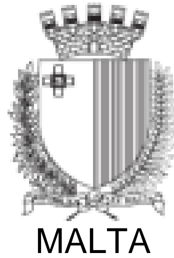

MALTA

COURT OF CRIMINAL APPEAL

THE HON. MR. JUSTICE
DAVID SCICLUNA

Sitting of the 14 th September, 2011

Criminal Appeal Number. 370/2010

The Police

v.

Ismail Guclu

The Court,

1. Having seen the charges brought against the appellant Ismail Guclu before the Court of Magistrates (Malta) as a Court of Criminal Judicature by the Executive Police that:

(1) in June 2006, in St. Paul's Bay and/or in other localities on these Islands, by several acts committed by him even at different times, that constitute violation[s] of the same provision of law and committed in pursuance of the same design, by lewd acts he defiled a minor, i.e. AB aged 15 years, being a Maltese national;

(2) in the same place, time and circumstances he committed any violent indecent assault on AB aged 15 years, being a Maltese citizen;

(3) in the same place, time and circumstances he committed an offence against decency or morals in a public place or in a place exposed to the public;

(4) during the year 2004, in St. Paul's Bay or in other localities in these Islands, by several acts committed at different times which constitute a violation of the same provision of law and committed in pursuance of the same design, by lewd acts he defiled a minor, i.e. CD, of Maltese nationality, aged twelve years, when he had been charged with her care;

(5) in the same place, time and circumstances, he committed a violent indecent assault on CD of Maltese nationality, aged twelve years, when he had been charged with her care;

(6) in July 2006, in Qawra, he committed an offence against decency or morals or by any act committed in a public place or a place exposed to the public;

2. Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 30th July 2010 whereby appellant was found not guilty of the first charge brought against him and was acquitted therefrom, guilty of the second charge with the third charge absorbed for the purpose of punishment in the second charge, guilty of the fourth charge without the aggravation of age, not guilty of the fifth charge which is subsidiary to the fourth charge and was acquitted therefrom, and guilty of the sixth charge. That Court, having seen articles 17, 18, 203(1)(c), 207 and 209 of Chapter 9 of the Laws of Malta, condemned appellant, the said Ismail Guclu, to imprisonment for a term of three years and six months, from which period is to be deducted that spent under preventive arrest;

3. Having seen the application of appeal filed by the said Ismail Guclu on the 10th August 2010 wherein he declared that he was appealing both from the judgment delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 30th July 2010, as well as that Court's decree delivered on the same day, and whereby he requested this Court to reverse the appealed judgement by declaring it null and void or, alternatively, to vary the said judgement by confirming the acquittal from the first and the fifth charges and revoking it in the part where he was found guilty of the other charges proferred by the Police or, alternatively, by varying the punishment meted out by the first Court;

4. Having seen the record of the proceedings; having seen appellant's updated conduct sheet exhibited by the prosecution at the Court's request; having heard the submissions made; having considered:

5. That the grounds of appeal can be briefly summarised as follows: (1) that the delivery of the judgment by the same Magistrate who had delivered the previous judgment that was declared to be null and void by this Court is in serious violation of appellant's right to a fair trial; (2) that, without prejudice to the first grievance, the Court of Magistrates adopted the wrong procedure following the declaration of nullity by this Court and the case should have been decided afresh on the merits of the case; (3) that, as a consequence of the fact that the Court of Magistrates should have decided the case anew, there was no evidence whatsoever that could possibly lead to any sort of conviction given that there was no exemption by the parties from the Court hearing the evidence once again; (4) that the judgement of the First Court is also null since the Attorney General's note of referral dated 22nd November 2006 was ignored in favour of the charges issued by the Executive Police; (5) that the judgement of the First Court is also null since the provision creating the aggravating circumstance of the offence of defilement of minors, of which appellant was found guilty, was not quoted correctly by the First Court. Apart from the fact that the Court omitted to quote the

correct provision creating the main offence [article 203(1)(c) does not exist], the aggravating circumstance emanates from paragraph (c) of the *proviso* to subsection (1) of section 203 of the Criminal Code which was not quoted by the Court. Moreover appellant was apparently found guilty of three offences in their continuous form; (6) that the judgement of the First Court is also null, since confusion reigns supreme when it comes to trying to understand whether or not appellant was acquitted or found guilty of the offence/s with regard to EF. A careful reading of the top paragraph on the last page of the judgement (p.19) only make in the words of Milton, confusion worse confounded! (7) that, without prejudice to the previous grievances, the evidence produced by the prosecution is contradictory, inaccurate and highly suspicious and fails to reach the level of proof required at law; (8) that, without prejudice to the previous grievances, the facts as described by CD exclude the offence of defilement of minors. (9) that, without prejudice to the previous grievances, the First Court could not find appellant guilty of the aggravating circumstance of the offence of defilement of minors contemplated in paragraph (c) of the *proviso* to subsection (1) of section 203 of the Criminal Code because such aggravating circumstance was not mentioned by the Attorney General in his note of referral dated 22nd November 2006. This conclusion further portrays that the said note was ignored in favour of the charges issued by the Executive Police; (10) that, without prejudice to the previous grievances, there was no evidence whatsoever supporting the finding of guilt in the aggravating circumstance mentioned in paragraph (c) of the *proviso* to section 203 of the Criminal Code. This paragraph states that the punishment for the offence of defilement of minors will be increased "if the offence is committed by any ascendant by consanguinity or affinity, or by the adoptive father or mother, or by the tutor of the minor, or by any other person charged, even though temporarily, with the care, education, instruction, control or custody of the minor"; (11) that, without prejudice to the previous grievances, there is no evidence whatsoever to support the application of article 18 of the Criminal Code. The application of the said article 18

requires, *inter alia*, “the pursuance of the same design”. Apart from the fact that the passage of two years from one offence and the other makes it hard to understand how the Court could determine whether the same design did in actual fact exist, nothing is mentioned in the judgement to this effect. This provision should be applied only in cases where “the pursuance of the same design” results from the evidence; (12) that, without prejudice to the previous grievances, the punishment meted out by the Court of Magistrates is far too serious given the facts that are being alleged. Appellant has a clean conduct certificate and the incidents mentioned to substantiate the accusations were isolated ones and not particularly serious in nature. It is therefore being submitted that an effective term of imprisonment is not the appropriate punishment in the circumstances of the case.

6. With regard to the first grievance, appellant states that a cursory reading of the judgments delivered by the first Court on the 17th September 2009 and on the 30th July 2010 shows that the only exercise carried out by the Court of Magistrates when delivering the judgment of the 30th July 2010 was that of altering the date of pronouncement, and this on the pretext of “adhering closely to the instructions given by the Court of Criminal Appeal”. Appellant observes that after this Court delivered its judgment on the 25th March 2010, he filed an application on the 3rd May 2010 requesting the Magistrate to abstain from presiding over the case, a request based on article 734(1)(d)(ii) of the Code of Organisation and Civil Procedure. By a decree dated 30th July 2010 the Court of Magistrates “tacitly rejected this request”. According to appellant, this meant “that the Court of Magistrates was prejudiced against appellant in the real sense of the word since prejudice means pre-judging which is precisely what happened in this case. The judgment delivered by the Magistrate lacks objectivity in that the Magistrate had previously formed an opinion that could not in any way be changed. Appellant reiterates that this is a serious violation of his right to a fair trial which violation flaws the final judgment delivered on the same day of the said decree.”

7. From the record of the case it results that judgment was originally delivered by the Court of Magistrates presided by Magistrate Dr. Jacqueline Padovani on the 17th September 2009. The transcribed judgment (at page 347 and again at page 366) states that judgment was delivered on the 16th September 2009. Appellant lodged an appeal and his first grievance was to the effect that the appealed judgment was null since the date was given as 16th September 2009 whereas judgment had in fact been delivered on the 17th September 2009. By its judgment dated 25th March 2010 this Court differently presided upheld said grievance **"by declaring the appealed judgment null and void because of the mistaken date of delivery and consequently orders that the record of the proceedings be sent back to the First Court for judgment to be delivered with the correct date of its pronouncement."** Appellant filed an application before the first Court on the 3rd May 2010 requesting that Court as presided to abstain from presiding over the case in view of the fact that it had already pronounced itself. By its decree dated 30th July 2010, the first Court as presided by Magistrate Dr. Jacqueline Padovani decided that it would adhere closely to the instructions given by the Court of Criminal Appeal in its judgment of the 25th March 2010 and passed on to deliver judgment.

8. During oral submissions before this Court the defence was clear in stating that appellant was not, through this first grievance, requesting a Constitutional reference but was requesting an ordinary remedy granted by law.

9. Now, this Court must point out that in its decree of the 30th July 2010, the first Court appears to have misconstrued the "instructions" given by this Court in its judgment of the 25th March 2010. The instructions were delivered to "the First Court", not to "the presiding Magistrate". Consequently if there were any reasons at law for the presiding Magistrate to abstain from taking further cognisance of the case, an abstention would have been in order. In this case, the presiding Magistrate had

already taken cognisance of the case and delivered judgment on the merits.

10. Article 368(1) of the Criminal Code provides:

"No magistrate may be challenged or may abstain from taking cognizance of any cause, except immediately after the report or complaint and for any of the reasons set out in paragraphs (*a*), (*b*), (*c*) and (*e*) and, so far as applicable, article 734(d) of the Code of Organization and Civil Procedure or on the ground that he has given or is to give evidence as a witness in the cause, or on the ground that the cause is in respect of an offence committed to his prejudice or to the prejudice of his spouse or of any other person related to him by consanguinity or affinity in any of the degrees mentioned in paragraphs (*a*) and (*b*) of the said article." (underlining by this Court)

Article 734(1)(d)(ii) provides:

"(1) A judge may be challenged or abstain from sitting in a cause – (d) …. (ii) if he had previously taken cognizance of the cause as a judge or as an arbitrator:
Provided that this shall not apply to any decision delivered by the judge which did not definitely dispose of the merits in issue or to any judgment of non-suit of the plaintiff;"

11. The said article 368(1) only provides for a challenge or abstention "immediately after the report or complaint". But the law, after all, normally provides for *id quod plerumque accidit*. The position contemplated in article 368 of the Criminal Code with reference to article 734(1)(d) of the Code of Organization and Civil Procedure remains unaltered in the present case. It would be legally absurd to allow a challenge or abstention of a magistrate immediately after the report or complaint on the basis that that magistrate would have definitely disposed of the merits in issue, and not to allow such challenge or abstention in a situation such as the present one where the first Court's judgement was annulled because of a

mistake in the date and the record remitted to the first Court for judgement to be delivered with the correct date. As the judgment of the Court of Magistrates dated 16th September 2009 (but delivered on the 17th September 2009) had been declared null and void by this Court by its judgment of the 25th March 2010, the Court of Magistrates could not simply amend the date of the said judgment, which legally no longer existed, but the same Court had to deliver judgment anew which implies that the Court had to reconsider afresh the merits of the case and deliver judgment as if the previous judgment had never been given. The request for an abstention was accordingly justified. This means that the judgment delivered by the first Court on the 30th July 2010 is null and void and there is no reason for this Court to consider appellant's other grievances.

10. For these reasons this Court disposes of the appeal by declaring the appealed judgment null and void and orders that the record of the case be forthwith sent back by the Registrar to the Court of Magistrates (Malta) as a Court of Criminal Judicature for that Court to decide the case according to law on the merits. Appellant is placed in the position he was before the judgment of the 30th July 2010 was delivered.

< Final Judgement >

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