MALTA

COURT OF CRIMINAL APPEAL

HON. MR. JUSTICE
JOSEPH GALEA DEBONO

Sitting of the 7 th September, 2006

Criminal Appeal Number. 100/2006

The Police.

(Inspector R. Aquilina)

vs.

Kiran Osman Murat

The Court,

Having seen the charge brought against the appellant Kiran Osman Murat before the Court of Magistrates (Malta) as a Court of Criminal Inquiry for having, on the 30th December, 2005, at Silver Star Transport Ltd, which is situated at Summer Street, Mosta,

1) by lewd acts defiled minor omissis of 6 years, a person under age, in breach of Article 203(1)(a) and (c) of Chapter 9 of the Laws of Malta;
2) in the same place, date, time and circumstances, by any means other than those mentioned in article 203(1), instigated, encouraged or facilitated the defilement of omissis, a minor under the age of 12 years, of either sex, in breach of Article 203A of Chapter 9 of the Laws of Malta;
3) in the same place, date, time and circumstances, without a lawful order from the competent authorities and saving cases where the law authorizes private individuals to apprehend offenders, arrested, detained or confined the same minor omissis against her will or provided a place for carrying out such arrest, detention or confinement, and this as a means of compelling the said omissis to do an act or to submit herself to treatment injurious to the modesty of her sex, in breach of Article 86 and 87 of Chapter 9 of the Laws of Malta;
4) in the same place, date, time and circumstances, committed an offence against decency or morals, by any act committed in a public place in breach of Article 209 of Chapter 9 of the Laws of Malta.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 20th March, 2006, whereby the appellant was found guilty, by his own admission, of the first charge brought against him, with all other charges being absorbed by the first, and after the Court saw Article 203(1)(a)(c), 203A, 209, 86, 87, 17(b), 383, 20 and 31 of the Criminal Code, was condemned for a term of imprisonment of three (3) years, the Court ordered a ban on the publication of all names with respect to this judgement.

Having seen the application of appeal filed by appellant on the 30th March, 2006, wherein he requested this Court to revoke the above mentioned judgement by declaring appellant not guilty and by

freeing him of any guilt and/or punishment according to law.

Having seen the records of the case;

Having seen the minute entered in the records of the sitting of the 18th. May, 2006, whereby Dr. Kenneth Grima on behalf of appellant declared that appellant was limiting his ground for lodging his appeal to that concerning the fact that the punishment meted out by the First Court was excessive in the circumstances and that he was withdrawing the other grounds of his appeal.

Having seen appellant's Note of the same date in which he withdrew all grounds of appeal except for those linked to the punishment meted out by the First Court.

Having seen appellant's updated criminal conduct sheet filed by the Prosecution as duly ordered by the Court.

Having heard the oral submissions by learned counsel for appellant and learned counsel for the prosecution.

Having also seen appellant's application dated 20th. June, 2006, wherein he requested to be allowed to insert the note of submissions attached to said application in the records of the appeal and where he requested this Court to take cognisance thereof.

Having seen the Attorney General's replies to said application objecting to the appellant's request, on the grounds that the case had already been adjourned for judgement and the appeal was limited to just one ground as indicated in the records of the case.

Having seen its decree dated 26th. June, 2006, whereby it rejected appellant's request in view of the fact that the merits of the appeal were debated at

length during the hearing and these were limited by Counsel to the punishment inflicted by the first Court and ordered that said note of submissions should not be included in the records of the case, which had been adjourned for judgement since 18th. May, 2006.

Having seen its own order to recall the case to today's sitting for judgement.

Having seen that the grounds of appeal, as limited by appellant as aforestated, now, in brief, are the following, namely that the sentence of three years imprisonment inflicted by the Court of first instance was excessive and unreasonable, given the particular circumstances, in that, contrary to the conclusions reached by the Court of first instance, there did indeed exist special circumstances and this particularly because of the complainants having forgiven the accused and having declared that they wanted nothing more from him than making sure that appellant never again did anything similar to their daughter. Accordingly the Court of first instance should have imposed a lesser punishment by going below the minimum in terms of section 21 of the Criminal Code. Furthermore as appellant had been kept in preventive custody and the time spent in preventive custody was never deducted from the period of imprisonment, this period ought to have been so deducted by the Court of first instance.

Having considered that this appeal has now been limited only to the punishment inflicted by the Court of first instance;

Having also considered that the general principle applied by the Court of Criminal Appeal is that it is not normal for an appeal court to interfere with the discretion of the court of first instance if the punishment inflicted is within the limits imposed by the law and if there is nothing to show that the punishment should have been less than that meted out by the first court. (cf.. "Ir-Repubblika ta' Malta vs. David Vella" **[14.6.1999] ,** "Ir-Repubblika ta' Malta vs.

Eleno sive Lino Bezzina" [**24.4.2003] and other judgements.)**

Now in this case, while the Magistrate's Court found accused guilty of all four charges proffered against him, for purposes of punishment, it correctly held that the last three charges should be absorbed in the first charge of defilement of minors. The punishment laid down by law for the crime of defilement of minors who are under the age of twelve years is imprisonment from three to six years, according to paragraph (a) of the proviso to section 203 (1) of the Criminal Code. It is not contested that the minor in question was only six years old and that therefore the crime was aggravated and liable to the above punishment, which the court of first instance awarded in its minimum, mainly on the grounds that appellant had entered a guilty plea and that he had been forgiven by the minor's parents. Therefore there can be no question that the punishment inflicted falls within the limits laid down by law.

Similarly there is certainly no validity in the argument that the punishment was excessive when it was awarded in its minimum.

Appellant however submits that in this case the court of Magistrates should have awarded a punishment below the minimum as provided in section 21 of the Criminal Code. The facts of the case however do not indicate the existence of any special and extraordinary circumstances in the commission of the crimes in question, which would entitle a court of law to award a punishment below the minimum prescribed by law. Even if appellant might have been the worse off for drink from the Christmas office celebrations, there was no justification for his compelling a six year old girl to kiss his exposed penis when he came out of the toilet where he had been urinating. This was clearly a case of initiating the minor to the practice of oral sex for appellant's gratification. That this experience was a traumatic one

for the minor could be gauged from the way she testified before the lady Magistrate presiding over the court of first instance, during the video conferencing session, recorded on tape and exhibited in the records of the case.

The first court already took into account the appellant's guilty plea filed in the course of his second appearance in court and the fact that the parents of the minor forgave the appellant and it expressly stated this when awarding the minimum punishment. However these two considerations can never be considered as special and extraordinary circumstances which, according to established case law, have to be inherent in the commission of the offence itself.

The Court could not have awarded a suspended sentence of imprisonment as this is not possible where the punishment is in excess of two years according to Section 28A of the Criminal Code. Nor was this a case for the making of a probation order or a conditional discharge under the provisions of Chapter 446 of the Laws of Malta, considering the seriousness of appellant's action.

In this Court's view the court of first instance was correct in awarding the minimum punishment in the circumstances but there was no reason for said court to go below the minimum, even after taking all factors in favour of appellant into consideration.

Having considered;

That with regards to appellant's second ground for appeal on the punishment, namely that the Magistrates' Court did not order that any period spent by the accused in preventive custody should be deducted from his sentence, it is to be noted that according to the recently amended Section 22 of the Criminal Code, such period spent under preventive arrest should automatically be reckoned to be part of

the term of imprisonment to which he has been sentenced. Accordingly, strictly speaking, the Court of first instance did not need to order that the period spent by appellant in preventive custody should be deducted from his prison term awarded in the judgement under appeal. However, in order to dispel any doubts that might arise in this connection, this Court is going to spell this out in this judgment.

For these reasons the Court rejects the appeal and upholds and confirms the sentence of the court of first instance. However it is to be made clear that any period spent in preventive custody by the appellant is to be reduced from the three year prison term as provided by Section 22 of the Criminal Code.

Finally , to protect the identity of the victim, the Court orders that the names, address and other details of the minor child and her parents are not to be mentioned in any press reports or publications of copies of this judgement .

< Final Judgement >

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