



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

**MAGISTRATE DR.
JACQUELINE PADOVANI**

Sitting of the 16 th April, 2007

Number. 856/2006

POLICE
INSPECTOR MALCOLM SPITERI
VS
ARSHAD NAWAZ

The Court,

Having seen the charges brought against the accused Arshad Nawaz, of 30 years, son of late Isaac and late Rahim, born at Pakistan on the 8th April 1976, and currently residing at 6, Nazzareno Street, Sliema, and holder of ID Card number 36104(A), and accused of having, on the 11th August 2006, at around 5pm, at No 6, Nazzareno Street, Sliema, by lewd acts, defiled *omissis*, a minor of *omissis* years.

And accused also of having on the same date, time, place and circumstances, without a lawful order from competent authorities, arrested, detained or confined the same *omissis* against his will.

Informal Copy of Judgement

Having heard the evidence tendered on oath;

Having examined all exhibited documents;

Having seen the record of the proceedings;

Having seen the Articles of Law, indicated by the Attorney General (vide page 86), upon which this Court may pronounce guilt;

Having seen the notes in the records of the proceedings (vide page 87) wherein the accused registered no objection in being adjudicated by the Court of Magistrates.

Having heard the oral submissions of the parties;

Considers:-

Omissis, at page 11 et seq, testified on oath stating that she was the mother of the minor *omissis*, aged *omissis*. In her testimony, she stated that on the 11th August 2006, her son met a foreigner as he was walking through Independence Gardens, Sliema, who insisted on befriending him. Thereafter, he took him to his apartment in Sliema and sexually abused him. *Omissis* declared on oath that she realized that there was something wrong because of the way her son was reacting, in the sense that he was anxious and looked afraid. *Omissis* confirmed document SS, document SS1, a written complaint requesting the Police to initiate criminal proceedings against the accused. *Omissis* stated that she went to Dr Spiteri, a psychiatrist, to better understand how to deal with the experience that her son had gone through, and then she took her son to pediatrician for medical check-up.

In cross examination, *omissis* stated that she works night shifts, and that on that particular day, her son *omissis* was going to swim with some friends. *Omissis* stated that her son told her that this foreigner took him to an apartment in Nazzareno Street, and that whilst he was there, this man

touched his private parts with his hands. *Omissis* said that after this, she took her son to the Police to lodge a report. *Omissis* stated, at page 15, that on the day in question, her son had between one (Lm1) and two Maltese Liri (Lm2) as pocket money.

Omissis, at page 19, stated that on the day in question, he was walking through Independence Gardens, in Sliema, the accused hailed him, however, he continued walking. Thereupon, the accused asked him whether he owned a mobile, and the accused asked for his number. *Omissis* stated that when he gave his mobile number to the accused, the accused immediately phoned him up and told him that when he went home, the accused's name and number would be indicated on his phone. *Omissis* stated that the accused wanted to befriend him, and then offered him a drink. The minor refused and the accused insisted. When the minor was about to leave, and the accused detained him with conversation. The minor *omissis* stated that at one point in time, he told him that he needed to leave because there was his mother was on the beach, and that he said this so that the accused would stop bothering him.

Omissis stated that the accused took him to a kiosk in Independence Gardens and bought a Fanta for him (the minor), and a Coke for himself, both bottles remaining uncorked. Thereupon, he told him that they would go to his flat near the Galaxy to have the drinks. *Omissis* stated that he went with the accused to his flat, and stated that they went through the principal door of the flats, went up the stairs, and the accused asked him to enter his flat, and to make himself comfortable. *Omissis* stated on oath that the accused asked him to sit on a bed, and told him to feel free to lie down on it. The minor declared that he simply sat on the bed.

Omissis stated on oath that the accused started to ask him whether he had any friends, or whether he knew any youngsters of around twenty years of age, so as to befriend them himself. *Omissis* responded that he will try and make the arrangements with one of his friends. The

accused thereupon asked him whether he knew any gays and the minor responded that he was not that way inclined and that he did not like talking to such people. The accused, thereupon, goaded him that he was afraid of what people would think.

The accused then asked him what he was going to do, and the minor stated that he was going to drink his Fanta and leave. The accused then showed him a container which contained a 'special oil'. The accused then offered to oil his body but the minor refused. Thereupon, the minor drank the Fanta and told him that he was ready to leave. However the accused held him by the arm, and with his other hand, he proceeded to oil the genitals of *omissis*. He did this by removing the elasticated shorts and his underpants. *Omissis* stated that the accused continued to oil him for about three minutes, and that during this time he was asking him to let go of him, and he tried to escape his clutches but could not do so.

The minor stated that at one point in time, the accused let him go, and the minor wanted to leave the flat. The accused then told him that they should meet again, and the minor responded with an excuse that he was going abroad for about fifteen days. The accused told him not to tell anyone of his friends or his mother about what had happened and then told him that he was ready to buy a mobile phone card for him, and then gave him twenty five cents (25 cents). *Omissis* stated that at one point in time, the accused went to the bathroom, and came back and told him that he had washed, and asked him whether he wanted to go to the bathroom. The minor however, refused. *Omissis* stated that the accused was wearing jeans and a white vest.

Asked to give a description of the accused, the minor stated that he was very tall and slim, and that he was dark in complexion with a moustache and a full crop of dark hair. *Omissis* stated that on entering the flat, the accused who was wearing a jeans and a vest, changed his clothes and wore only a towel around his middle. Subsequently,

he removed his towel (vide page 24). *Omissis* stated that he had never had a similar experience previously.

In cross examination, *omissis* stated that he had not in fact, contacted any of his friends to meet on the beach on the day in question, but he had his bathing costume with him. Asked why he did not proceed to go down to the beach when the accused was pestering him, the minor responded that he had never imagined that the accused would do such things. The minor continued to say that the accused had told him that they would only go to his house to have a drink, and that he understood this would take a couple of minutes. *Omissis* stated that when the accused bought the drinks, **he had told the bar tender not to open the drinks.** *Omissis* stated that he was actually wearing his bathing suit, and he was also wearing a pair of underpants under the bathing suit.

Omissis stated that when he entered the flat, the accused took him immediately to a room which contained three beds, and that the accused took the drinks and went to open them. The minor stated that the accused then spent a couple of minutes in the bathroom showering, and during that time, he did not in fact inspect the rest of the flat. When he went home, *omissis* told his mother about the incident, and then she took him to the Police station. The minor stated that the accused had brought the oil (that he used to massage his groin) in a tea cup. He also confirmed that he had told all this to the Police. The minor confirmed that he was examined by a doctor, later on in the evening, but that he had not shown the oil massaged into his body to anyone. The minor also stated that this oil had a peculiar smell which he had never before experienced. After the incident, both the shorts and the underpants were washed.

Omissis stated that after he had told the Police of this experience, the Police had taken him in a car and that he had showed them where the flat of the accused was situated. The minor stated that he remained in the car, and that it was the Police who went up for the accused. *Omissis* stated that the Police then asked him to get out of

the car, so as to be in a position to identify the accused. The minor stated that he saw the accused in the staircase of the flat in question. The minor stated that he never entered the flat of the accused again.

At page 35, *omissis* stated that he remained outside the principal door of the flat, and saw the accused as the latter went downstairs, accompanied by the Police. After that, the Police told him to go back into the car. *Omissis* stated that whilst he was in the car waiting in the Police car, he did not hear anyone shouting or crying out in pain. At page 36, the minor identified the accused present in the Court room.

Inspector Malcolm Spiteri, at page 42 et seq, stated that on the 11th August 2006, at around 6pm, he was informed by PS 1126 Fabian Fleri, that a report had been lodged regarding defilement of a child. Inspector Spiteri went to Sliema Police station and found the accused. Inspector Spiteri stated that he was briefed by Police Sergeant that the accused had admitted his involvement in the defilement of a child in the presence of Police officers. Prosecuting Officer stated that he asked the accused whether he understood the English language, and he responded in the affirmative, and that he released a statement on the 11th August at around 7pm, after being duly cautioned in the presence of PC 1214 Lee Dimech.

Inspector Spiteri stated that in his statement, the accused had admitted his involvement in the defilement of *omissis*; that he met the child in a public gardens; took him to his apartment in Nazzareno Street, Sliema, and that he put the child on his lap; held him and touched his private parts for about a minute. The statement was exhibited and marked as document MS at page 47-48.

Prosecuting Officer stated that he also spoke to the child *omissis*, in the presence of his mother, and that the child corroborated the version that was released by the accused. Prosecuting Officer stated that *omissis*, the child's mother, confirmed that she was to initiate and continue criminal proceedings against the accused.

In cross examination, Inspector Spiteri confirmed that he first spoke to the child and then to the accused. He also confirmed that the accused's bedroom contained in fact, four beds. Prosecuting Officer stated that PS 1136 Fabian Fleri was present at the arrest of the accused, but that he did not inform him that the accused was beaten up. In fact, he spoke to the accused after about an hour of his arrest, and that the accused had no markings on his face or body when he was speaking to him, and neither did he complain about anything that had happened to him on arrest (vide page 45).

In his statement, at page 47 and 48, the accused stated that he had been in Malta for a period of two years, and that he had family in Pakistan.

PS 1136 Fabian Fleri confirmed the report lodged by *omissis* on the 11th August 2006, regarding her son *omissis*. He stated that this report was to the effect that whilst *omissis* was playing in Independence Gardens, Sliema, he was approached by a foreigner who asked for his mobile number, which was given to him, and then this foreigner invited him to his house. The boy accompanied the man to his residence, the man offered him something to drink, same man proceeded to the bathroom where he undressed and had a shower, and came out of the shower naked except for a towel. Thereupon, he asked his boy to sit on his lap, and asked the boy to undress. The boy did not comply, and the man lowered the trousers of the boy.

At page 49, Sergeant Fleri stated that the boy put his trousers back on, and the man lowered them for a second time, and that he took some oily substance from a cup and proceeded to oil the private parts of the boy. PS 1136 stated that at this time, the boy asked the man to let him go, but the man detained him. Subsequently, this man let go the boy, and gave him twenty five cents (25 cents). *Omissis* then told his mother of his experience and they both came to Sliema Police station. PS Fleri stated that the boy gave him a description of the man, given to him at

page 50, and took him to the flat in Nazzareno Street, where the incident had occurred.

Thereupon, PS Fleri, together with PC 70, PC 857 and PC 99, proceeded to the flat, together with the child and the mother, the boy indicated the residence of the accused, and eventually identified the accused as the person who had molested him. PS Fleri stated that he went up the residence of the accused, and cautioned him and searched for a cup with an oily substance in it, however he only found a broken cup in the kitchen sink. Thereupon, he arrested the accused. PS Fleri stated that he asked the accused whether he was in the vicinity of Independence Gardens in Sliema, to which the accused answered in the affirmative, and whether he had met or spoken to a boy, and he also answered this in the affirmative. PS Fleri asked the accused whether he had asked the boy to accompany him home, and the accused answered in the affirmative, but he gave no details about what happened whilst they were in the residence.

The accused then asked PS Fleri whether he could speak to the parents of the child, because he wanted to excuse himself with them, and that the accused had said that he was sorry for what he had done, he knew it was wrong and never do it again. PS Fleri stated on oath that he had asked the accused whether what the child was saying was the truth, he informed the accused what the child had said, and that the accused had answered in the affirmative. Asked whether the accused was fluent in English, PS Fleri stated:

**‘Not very fluent, but he spoke quite good English.’
(vide page 51).**

PS Fleri then informed Inspector Spiteri who proceeded with the investigation. The Police report was exhibited and marked as document PS, at page 55 et seq. PS Fleri confirmed that he had not found a cup with oily substance in it, and declared on oath that he accused was in his sight from the moment he entered the flat, until he was taken to the Police station, and that at no time was he

beaten up by any member of the Police. PS Fleri confirmed that when the accused was taken to the Police station, PS Fleri was in the front passenger seat, the accused was at the back, together with PC 99 Mario Portelli, whilst PC John Laferla was driving the car. At no time, the accused resisted arrest.

PC 70 Omar Caruana confirmed the evidence of PS Fleri, regarding the report that was lodged by *omissis* regarding her son on the 11th August 2006. PC 70 confirmed that he was involved in the arrest of the accused, at Nazzareno Street, Sliema, the residence indicated by the boy *omissis*. PC 70 stated that he was driving the car, and Sergeant Fleri was in the front passenger seat, whilst *omissis* and *omissis* were at the back of the car. PC 70 stated that when the Police knocked on the door of the accused, he opened the balcony and looked down, and then proceeded to open the door. PC Caruana identified the accused present in the Court room. PC Caruana confirmed that the description given by the boy to the Police, in fact tallied well with the appearance of the accused.

PC 70 stated that at first, the accused resisted with the Police regarding the putting on of hand cuffs, and that the Police used the necessary force to put the cuffs on. PC 70 stated that the only force that was used consisted of pulling the accused on so as to facilitate the putting on of the hand cuffs. PC 70 stated that the accused wanted to meet the parents of the boy, and he was saying that he was very sorry for what he had done, and he kept on repeating this even at the Police station.

PC 70 stated that at one point in time, as they were putting the accused in the cell, the accused asked to speak to Sergeant Fleri and that he had left Sergeant Fleri alone with the accused for less than a minute. Sergeant Fleri had come back and said that the accused had admitted. PC 70 stated that the Police were in two cars, a Police car commissioned to the Sliema Police station, and another car commissioned to the Mobile Unit, and that he was accompanying the Police Sergeant whilst the other

two Constables were in the other car. When the accused was arrested, the accused was put in the Mobile Squad car, and he was sitting at the back, together with PC 857 John Laferla and PC 99 Mario Portelli. PC 70 was unaware of any allegations made by the accused that he was beaten up by the Police. PC 70 confirmed that when the accused came out of the Mobile Squad car, he had no visible injuries on his hands or face, or on his person, and that he was calm at all times.

As regards language problems, PC 70 stated that the Police started to talk to him in Maltese, thinking he was of Arabian nationality, but that the accused had answered back in English, and after that they had no problems communicating with him at all.

PC 1214 Lee Dimech, at page 67 et seq, confirmed his presence during the statement of the accused, stating that the accused was properly cautioned according to law, that he admitted that he had touched the young boy, and that he signed the statement. Asked whether there were any language problems, PC 1214 stated '**no, nothing at all.**'

At page 72, Inspector Malcolm Spiteri exhibited document MSX, which is the birth certificate of the minor *omissis*.

PC 857 John Laferla, at page 74, confirmed that on the 11th August 2006, a woman and a child of around thirteen years of age, came to lodge a report to the Police Sergeant. He confirmed that the Police accompanied the child and the mother to a particular residence which the child himself had indicated, the Sergeant went upstairs to the flat, and gave him instructions to escort the accused to Sliema Police station. PC 857 stated that he was driving the Police car and escorted the accused back to the Police station. PC Laferla identified the accused present in the Court room.

In cross examination, PC Laferla stated that prior to this case, he had not known the complainants or the accused. PC Laferla confirmed that he did not take any part in the search and that he remained in the staircase. He also

confirmed that the accused didn't offer any resistance during arrest.

PC 99 Mario Portelli confirmed the evidence given by PC 857 Laferla, and that he had received instructions from Sergeant Fleri to accompany him to Nazzareno Street, Sliema, to a place where *omissis* indicated. PC Portelli identified the accused as the person who was found in the residence indicated by the boy, and that he escorted the accused back to the Police station.

At page 89, the accused Arshad Nawaz stated that he arrived in Malta on the 6th of October 2004, and that he spend one year sixteen days living in a closed centre, and ten months living in an open centre, until he found his own residence in Sliema. He stated that he had only been in this flat for ten days, but which he shared with other two Pakistani and an Indian. This flat contained one kitchen, one bathroom, and one bedroom. In the bedroom, there were four beds, that initially they had three beds, and that subsequently they had asked the owner for another bed, and he had acceded to the request.

The accused stated that on the 11th August, he had received a phone call from his home country in Pakistan, where his family asked for some money, and he went out to look for a job, asking for work at divers, hotels and restaurants. After that, he was walking by the sea in a small park, so he sat down and proceeded to phone some friends for money. He stated that a Monsignor Philip Calleja gives him an allowance of five pounds (Lm5) every ten days. Whilst he was on the mobile, he saw a young man, and so he said hello, the boy responded and then asked him how much he paid for his mobile. They started to talk and the boy gave him his mobile number.

The accused stated that there was a hotel near this park, and that he went there and bought a Pepsi, and gave the hotel manager ten pounds (Lm10). Because the boy was standing beside him when he asked for a Pepsi, he asked the boy whether he wanted a drink, and the boy accepted. The accused stated that he bought the drinks and then

they walked over to a table and sat down. The accused stated that they were finishing with the drinks, and he was talking on the mobile, and the boy asked him where he came from. The accused answered that he came from Pakistan and all the while, he was speaking in English, he admitted that he spoke very little English but that he knew and spoke the Arabic language much better than he spoke English, and in this manner, he could understand the boy, who was talking to him in Maltese.

The accused stated that whilst they were conversing, the boy was talking to him like a man rather than a boy. The accused stated, at page 93, that he told the boy that he was thinking of leaving because he had to go to have a shower and find a job:

'At that moment I was near my door, when I went near my door I tell the boy bye bye and he answered I don't hear it, I don't remember that he gave me any answer. I opened my door, when I was closing my door he was still standing in my door, when I was closing the door I saw he was standing in my door, I was thinking he wants to speak to me but I don't know what. He didn't say anything. He said ok, I went inside the flat, I changed my clothes, and when I went in the flat I removed my clothes, and then after a few minutes I heard that somebody was knocking on my door. I did not realize that who is there, then somebody knocked again and I see from the balcony and saw outside, and the boy was standing near my door. I asked him what do you want and he asked me, give me one pound...I wrapped my towel, I went down and I gave him twenty five cents, he told me I return the twenty five cents tomorrow, I said there is no problem and he left. I was still at home after one hour, I changed my clothes after one hour.' (vide page 94).

The accused insisted that the boy never came upstairs to his flat. The accused stated that after about one hour, somebody knocked very hard on his door, and when he opened the door, he found the Police:

‘As soon as I opened the door, the Sergeant went inside and he hit me very hard on my face.’

Then they hand cuffed him, they asked him for his name, and then three Policemen started hitting him. They kept him and punched him, and the accused stated that one Policeman had a baton and that he hit him with it on the temples, that the Policeman who hit him with the baton was called Johnny by the other Policemen. After that they arrested him and put him in a cell. When he was taken to the Corradino Correctional Facility, he was seen by a doctor who gave him two tablets.

The accused stated, at page 96, that the Policeman who had stated in Court that he was the driver, he was not in fact driving the Police car, and in fact was sitting beside him in the Police car, and during the journey, the Policeman who said was the driver, actually slapped him about four or five times. In fact, the Sergeant who was in the car, told this Policeman not to hit him any more. The accused reiterated, at page 96, that during the journey in the car, he was punched about five or six times. At the Police station, he met the Prosecuting Inspector and the actual driver of the car, and that he told the Inspector that he had given a Pepsi and twenty five cents to a child, and that if it was wrong, he was ready to go to his parents and ask for forgiveness.

The accused stated that the Inspector asked him whether he wanted a translator, but that he was out of his mind and he could not tell him anything. The accused stated that his understanding of the English language was very shallow. With reference to the questions that were put by the Prosecuting Officer during the statement, the accused stated that he understood a little bit and that he couldn't give an answer to some of the questions. The accused stated, at page 99, that the doctor at Corradino Correctional Facilities saw him on the 14th August. By that time, he couldn't eat and couldn't sleep, and this because his jaws were locked open, so that he couldn't close his mouth. At about 10pm, he went to hospital and the doctor tried to close his mouth, he then proceeded to take an X-

ray, gave him an injection and managed to close his mouth.

After five days, he was sent to St Luke's Outpatients in the dental clinic, where Dr Cassar examined him. This doctor told him that there were no fractures, but that he had a problem in the joint. Since then, he had been admitted to hospital about eight times, and that his mouth had locked wide open another four subsequent times. The accused stated that he did not understand why the boy was making up the story, and why he was lying. The accused stated that when the Police were hitting him, the boy came upstairs into the flat, and that he had never done this before. The accused denied that he ever touched or molested the boy sexually.

After the statement was read back to the accused, the accused, with the assistance of his translator, stated that he did not understand the questions that were being put by the Prosecuting Officer. The accused stated that:

'Everything happened in the park, he said its there whatever he said but everything happened in the park not in the house.' (vide page 102).

Asked whether he had in fact touched the private parts of this boy outside the park, the accused stated that because of the beating by the Police, he didn't know what he was saying to the Police, but whatever the Inspector said, he was very kind to him, and that he said **'yes'** to him but in fact never happened.

At page 103, the accused stated that at no time did the boy actually sit in his lap, that the boy was sitting next to him whilst he was drinking the Pepsi. Asked for the reason why the accused chose to sign the statement, the accused said that he did so because he was scared that the Police were going to continue beating him up, and this in spite of the fact that the Inspector was kind to him:

'the other ones were standing behind him, they saw me and I was afraid, I just signed it. I said whatever...'

In cross examination, the accused said that he paid a hundred and twenty pounds (Lm120) in rent for the flat, which he shared with a number of friends. The accused stated that the Policeman who took the witness stand and said that he was the driver was in fact not the driver of the car. He also confirmed that the third witness who recognized his signature was in fact driving the Police car. In the flat, the accused said that there were four Policemen in all, there were three in the car besides himself. The accused said that it was not true that he asked to speak to the Sergeant on his own, and that during the statement, there was the Inspector and two other Policemen present, that is, the Sergeant and the one who was the driver.

The accused stated that the Inspector did not inform him that whether he needed to be seen by a doctor, and that he was too afraid to ask him for that. The accused also confirmed that at no time during the statement did he complain about any injuries to his face to the Inspector. It was only when he spoke to his lawyer that he told him about what happened.

At page 107, the accused stated that he does not remember any of the questions that were put by the Inspector during the statement, but he did remember that he had signed the statement. Asked by the sexual preferences, the accused stated that he liked women and that he was married and had kids.

Victor Gilson, at page 110, stated that he was the owner of the flat which was rented out to the accused, that is, a second floor flat, which consisted of one large room, and that it contained more or less four beds. Gilson stated that sometimes, the tenants would take up one bed from another flat, and that he had no control over this. He remember that the tenants in the second floor had asked for an additional bed, and that since then, they had asked for yet another one. Asked to inform the Court as to the precise number of beds, Gilson stated that there were approximately four (vide page 112). Apart from this large

room, there was a dining room, kitchen and a shower and toilet.

At page 124, Dr Catherine Camilleri, working with the Jesuit Refugees Service, stated that she had known the accused who had arrived in Malta in 2004, and that whilst he was in detention, she had spoken to him on a number of occasions, and she stated that if she did not have an English interpreter, it was impossible to discuss anything other than the very basic things, since the accused's English was very limited. In fact she always used the aid of an interpreter to be able to talk to him. In the course of his detention, Dr Camilleri stated that they had no problems whatsoever or complaints against the accused.

Deliberates:-

The first question that this Court is going to address is the validity or otherwise of the statement, document MS, released by the accused, and this examination necessarily involves two issues:

1. whether the accused in fact possessed the requisite mastery of the English language to enable him to understand the questions that he was answering; and
2. the voluntariness of the statement, in view of the serious allegations of physical abuse by the members of the Police who effected the arrest of the accused.

In the light of the testimony given by Dr Catherine Camilleri, at page 124 et seq, this Court is not in fact satisfied that the accused in reality, possessed the requisite knowledge of the English language to enable him to understand the questions that were put to him, and this in spite of the fact that the Prosecuting Officer, in fact, used very simple and very short questions.

Furthermore, after hearing the serious allegations that the accused put forward in his testimony regarding the physical abuse that he was subjected to in hands of the arresting Officers, it is the opinion of this Court, that it would be most unwise to put any probatory value on the

statement of the accused, and therefore, declares it invalid according to law.

Indeed, in view of the allegations of physical abuse of the accused, the Court deems it similarly improper to rest on any evidence given by the members of the Police who effected the arrest of the accused, and the search in his residence.

The Court will therefore concentrate on the evidence and testimony tendered by the minor and his mother, together with the evidence given by the accused with the aid of the interpreter and evidence tendered by Victor Gilson.

Considers:-

Indeed, the version of events, as outlined by the minor, are diametrically opposed to those put forward by the accused in his testimony before this Court.

In matters relating to the credibility of witnesses, Article 637 of the Criminal Code provides:

'Any objection from any of the causes referred to in articles 630, 633 and 636, shall affect only the credibility of the witness, as to which the decision shall lie in the discretion of those who have to judge of the facts, regard being had to the demeanour, conduct, and character of the witness, to the probability, consistency, and other features of his statement, to the corroboration which may be forthcoming from other testimony, and to all the circumstances of the case.'

In the light of the guidelines portrayed in Article 637 of Chapter 9 of the Laws of Malta, and after having examined the manner in which the minor and the accused tendered the evidence before this Court, it is this Court's considered opinion that the testimony given by the minor *omissis*, is credible, and was consistent throughout, in spite of a very thorough and lengthy cross examination.

In his evidence, the minor recounted to the Court the manner in which he was accosted; how the conversation struck up; the manner in which the offer for a drink was made; how the accused actually bought two un-opened bottles of soft drinks; and how the accused decided to have the refreshments in his apartment. The minor described to the Court a room containing three beds; how the accused went to shower; undressed and came back, clad only in a towel; how he forced the minor to sit on his lap; and how he molested him by pulling down his trunks and oiling his groin.

In contrast, the accused denies the entire incident, and states that he actually bought the drinks in a nearby hotel, but these drinks were consumed in the park; how the boy followed him to his apartment and left whilst he was still outside of his apartment. The accused also states that somebody knocked on his door after he had a shower, and he discovered that it was the boy who asked him to give him a pound (Lm1); that he went downstairs clad in a towel and gave him twenty five cents (25 cents).

Apart from several inconsistencies in the version of events put forward by the accused, {including that he didn't have any money ((vide page 91), so much so that he didn't even have any credit left on his mobile to answer a telephone call (vide page 92), he still allegedly managed to pay for the drinks with a ten pound (Lm10) note (vide page 92 middle section), and give the boy twenty five (25) cents}, this Court found the manner in which the accused gave testimony, a complete absence of outrage at the 'unfair allegations'; a complete lack of righteousness, that left this Court completely unconvinced about the version of events as given by the accused. Neither did the accused have any explanation of why the minor would be lying in such a malicious way against him.

The accused, in addition, failed to corroborate his version of events by producing in evidence the hotel manager, from whom he had allegedly bought the drinks, and allegedly sat outside with the boy enjoying them. This would have been a perfect alibi.

Apart from this, the evidence of Victor Gilson and 'his approximately four beds', is dicey to say the least.

The Court will now address the question as to whether acts of undressing the minor and oiling his groin are in fact lewd acts in terms of law.

Article 203(1) of Chapter 9 of the Laws of Malta states:

'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:

Provided that the offence shall be punishable with imprisonment for a term from three to six years, with or without solitary confinement, in each of the following cases:

- (a) omissis;*
- (b) if the offence is committed by means of threats or deceit.'*

As to what constitutes actual defilement, the Court of Criminal Appeal in the case *Police versus Wiffen*, decided on the 8th January 1996, reiterated:

'As to the requirement of the actual defilement, this is obviously not something that can be measured with any known specific instrument, but it is something which has to be assessed by the appointed Judge – the lay Judge in the case of a trial by jury, the professional Magistrate or Judge in all other cases – taking into account all the circumstances of the case, including in particular, the age of the victim and the nature of the act or acts.'

Without a doubt, the actions of the accused in deluding the boy to accompany him to his flat and in massaging oil in the area of his groin, constitutes lewd acts, with particular reference to the relatively young age of the minor, that is *omissis* year old boy who, as was shown, had no previous sexual experience in his life.

Indeed, in the case *Police versus Andrew Bonnici*, decided on the 23rd January 1998, the Appellate Criminal Court held:

‘Tifel ta’ appena tlettax-il sena li jigi espost ghall-eghmil li jaghmel l-appellant, kemm fuqu nnifsu, kif ukoll fuq il-persuna tal-istess tifel, ma jistax ma jigix korrott anke jekk forsi dak it-tifel ikun diga’ jaf certi fatti tal-hajja, jew ikollu xi esperjenza sesswali. Altru esperjenza sesswali fil-kors normali tal-izvilupp fizjologiku ta’ dak li jkun, u altru impozizzjoni ta’ sitwazzjonijiet determinati minn eghmil zieni, li manifestament jipproducu lezjoni f’integrita’ morali tal-minorenni.’

In its examination of whether or not the actions of the accused **actually defiled** the minor concerned, this Court also examined the principals laid out by the Court of Criminal Appeal in the case *The Republic of Malta versus Carmelo Spiteri*, decided on the 20th March 1989, wherein it was stated:

‘Huwa fatt li jistghu jinqalghu kazijiet fejn l-allegat suggett passiv tar-reat ikkontemplat fl-Artikolu 203, minhabba hajja dedikata ghall-laxxivja u ghall-pjaciri sesswali, ikun fi stat ta’ travjament morali tant komplet li difficli wiehed jista’ jimmagina kif jista’ jigi ulterjorment korrott, u kazijiet bhal dawn gieli gew ikkunsidrati minn din il-Qorti, izda huwa cert ukoll li l-esperjenza sesswali precedenti mhux necessarjament teskludi l-possibilita’ li jkun hemm korruzzjoni ghaliex kif intqal mill-Qorti tal-Appell Kriminali, in re, Il-Pulizija versus George Portelli, deciza fit-2 ta’ Frar 1975, (fejn dik il-Qorti kienet abbraccjat it-tejorija moderata tal-Maino), mhux qed jinghad li persuna gia parzjalment korrotta, ma tistax tigi korrotta izjed. Si tratta ta’ kwistjoni ta’ bilanc.’

In this case, the Prosecution and the Defense failed to prove that the minor *omissis* had in fact, any previous sexual experience with members of either sex. On the contrary, from the boy’s testimony was shown that this incident was in fact his first sexual experience. There is no doubt in the Court’s mind therefore, that the actions

practiced by the accused on the minor were in fact, lewd acts, which actually involved a corruptive influence on the boy.

Furthermore, there is no doubt that the accused effected the offence of corruption of minors in this case, **by deceiving the minor when he encouraged him to go to his apartment on the pretext of having a drink, and in so doing, with malice aforethought bought uncorked bottles of drinks.**

With regards to the offence contemplated under Article 86 of Chapter 9 of the Laws of Malta, that is, with illegal arrest and detention of the minor, it is this Court's considered opinion, and an opinion which is consonant with the latest jurisprudence by the Criminal Court, that the actions practiced by the accused on the minor fall fairly and squarely within the perimeters delineated by Article 203, in that the 'detention' by the accused of the minor, was in fact, an essential element of the offence of defilement of minors, and does not in fact constitute a separate offence of arrest and illegal detention – vide *Repubblika ta' Malta vs Denis Pandolfino et*, decided on 19th October 2006 by Onor Mr Justice Joseph Galea Debono.

For these reasons, the Court finds the accused guilty of the first charge brought against him, and after having seen Article 203(1)(b) of Chapter 9 of the Laws of Malta, condemns him to three years imprisonment. This Court furthermore, finds the accused not guilty of the second charge of illegal arrest and detention of the minor, for reasons above stated, and acquits him of the same.

This punishment is being given after the Court took into consideration the facts of the case; the gravity and the nature of the offence; age of the minor; and that there is no evidence to suggest that the accused had a previous criminal record.

The Court furthermore, in view of the allegations of physical abuse by members of the Police, orders that the

Informal Copy of Judgement

Commissioner of Police investigate this case thoroughly and proceeds with criminal proceedings as necessary.

The Court orders that a copy of this judgment be served to the Commissioner of Police.

The Court furthermore, orders that a copy of this judgment be served on the Director of Sedqa, Mr Joe Gerada, and recommends that the minor be given the necessary therapy to enable him to overcome this abuse.

< Final Judgement >

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