MALTA

COURT OF CRIMINAL APPEAL

THE HON. MR. JUSTICE
JOSEPH GALEA DEBONO

Sitting of the 9 th July, 2009

Criminal Appeal Number. 135/2009

The Police
(Insp. Raymond Aquilina)
(Insp. Melvyn Camilleri)

Vs

Omissis
Omissis
Jessica Vella

The Court,

Having seen the charges brought against the appellant Jessica Vella before the Court of Magistrates (Malta) as a Court of Criminal Inquiry for having on these islands on the night between 16th and 17th March, 2008, inside the premises “Dione Apartments”, Flat 4, Hgejjeg Street, Bugibba :

1. by lewd acts corrupted minor omissis of thirteen (13) years old;
2. at the same time, place, date and circumstances, by means other than those mentioned in Article 203(1), excited, instigated or facilitated the corruption of the said minor omissis;
3. at the same time, place, date and circumstances committed violent indecent assault on the same minor omissis.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 15th April, 2009, by which, after that Court had seen articles 203A, 203(1) of Chapter 9 of the Laws of Malta, it found appellant guilty of the second (2nd) charge brought against her, not guilty of the first (1st) charge and third (3rd) charge brought against her which are alternative to the first (1st) and acquitted her of the same and condemned her to a term of ten (10) months imprisonment .
The time the appellant spent in preventive arrest was to be deducted according to the recent amendments to the Law.

Having seen the application of appeal filed by appellant on the 24th April, 2009, wherein she requested this Court to reform the appealed judgement in that while confirming the acquittal of appellant where it found appellant not guilty of the first (1) and third (3) charges, acquits also appellant from the second (2) charge and acquit her completely from all charges and, should the appeal on the merits fail, to reform the judgement in applying a suspended sentence to the term of imprisonment of ten months for a period of years that will be established by this Court.

Having seen the records of the case.

Having seen that appellant's grounds for appeal are briefly the following, namely:- 1. That this is a case where the alleged victim omissis, although a minor, was already "corrupt sexually" which is also admitted by the prosecution itself in its note of submissions and although

this, in itself, could not bar subsequent prosecutions, appellant did not contribute towards the victim's corruption. The victim's father himself said (at page 143) that he was not sure whether he should press prosecution (Sic!) in this case. For this reason the elements to prove article 203 (Sic!) of the Criminal Code do not suffice. 2. The first Court did not take into consideration that although appellant at the time of the alleged crime was 19 years of age, she was mentally still aged behind (Sic!) and behaved like a minor herself. The minor in question was literally leading her to go out and mix with men and this should have been taken into consideration by the First Court but was not. 3. The Court should have taken into consideration the clean conduct sheet of appellant and applied a suspended sentence on her and directed that she be followed by a social worker to steer her in life and give her a second chance. This was not being opposed by the prosecution.

Having heard submissions by Prosecuting and Defence Counsel in the sitting of the 18th. June, 2009.

Having considered Prosecution's declaration that, although it would not be averse to a reduction in the sentence of imprisonment, it did not countenance the infliction of a suspended sentence in this case.

Now therefore considers,

From a perusal of the evidence tendered before the First Court it results that appellant and the minor in question were friends. The minor was 13 years old at the time and appellant was 19. The minor had already had sexual relations with at least four other men in similar circumstances before the alleged incident which took place on the 16th/17th. March, 2008. On that date, the two girls were at Bugibba. There they met two young foreign men (who were co-accused with appellant), whom they did not know before and, after some flirtation and drinks, accompanied them to a flat in Bugibba. In this flat, the minor indulged in sexual practices with one of the men, namely oral sex and full sexual intercourse and appellant

twice had intercourse with the other in the same bedroom. (vide appellant's statement at pages 41 to 43 of the records and the minor's testimony.)

The two men and appellant were subsequently prosecuted and appellant and the man she slept with were convicted of the charge of having excited, instigated or facilitated the corruption of the minor and sentenced to a term of imprisonment of ten months each, while the other co-accused, who had actually had direct sexual contact with the minor, was convicted of the crime of defilement of minors and sentenced to a term of imprisonment of two years. Only appellant appealed from this judgement.

Having considered;

That the crime appellant was found guilty of, namely that under article 203A of the Criminal Code was only recently introduced into our Code by Act III of 2002. Case Law on the interpretation and application of this article is obviously still very limited.

In Criminal Appeal **"The Police vs. Carmelo Sant"** [12.2.2009] it was held that from a perusal of the Parliamentary Debates held in the course of the sitting of the House of Representatives number 100, The Minister of Justice and Internal Affairs who piloted the Bill to amend the Criminal Code, when referring to clause 34 of that Bill (now article 203A of the Criminal Code) had stated :-

"…il-klawsola 34 qed tintroduci reat gdid ta' istigazzjoni ta' korruzzjoni fuq tfal taht l-eta' . Subartikolu (1) t' artikolu 203 jghid li kull min jikkorrompi persuna taht l-eta' b' ghemil zieni jkun hati ta' korruzzjoni fuq il-minorenni. Issa hawnhekk qed nghidu li jekk xi hadd ma jaghmel l-ebda ghemil zieni imma jeccita, jghin jew jiffacilita l-korruzzjoni ta' persuna ta' taht l-eta' ta' sess il-wiehed jew l-iehor, jehel, meta jinsab hati, il-piena ta' prigunerija ghal zmien ta' mhux izjed minn sentejn u d-dispozizzjonijiet tas-subartikoli (2) u (3) tal-artikolu 203 jghoddu, mutatis

mutandis, ghad-delitt taht dan l-atikolu……. Fi kliem iehor, hawnhekk qed nestendu r-reat billi qed nghidu li mhux biss b' eghmil zieni imma anki b' ghemil iehor tkun qed tohloq, tghin jew tiffacilita l-korruzzjoini ta' persuna taht l-eta'.

"……din l-emenda qed issir minhabba li kien hemm min qal li biex tkun tista' tghid li wiehed wettaq ghemil zieni jrid ikun ghamel kuntatt fiziku ta' xi xorta. Per ezempju kien hemm min qal - ghalkemm mhux kullhadd qabel ma dan - li jekk wiehed juri ktieb pornografiku lil persuna taht l-eta' ma jkunx qed iwettaq ghemil zieni, u allura hawnhekk qed naghmluha cara li din ukoll hija forma ta' korruzzjoni u b' hekk wiehed irid jigi kastigat ghal dan l-ghemil."

The comments of other members of the House Committee strayed somewhat from the substance of what the Minister was stating as they concentrated on the case where someone, out of carelessness, allows a minor to view pornographic material on a satellite television and the resulting short debate concentrated on whether the new article should include the word *"dolozament*" or not. In actual fact this word was not included on the Attorney General's advice.

In the judgement above quoted it was stated that:-

"Jidher car li l-ghan tal-legislatur kien li bl-introduzzjoni ta' dan l-artikolu gdid jikkolpixxi kull att li ghalkemm ma jsirx fuq il-persuna tal-minuri jista' jwassal biex din tigi eccitata jew biex jghin u jiffacilita' l-korruzzjoni tal-istess persuna taht l-eta' … Jidher ukoll li dan sar minhabba xi gurisprudenza konfliggenti dwar din il-materja li kienet tezisti."

In view of the above, if the intention of the legislator was to include under this kind of crime even the showing of pornographic material to a minor be it in stills or movie form, *"multo magis"* it was intended to include in the material elements of this crime the giving of a "live spectacle" by two persons having sex twice over in the next bed to that of the minor, albeit that she was

simultaneously having sex too with another man. It is obvious that the sight of two persons having sex in the flesh a few feet away can be equally if not more stimulating and exciting than watching a pornographic film showing persons indulging in sex. The fact that the lights were switched off has little relevance as even in a dark room one can still have enough light to perceive a couple engaging in sexual intercourse. In fact the minor states that she could see what the appellant and her partner were up to.

Accordingly, this Court like the First Court finds that appellant's actions amounted to the material element of the crime under article 203A.

The fact that in this case it results that the minor was very sexually active herself and had already had full sexual intercourse with four men of African origin previously, in no way affects the guilt of appellant. In fact with regard to the related crime of defilement of minors contemplated in article 203 of the Criminal Code, the plea of *"corrupta non corrumpitur"* has never been entertained by our Courts.

As stated by this Court presided over by Mr. Justice William Harding in **"Il-Pulizija vs. Carmelo Grech"** [18.6.1960] :-

"Il-Qrati ta' Malta qatt ma abbraccjaw it-teorija, propunjata minn xi skritturi, illi r-reat ta' korruzzjoni ma jezistix meta l-minuri jkun ga totalment korrott. Huma dejjem irritenew illi anki l-minuri korrott ghandu d-dritt li ma jigix ulterjorment korrott, hu x' inhu l-istadju tal-korruzzjoni tieghu."

And the same learned judge in **"Il-Pulizija vs. Lorenzo Baldacchino"** [30.3.1963] held that:-

"Il-persuna korrotta ghandha d-dritt illi ma tigix ulterjorment korrotta, u hadd ma ghandu d-dritt li impunement jispingiha aktar fit-triq tal-korruzzjoni, jew jimpedilha l-possibilta' tar-rigenerazzjoni."
(vide also : **Ir-Repubblika ta' Malta vs. Carmelo Spiteri"** [20.3.1989] and other judgements)

This principle applied to the crime of defilement of minors under article 203, in this Court's view, should equally apply and be extended to the application and interpretation of the new article 203A.

Therefore, even if - as the defence submits - the minor might have taken a certain degree of initiative to get this "foursome" going on that night and even if appellant might, to a larger or smaller extent, have been lured into participating in it by the minor herself, this would not acquit her of the crime in question. This Court is qualifying this statement because from a perusal of the evidence it appears that appellant was all too pleased to indulge in this sexual escapade in the company of the minor and she was not all that naïve as the defence would like to make her out to be. In fact, according to the minor, on the previous night, appellant had also had full sexual intercourse with a certain Jeffrey in the minor's presence.

Accordingly, appellant's grounds of appeal against the finding of guilt of the crime under article 203A by the First Court are being dismissed.

Having considered;

That as to appellant's plea in mitigation of punishment, it has always been held that the Court of Criminal Appeal would not normally interfere with the discretion exercised by the First Court in the meting out of the punishment unless this exceeds the punishment prescribed by law or appears to be manifestly excessive.

According the article 203A the punishment prescribed by law for the offence in question is a term of imprisonment not exceeding two years. No minimum punishment is prescribed. Therefore the sentence of ten months imprisonment is well within the parameters of the law.

However, in this very particular case, the absolutely clean conduct of the appellant, the initiative shown by the minor girl herself in getting herself into the above described

situations and her previous experiences of full sexual intercourse, the declaration of Prosecuting Counsel that the Prosecution would not be averse to a reduction in the effective prison term inflicted by the First Court - though not to a suspended sentence - and all the circumstances of the case, prompt this court to apply a suspended term of imprisonment rather than an effective one in combination with a supervision order in terms of articles 28A and 28G of the Criminal Code. This, in this Court's view, does more justice to the case and might certainly help to assist appellant, who is still of a very young age herself, to appreciate better the values of life which should guide her in her future days and that there is more to life than one-night stands with unknown men.

Accordingly this plea is being upheld as stated hereunder.

For the above reasons, this Court upholds the appeal only in so far as it concerns the punishment inflicted on appellant by the First Court and therefore varies said judgement by confirming it in so far as it found appellant guilty of the second charge proffered against her and not guilty of the first and third charges, and revokes same in so far as it condemned the appellant to an effective term of imprisonment of ten (10) months and, whilst condemning her to the same term of imprisonment of ten (10) months, orders that said sentence shall not come into effect unless during the period of four (4) years from today, appellant commits another offence liable to the punishment of imprisonment. In addition this Court is issuing the Supervision Order herewith attached whereby it is placing appellant under the supervision of a supervision officer for the aforesaid period of four (4) years and this under the terms and conditions contained in said order.

The convictions against the other co-accused (who did not file an appeal from the same judgement) and their respective sentences are in no way to be affected or varied by this judgement.

The Court is explaining in clear language the implications of any breach of this suspended sentence as well as any breach of the conditions of the Supervision Order in terms of law.

Finally the Court draws the attention of the Deputy Registrar to his duty under article 28A (8) and 28G (4) of the Criminal Code.

< Final Judgement >

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