



COURT OF CRIMINAL APPEAL

**THE HON. MR. JUSTICE
MICHAEL MALLIA**

Sitting of the 25th March, 2010

Criminal Appeal Number. 348/2009

**The Police
(Insp. Therese Sciberras)**

Vs

Ismail Guclu

This, (25th) day of March, 2010

The Court,

Having seen the charge brought against the appellant Ismail Guclu before the Court of Magistrates (Malta) as a Court of Criminal Judicature with having

a) in June 2006, in St. Paul's Bay and/or in other localities on these islands, by several acts committed by him even in different times, that constitute violation of the same provisions of Law and committed in pursuant of the same design by lewd acts defiled a minor, i.e. *Omissis* of 15 years, being a Maltese National and this in violation of Article 203 of Chapter 9 of the Laws of Malta;

- b) with having in the same place, time and circumstances, committed any violent indecent assault on *Omissis* of 15 years, being a Maltese citizen, and this in violation of Article 207 of Chapter 9 of the Laws of Malta;
- c) with having in the same place, time and circumstances, committed an offence against decency or moral in a public place or in a place exposed to the public and this in violation of Article 209 of Chapter 9 of the Laws of Malta;
- d) with having during the year of 2004, in St. Paul's Bay or in other localities in these islands by several acts committed by him at different times which constitute a violation of the same provisions of Law and committed in pursuance of the same design by lewd acts, defiled a minor, i.e. *Omissis* of Maltese nationality, 12 years of age, when he had been charged with her care and this in violation of Article 203 of Chapter 9 of the Laws of Malta;
- e) with having in the same place, time and circumstances committed in a violent indecent assault on *omissis* of Maltese nationality. 12 years of age when he had been charged with her care and this in violation of Article 207 of Chapter 9 of the Laws of Malta;
- f) in July 2006 in Qawra, with having committed an offence against decency or morals or by any act committed in a public place or a place exposed to the public and this in violation 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 16th September, 2009, by which, after that Court had seen articles 17, 18, 203(1)(c), 207 and 209 of Chapter 9 of the Laws of Malta, found the appellant not guilty of the first charge brought against him and acquitted him of the same, but found him 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 and the Court acquitted him of the same, guilty of the sixth charge and condemned him to three years and six months imprisonment from which the

period that the accused spent in detention is to be deducted in terms of Law.

This punishment was accorded after the Court took in consideration the criminal record of the appellant and the fact that this case involved two minor girls and a young female adult, and the fact that in the realms of lewd acts, all things being considered, the acts committed on these three females were of a more minor nature.

Having seen the application of appeal filed by appellant on the 30th September, 2009, wherein he requested this Court to reverse the appealed judgement by declaring it null and void or, alternatively, vary the said judgement by confirming the acquittal from the first and the fifth charges and revoking it in the part where appellant was found guilty of the other charges proffered by the Police or, alternatively, by varying the punishment meted out by the Court of Magistrates.

Having seen the records of the case.

Now duly considers.

That the grounds of appeal of appellant can be briefly summarised as follows:-

1. That the judgement of the First Court is null since its date is indicated as the 16th September, 2009 whereas the judgement was actually delivered on the 17th September, 2009. This results clearly from the minutes in the acts of the proceedings.
2. 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.
3. 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.

4. 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 *omissis*.. 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!

5. That the evidence produced by the prosecution is contradictory, inaccurate and highly suspicious and fails to reach the level of proof required at law.

6. That the facts as described by *omissis* exclude the offence of defilement of minors.

7. That the First Court could not find appellant guilty of the aggravating circumstances 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.

8. That 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.

9. That there is no evidence whatsoever to support the application of section 18 of the Criminal Code. The application of the said section 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.

10. That 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.

Considers :

That the appellant brought to the attention of the Court that the judgement found in the records of the case dated 16th September 2009 is not the original judgement once according to the minutes of the sitting of the 17th September 2009 judgement was pronounced on that date and not the day before.

The defense and the prosecution agreed that once no original judgement is found in the records, the Court would have to refer to the copy that has a mistaken date. They also agreed that this mistake nullifies the first judgement so that this Court should order that the records be sent back to the First Court for judgement to be delivered again according to Law with the correct date.

Considers :

That it is manifestly clear that the date on the official copy of the first judgement is incorrect in so much that it should have read the 17th of September 2009 and not 16th of September 2009.

It therefore disposes of this appeal by declaring the appealed judgement null and void because of the mistaken date of delivery and consequently orders that the records of proceedings be sent back to the First Court for judgement to be delivered with the correct date of its pronouncement.

Informal Copy of Judgement

< Final Judgement >

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