 24), the current incident report, all the translations from Maltese into English of the transcribed versions of testimonies given in Maltese, the consent of the defendant for summary proceedings (page 148), the reading out of the articles sent by the Attorney General (page 148), the

appointment of Dr David Farrugia Sacco as an interpreter from Maltese into English and vice versa, the report (in English ) written by the complainant. (Page 176) and the certificate marked JB at page 189.

Having heard the witnesses on oath.

Having heard the final submissions being made.

Considers.

On the 20<sup>th</sup> March 2007 a certain M.B. , 23 years old, filed a police report alleging that she had been assaulted by one of the immigrants. He had detained her against her will and forced to commit acts she did not desire to commit. The alleged incident happened at Liedna House, Liedna Street, Fgura.

M.B. was a care worker at the hostel in charge of immigrants who were still under age. On the 19<sup>th</sup> March 2009 the defendant caught her from her back and managed to turn her face towards him. He started saying 'A Kiss! A kiss! Please.' He held her face and used his tongue to lick her cheeks. He pressed her against the wall of the dining room and started touching her private parts including her breasts. At one moment he started masturbating against her. The defendant did not expose his private parts. Nor did he put his hands under her clothes. She also felt his private part against her body. (page 15). Then the alleged victim managed to release herself and called another carer for help. The defendant denied any wrong doing.

The alleged victim filed the report on the following day because she could not leave the hostel. She insisted that the Police file court proceedings against the defendant. (See Complaint made by alleged victim Doc.JB 1 on page 23).

**The statement by the defendant.**

In his statement made on the 26<sup>th</sup> March 2007, the defendant stated that he knew the complainant as she was a care worker. He denied grabbing her on the 19<sup>th</sup> March 2007. He insisted that he had only moved her because he had to clean the kitchen. She became angry and ordered him not to push her. Then she called a certain David who was working as a family carer in the upper floor. He denied kissing the complainant and touching her private parts. He only held her friends to move her away. He denied any other wrongdoing.

The defendant insisted that he had not held the alleged victim. (See page 26). He accused the alleged victim that she was lying. The following morning the coordinator put the same questions that the Inspector was asking the defendant and he replied that there was no truth in the allegations.

PS 85 Cyril Butters confirmed that the alleged victim had been to the Police station and she had filed a report. She alleged that the defendant had tried to touch her but with her clothes on and that no sexual act had been made nor were any private parts exposed. (Page 27). She felt her private parts pressing against her body. Then the alleged victim made a declaration in the presence of Superintendent Mamo.

The alleged victim made a declaration (see Document JB) and took the witness stand on the 30<sup>th</sup> March 2007. She confirmed that she had filed a complaint about an incident of indecent assault by the defendant. (Page 32). She stated that as a care worker she was in charge of the minors. She felt that she had been pulled from behind as she was walking out of the dining room and the defendant started saying 'Please, one kiss.' He indicated that he wanted a kiss on the lips. He turned her face towards him by using his hands. He filled her face with saliva while she tried to resist his approaches. He wanted to have a French kiss and so he filled her with saliva because he was using his tongue. (Page 36). He touched her on her breasts and touched her private parts but he touched her on the top of her clothes and not under her clothes. (Page

37). The witness felt terrified and she felt his private part.  
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She then contacted Mr David Leguesse, the other carer, who could not believe that the incident had happened. She then overheard the defendant saying 'It is not true! It is not ture!' (Page 38).

She added that the defendant had never given her any trouble before and that she had been alone during the incident which had lasted about five minutes. The alleged victim did not shout but she asking the defendant to let her go. She wrote the report of the incident in the morning just before leaving.

The care coordinator had asked her whether an apology from the defendant would have been enough. However, the witness refused to accept an apology because she was afraid of similar incidents later on.

She also confirmed the complaint she had filed at the Police Station.

During the cross-examination, the witness said that she had never had any trouble with the defendant before. He used to carry out the work assigned barring exceptions when he was not in the mood. (Page 45). She was aware that there were other persons in the adjoining room but she did not call for help as these were foreign residents who would not have tried to defend her.

Superintendent Alexandra Mamo confirmed that the complainant had made a declaration on the 21<sup>st</sup> March 2007 at 09.23 Briefly the alleged victim stated that the defendant had at first refused to carry out his duty but then she had offered to assist him. Then he had caught her by her hand to persuade her to go on helping him. He let go of her hand. Then, as she was leaving the dining room she felt someone pulling her from behind. She tried

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<sup>1</sup> The report filed by the alleged victim (see page 19) and signed by her, PS 85 Cyril Butters and Superintendent Mamo has the same details. (See pages 19 et)

to resist the defendant. He insisted on kidding her and touched her private parts and her breast from the outside of her dress. He never exposed his private parts.

David Samson Laguesse confirmed that he worked as a care worker. He was informed by the alleged victim about what had happened. He spoke to the defendant who denied having done anything wrong. Then the complainant asked the defendant to show what he had been doing but did not make any move at all. Then she grabbed the witness, made him face the wall and started to give the details. (Page 63). In the meantime, the defendant denied that he had done anything of the sort. Then the witness took up duties with the minors while the complainant went to upstairs to look after the families.

Under cross examination, the witness did that he had not heard anyone shouting for help. He also confirmed that the alleged victim had first given some details and then went on adding other details. She was also very angry.

The next witness was Ronald Zammit, the care coordinator. He confirmed that at on the 19<sup>th</sup> March 2007, 10.00pm he had received a telephone call from the alleged victim claiming that the defendant had tried to kiss her. He had then suggested that the alleged victim should take care of the families while another care worker should take care of the minors. The complainant accepted such an arrangement. He also contacted a certain Charmaine Cachia. When he spoke to the defendant, the latter said that this was something normal for him;

‘like brothers, like brothers and sisters like a family.’

In his perception the defendant did not have any evil intentions. He only wanted to hug her and kiss her. (Page 78). The victim had thanked the witness (by sending him an sms) on the night in question. The alleged victim had also informed the director but the witness had not been aware that the alleged victim had made such a report behind his back. (Page 77).

Under cross-examination, the witness stated that language difficulties always created problems. He confirmed that the alleged victim had made a report of the incident which he had asked for on the 19<sup>th</sup> March 2007. He stated that, as far as he could remember, the report only contained a reference to an attempt to kiss the defendant. (Page 82). The complainant had been complaining about the conditions of work because there was only one person on duty at night. **The witness said that the defendant was under a care order.**

When the Prosecution re-examined the witness, the latter denied having asked the alleged victim to forgive the defendant.

Inspector Edel Camilleri confirmed that the defendant was an Ethiopian and that he arrived in Malta on the 9<sup>th</sup> September 2006. His number was 06VV12. Once he was a minor he is put under a care order by the Ministry responsible for the family. (Page 113). She confirmed the Immigration on pages 7 and 8.

The Attorney General transmitted the records to the Court of Magistrates once it appeared from the investigations that the defendant could have violated articles 207, 86, 87(1)(g) and 251(1) of Chapter 9 so that the Court could decide on such offences.

### **Mr. Ronald Zammit in the witness box a second time**

The defence asked Ronald Zammit whether the defendant was still under a care order. The latter confirmed that this was so and that he was ready to accept the defendant were he to return to Liedna House. He also presented a report that was written by the complainant on the 20<sup>th</sup> March 2007, that is, one day after the alleged violent indecent assault. (Page 176).

In this report one finds the following words:

**'Please, Please only one Please. He tried to touch me (intimate parts) wrapping his hands around me.'**

The defence declared that it was not going to proffer any evidence as the main witnesses had all been cross-examined and the version of events according to the defendant is the one he made in his statement to the Police.

Has considered

As to the law

Section 207 of the Criminal Code reads as follows:

'Whoever shall be guilty of any violent indecent assault 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 months to one year.'

According to the Italian writer Antolisei

*'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 contatto corporeo, senza che occorra che questo sia al nudo o riguardanti direttamente gli organi genitali....*

*Con la realizzazione 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 or 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.<sup>2</sup>*

On much the same lines about the kiss the judgement in 'The Executive Police versus Spiru Silvio'<sup>3</sup> 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.'<sup>4</sup>

As to the Facts

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<sup>2</sup> Antolisei F. Manuale di Diritto Penale Parte Speciale 1 pagine 440 et

<sup>3</sup> 12<sup>th</sup> March 1960 Court of Criminal Appeal per Judge Harding.

<sup>4</sup> See also the judgements: 'The Executive Police versus E/L25606 Leading Steward Victor Dalmas' 13<sup>th</sup> May 1961 (Court of Criminal Appeal) Page 963 and 'The Executive Police versus Gerald Cassar' of the 18<sup>th</sup> July 1959 (Court of Criminal Appeal).

The Court has two versions of the events: the version of the complainant and the version of the defendant as described in his statement to the Police.

The Court makes it clear that the fact that one has two contradictory versions does not mean that the Court should automatically acquit. Were this so, then all one would have to do to defend oneself is to produce the evidence of or more persons stating the opposite.

It is, in fact, the duty of the Court to weigh the evidence carefully and only if there is no way should it acquit. But if 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.

The Court is satisfied that the version given by the alleged victim is the correct one. The defendant not only tried to kiss the alleged victim but he also carried out other libidinous acts. The defendant denies any wrong doing. In fact, he even declared that he wanted to remove her out of the way so that he could go on working in the kitchen.<sup>5</sup> This is rather surprising considering that at first he was reluctant to obey orders. So the Court cannot believe that the defendant underwent this sea change in a few minutes.

Was the kiss violent, innocent or just one which puts a person off? If we follow the doctrine as set out by the Italian author and by our own case law the circumstances have to be taken into consideration.

First of all the alleged victim had to struggle to set herself free. She herself testified that she had to resist the defendant.

Secondly, the details of the kiss reveal that this was not a simple one. The Court refers to the details given by the alleged victim including the one about her face being covered with saliva.

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<sup>5</sup> See page 25

Thirdly, the Court believes that the defendant is also responsible for other acts. The defence referred to the report filed by the complainant herself on the following day. But this report also mentions the fact that the defendant had been touched on her intimate parts. This appears in brackets.

Fourthly, from the evidence produced by the Prosecution, it is quite clear that the defendant touched the defendant on her breasts and that she was also made to feel his private parts.

Fifthly, the alleged victim was careful not to exaggerate. All this was done when she was fully clothed and all the touching was done from outside her dress. Had this witness wanted to drive her point home she would have given a more colourful version of events.

The Court notes that the alleged victim was consistent in her long declaration to the Police, in the report she submitted to her own head of section and on the witness stand.

At one point the defence put a question to one of the witnesses as to whether the alleged victim had narrated by what had happened by starting from A and then adding details until the letter Z. In other words he asked whether the alleged victim had added extra details. The witness replied in the affirmative.

With all due respect, it was possible for all the acts to take place in five minutes. Moreover, it must have been very embarrassing for a female worker to give all the details at once and she must have started by referring to the violent kiss as this act is obviously less gruesome than what followed.

So the Court is considering that the Prosecution proved the first charge in accordance with the law.

As to the second charge and articles 86 and 87 – which articles refer to illegal arrest, detention or confinement and

the aggravating circumstances – in particular 87(1)9g) – the Court is not satisfied that there has been a breach of these articles. It is true that the defendant held the complainant against her will but (a) the circumstances definitely could not have allowed him to go on for a long time given that there were other people in the very next room; (b) that the incident was over in such a short time that one cannot consider that the complainant was 'detained'. 'Detained' implies a period of time when you cannot move around. The Court does not think that five minutes are enough to amount to a detention. So the Court decides that the defendant has not breached this article.

As to the third charge, article 251(1) (Private Violence) reads:

'Whosoever shall use violence in order to compel another person to do, suffer or omit anything shall, on conviction be liable....',

The Court thinks that the really relevant article in the circumstances is section 270. In a violent indecent attack one always suffers something – from a violent kiss to more rude acts. The Court is considering that section 207 is the special section which deals with the circumstances of this case. Hence, it is deciding that the defendant has not committed any offence under this section.

### **Conclusion**

The Court, after considering sections 207, 86, 87(1)(g) and 251 (1) is finding the defendant guilty of the first charge laid against him but is acquitting him of the second and the third charge.

As to the penalty, the Court is considering the following:

- (a) Article 207 sets a prison tariff of between three months and 1 year.
- (b) That the defendant was under age at the time and hence article 37 applies. Hence the prison tariff

Informal Copy of Judgement

established by article 207 has to be lowered by one or two degrees.

(c) That the defendant has a clean criminal record;

(d) That the defendant has already spent two months and eight days in preventive custody.

Applying article 37 of Chapter 9, and article 28A of the same Chapter the Court is condemning the defendant to a term of imprisonment of four months which are to remain suspended for a period of one year.

**< Final Judgement >**

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