



MALTA

**QORTI TAL-MAGISTRATI
(GHAWDEX) BHALA QORTI TA' GUDIKATURA
KRIMINALI**

**MAGISTRAT DR.
EDWINA GRIMA**

Seduta tat-8 ta' Gunju, 2010

Numru. 38/2009

**The Police
(Inspector Josric Mifsud)**

Vs

OMISSIS A

The Court,

Having seen the charges brought against the above-mentioned *OMISSIS A* wherein he was charged with having in the month of *OMISSIS* and months before at *OMISSIS* and/or in any other localities 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, by lewd acts defiled minor *OMISSIS B* when he was *OMISSIS* years of age, which offence was committed on a

Kopja Informali ta' Sentenza

person who had not completed the age of twelve years and was committed by deceit.

Also charged that in the same period of time, place and circumstances instigated encouraged or facilitated the defilment of *OMISSIS B* when he was *OMISSIS* years of age, a minor by means not covered by Article 203(1) of the Criminal Code.

Having seen the documents exhibited.

Having heard the evidence,

Having seen the articles of law sent by the Attorney General of the 5 February 2010.

Having heard submissions.

Considers,

That from the note of the Attorney General of the 5th February 2010 it results that the accused, being a minor himself, is being charged with the defilment of another minor being a certain *OMISSIS B* having *OMISSIS* years of age. The alleged defilment was committed at the residence of accused in *OMISSIS* which was frequented by the said minor on a regular basis. It results from the evidence that the accused and his mother of British nationality had taken up residence in Gozo. Some time later accused's mother befriended *OMISSIS*, *OMISSIS B's* mother also of British nationality and who was living in Gozo together with her mother and her son. Being both foreigners residing in *OMISSIS* it was only natural that these people should liase together. The boys then started frequenting each other. It results that they would meet both outside and even go for bike rides as well as at the accused's place of residence where his mother used to run a *OMISSIS*. Here the boys used to have a swim in the pool as well as play on computer. In their testimonies they both agree that they would play computer games and video games when in each other's company at the accused's residence. However whilst *OMISSIS B* affirms

that they use to access the internet in the accused's bedroom, accused denies all this and states that he had no internet access in his bedroom and the only computer that had access to internet was the one found in the kitchen which was used by his mother. In fact both accused and his mother affirm that they had no Wi-Fi available at home and access was through a modem found in the kitchen linked to his mother's computer.

This alleged abuse came to light when a report was filed by a certain *OMISSIS*¹ claiming that his minor son *OMISSIS* had been sexually abused by another minor and this with reference to *OMISSIS B*. Upon investigation it resulted from a statement released by *OMISSIS B* and confirmed on oath before inquiring magistrate Dr. Anthony Ellul² that the said *OMISSIS B* was in turn being allegedly abused by the accused being himself of minor age at the time. This was also confirmed by the alleged victim in his testimony given before the court. *OMISSIS B* alleges that accused used to access adult pornographic sites on internet whilst in his company. He also alleges that accused also exposed himself in front of him and in turn he did so too upon instigation by accused.³ *OMISSIS B* also alleges that accused ordered him to repeat what he had seen on internet with his friends. In fact *OMISSIS B* in turn then committed lewd acts on two other minor boys by the names of *OMISSIS* and *OMISSIS*. He even states that he committed these lewd acts with *OMISSIS* in accused's bedroom, when accused was present.⁴

Accused denies all this both in the statement released during investigations by the police as well as in his testimony before the Court. He affirms that his friendship with *OMISSIS B* was short lived because *OMISSIS B* was becoming rather a nuisance and was continuously harassing him. He used to come over to his house either very late at night or early in the morning and his mother refused to let him in at this time. However if this happened

¹ Vide report Document JM6 at folio 16 and 17 of the court records.

² Vide *proces verbal* at folios 30 to 4 of Court records.

³ Vide testimony of *OMISSIS* at folio.55

⁴ Ibid folio.59

OMISSIS B would start harassing him through smss and by phone calls. This forced accused to change his mobile number so as not to receive further calls from *OMISSIS B*. Accused admits that initially he started hanging out with *OMISSIS B*. He denies ever being alone in the house with him and states that when *OMISSIS B* used to come over his mother used to be present. They would have a swim in the pool or play some video games. Accused denies having internet access in his bedroom and states that when in *OMISSIS B*'s company at his house they never surfed on internet. After he broke up his friendship with *OMISSIS B*, he got to know from a common friend a certain *OMISSIS* that *OMISSIS B* was spreading rumours about him that he had been showing him pornographic sites and that he had masturbated in front of him. Accused declares that all this was untrue and that *OMISSIS B* had spread these rumours out of spite. He had spoken to his mother about this, however they had both decided to ignore the matter as *OMISSIS B* was only a boy and they presumed that he would forget about this quickly. It was only when he was arrested by the police about a year later that he heard about all this story again.

Considers,

As already stated above accused is being charged in terms of Article 203 of the Criminal Code. For the criminal action to proceed against the accused the law necessitates a complaint by the injured party⁵. In this case since the alleged victim is a minor, therefore the complaint of his mother as his legal guardian is required for the criminal action to proceed against the accused. This complaint however is nowhere to be found in the records of these proceedings. *OMISSIS B* was spoken to by the police due to a report filed by *OMISSIS*. In the course of these investigations, the said *OMISSIS B* accused *OMISSIS A* of showing him pornographic material amongst other accusations and states that the reason why he committed the lewd acts on his friends *OMISSIS* and *OMISSIS* was as a consequence of what accused

⁵ Article 203(2) Criminal Code

was showing and telling him to do. Consequently the police proceeded with investigations against accused. However at no point in time does the complainant specifically request the police to take criminal action. Nor does she make mention of it during her testimony but confirms that it was only when spoken to by the police that she got to know what was happening between her son and accused.

However during the compilation of evidence before this court the accused did not demand that proof of the said complaint be brought forward and therefore there is a presumption at law in terms of Section 390(5) that the same has been made according to law.

“If, in the course of the inquiry, the accused shall not have demanded nor the court *ex officio* shall have ordered the production of evidence of the complaint, the complaint shall be presumed to have been made according to law.”

Considers further,

The law regulating the defilement of minors is found in Section 203 of the Criminal Code which reads:

“Whosoever, by lewd acts, defiles a minor of either sex, shall, on conviction, be liable to imprisonment for a term not exceeding three years, with or without solitary confinement”.

In his notes on criminal law, Professor Mamo lays down the elements which constitute this crime which in his words: “deals with those lustful acts not consisting in carnal knowledge or attempted carnal knowledge with violence, whether actual or constructive, committed on the person or in the presence of any individual, whether male or female, and capable of defiling such individual.” The first ingredient of this crime is the young age of the victim; the second being the material element of the crime are the **lewd acts**. Lewd conduct is any unlawful act committed by an individual with the purpose of arousing

the libido or sexual interest of themselves or the person towards whom this action is directed. Professor Mamo goes on to state that this expression does not include mere words, or any picture, book or representation, though obscene, or other indecent facts which affect only the moral sense. These do not constitute the crime in question. It is required that the defilment be by lewd acts, which acts must be committed either on the person of the minor or at least in his presence. Professor Mamo states: "To take a different view would be to ignore the obvious spirit of the law in creating the crime, that is the desire to protect youth from the pernicious effects of moral defilment and, therefore also from all those acts, which, although they take place without physical contacts, are nevertheless inherently intended to defile." In fact Professor Mamo describes these acts as "inclusive of all acts directed to the indulgence of the sexual appetite."

Finally the third element which constitutes this crime is the actual defilment. Although there has been a divergence in views between jurists as to whether a minor who is already defiled can be the subject of this crime, however our courts have always been inclined to the doctrine that previous defilment whatever its degree does not exclude the crime. Finally with regard to the *mens rea* behind the commission of this crime Professor Mamo states that no specific intent to defile is necessary. "The defilment whether intended or not, must be considered as a necessary consequence of the lewd acts themselves, leaving it in every case to those who are to judge to determine whether they were calculated to defile."

That from the acts of these proceedings it results amply proven that the alleged victim of this crime is a minor. *OMISSIS B* at the moment of the alleged commission of this crime was *OMISSIS* years of age. The first element for the commission of this offence therefore results amply proven. The second element being the material element are the lewd acts. With regard to this element it must be pointed out at the outset that in his testimony, the alleged victim was rather hesitant in revealing his version of the facts. His testimony is characterized by many hypothetical

answers including phrases like “maybe”, “if it happened”, “I don’t remember” amongst others. This poses serious doubts as to the nature of his testimony and as to the real acts which are alleged to have happened between him and the accused. The only thing that *OMISSIS B* is certain about in his testimony is the fact that the accused used to show him pornographic material on the computer, indicated to him various web-sites where such material could be found and also states that accused exposed himself in front of him and he did the same too. However he stops at this and does not indicate the manner in which this happened, why it happened and whether there were any sexual acts which were committed in his presence or on his body by accused. In fact he denies that accused ever touched him in an intimate manner and only states that accused told him to do what he had seen on internet to his friends. This is in fact what *OMISSIS B* does. In fact he goes as far as saying that he performed lewd acts with *OMISSIS* in the presence of accused but denies that accused participated in this. There is clearly therefore, a degree of doubt as to what actually happened between these two “boys”. As indicated above, the fact that accused showed pornographic material to the minor and the fact that he also indicated pornographic sites to him, does not constitute a lewd act according to law. As to the physical exposure of the accused in front of the minor, there is a certain degree of doubt here as to the circumstances in which this happened. When stating that the accused showed his private parts to him, *OMISSIS B* states, that he never touched him. He does not recall the circumstances in which this happened, he clearly states that this did not happen whilst accused was showing him pornographic material. He does not even recall why the accused did so.⁶ He is not certain whether he exposed himself also on this occasion and states that if he did so, this happened because accused said something to him, however he does not remember what he told him.

Accused on his part denies all this adding even more doubt as to what could have actually occurred between

⁶ Vide testimony of *OMISSIS* at folio.53, 54 of court records.

these two young men. Consequently there is not enough evidence in the court records to indicate that accused actually performed lewd acts on the minor or at least in his presence. As a result the first charge brought against accused has not been proven beyond reasonable doubt.

Considers further,

That the second charge brought against the accused embodied in Section 203A of Chapter 9 of the Laws reads as follows:

“Whosoever, by any means other than those mentioned in article 203(1), instigates, encourages or facilitates the defilement of a minor of either sex, shall, on conviction be liable to imprisonment for a term not exceeding two years
....”

The law here speaks of three main actions being the instigation, encouragement or facilitation to the defilment of the minor. Under this section of the law there is therefore no mention of lewd acts and therefore the performance of such is not a necessary element to the commission of this crime. However if a person by any means whatsoever, short of lewd acts, encourages, instigates or facilitates the defilment of a minor is guilty of this crime.

As already pointed out *OMISSIS B* alleges that he was introduced to pornography by accused, that accused indicated to him the sites wherein he could find such material and that accused actually ordered him and therefore instigated him to perform similar acts on his friends. In fact *OMISSIS B* alleges that he was threatened that if he did not do so, he would harm his mother. Accused denies all this. Furthermore, although *OMISSIS B* alleges that he performed lewd acts on his friends *OMISSIS* and *OMISSIS* upon accused's instigation, however the prosecution failed to bring forward these two minors as witnesses in order to corroborate the version put forward by *OMISSIS B*. In fact *OMISSIS B* goes as far as to say that he preformed lewd

acts on his friend *OMISSIS* in accused's presence, however *OMISSIS* was never brought to testify in these proceedings. This Court therefore is faced with a degree of doubt as to what actually has transpired between these two boys. Suffice it to state once again that *OMISSIS B's* testimony itself is filled with doubts and half truths. Consequently although this Court may be morally convinced that something actually happened between accused and *OMISSIS B*, however the evidence in these proceedings is grossly lacking – many persons mentioned by the victim and also indicated by accused himself in his written statement are never brought to take the witness stand – *OMISSIS* and *OMISSIS* being the foremost and other common friends like a certain *OMISSIS* who seems to have had some knowledge of this episode. Consequently the evidence found in the records is not enough to convict accused beyond reasonable doubt even of the second charge brought against him. The Court is faced with two conflicting testimonies, no circumstantial evidence and no testimonies to corroborate victim's version of events. Even the report prepared by Superintendent Paul Caruana is not indicative of any misdeed committed by accused and although the hard drives of both accused and the *OMISSIS B's* was examined and some material containing pornography was found, however there is no evidence to indicate that this was accessed by accused or by *OMISSIS B*.

Consequently, in view of the above-made considerations, the Court acquits accused from all charges brought against him and this for lack of sufficient evidence as required by law.

< Sentenza Finali >

-----TMIEM-----