MALTA

COURT OF CRIMINAL APPEAL

THE HON. CHIEF JUSTICE
VINCENT DE GAETANO

Sitting of the 11 th June, 2007

Criminal Appeal Number. 170/2007

The Police

v

Arshad Nawaz

The Court:

Having seen the charges preferred against Arshad Nawaz son of the late Isaac and late Rahim, born at Pakistan on the 8th April 1976, and holder of ID Card number 36104(A), to wit the charges of having (**1**) on the 11th August 2006, at around 5pm, at No 6, Nazzareno Street, Sliema by lewd acts, defiled A.B.[1], a minor of fourteen[2] years; as well as having (**2**) on the same date, and at the same time, place and circumstances, without a lawful order from competent authorities, arrested, detained or confined the same A.B. against his will;

[1] These are not the true initials of the minor involved.
[2] From the birth certificate exhibited at fol. 73 it transpires that the boy was only thirteen at the time of the incident; he turned fourteen in the latter part of November of last year.

Having seen the judgment delivered by the Court of Magistrates (Malta) on the 16 April 2007 whereby that court acquitted the said Arshad Nawaz of the second charge, but found him guilty of the first charge, that is of defilement of a minor, and sentenced him to three years imprisonment;

Having seen the application of appeal of the same said Arshad Nawaz whereby he requested that this Court vary the judgment of the first court by acquitting him also of the first charge;

Having seen the record of the case; having heard submissions by counsel for appellant and by counsel representing the respondent Attorney General; considers:

Appellant has in effect two grievances. The first grievance, spread over pages two to five of the application of appeal, is that the first court should not have found him guilty of the offence of defilement. Appellant, while protesting his innocence, claims that the boy's version of what happened is riddled with inconsistencies and he points out several of what he considers to be such inconsistencies (see pages four and five of the application). He also criticises the first court's comments regarding his own testimony. The second grievance is to the effect that even if, for the sake of argument only, he did defile the boy, the offence was not aggravated in terms of paragraph (b) to the *proviso* of subsection (1) of Section 203 of the Criminal Code, that is aggravated because of the fact that it was committed "by means of threats or deceit".

This court has carefully examined all the documents and, as suggested by appellant himself in his application of appeal, has also examined the video recording of the boy's testimony given before the first court. Even if one were to take into consideration only – as the first court did – the evidence of the boy and that of the accused as being the only two persons who can really shed light on what actually happened (the evidence of the boy's

mother, of Inspector Spiteri, of Mr Gilson and of Dr Cathrine Camilleri being only marginally relevant to the core issue in this case), this Court is satisfied that what happened in this case was that appellant lured A.B. to his (appellant's) apartment on the pretext that they were going to have a drink – a Coca and a Fanta – and there, after removing the boys swim shorts and underpants, proceeded to touch the boy's genitals. The fact that the boy said that in the room where this act took place there were three beds whereas in effect there may have been four, does not detract from the truthfulness of the boy's version of events in substance. Childish curiosity coupled with appellant's guile ensured that the boy remained in the apartment even while appellant showered, returning a few moments later to perform the lewd acts above mentioned. Appellant's first grievance is therefore dismissed.

As to appellant's second grievance, this is likewise unfounded. It is patently obvious that all of appellant's behaviour and actions when he first met the boy outside – chatting him up, offering to buy him a drink, and then buying two bottles and ensuring that both bottles remained uncorked so that the drinks would have to be consumed in his apartment, were all acts specifically pre-ordained to ensuring that the boy follow him to the apartment where he could then proceed to commit the lewd acts. There were no threats in this case but there was certainly deceit. The deceit referred to in paragraph (b) of the *proviso* to subsection (1) of Section 203 consists of all those deliberate words or acts, preceding or accompanying the lewd acts, which facilitate the performance of those same acts by inducing false ideas or perceptions in the minor, including a false sense of security. Obviously, what amounts to a deception will depend also on the age of the minor – what deceives a five year old may not necessarily deceive a fourteen or fifteen year old. In this case there was deception perpetrated by appellant: A.B. went to appellant's apartment because he was led to believe that all that appellant wanted was to have a word and a drink.

For these reasons the Court dismisses the appeal and confirms the judgment of the first court.

< Final Judgement >

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