



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

**MAGISTRATE DR.
JACQUELINE PADOVANI**

Sitting of the 10 th January, 2011

Number 435/2010

**POLICE
INSPECTOR MELVYN CAMILLERI
VS
DAVID JOHN MORTIMER GROSS**

The Court, having seen the charges brought against David John Mortimer Gross, 50 years old, son of William John Mortimer and Claire Olivia Gross, born at Essex, United Kingdom on 9th February 1960, residing at Crystal Court, Flat 7, Msida Circus, Msida, holder of I.D. Card Number 47372A;

Charged with having:

In Malta, acquired or were in possession of an indescent photograph, film, video recording or electronic image of a

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minor and also of a minor who has not completed the age of 9 years;

Having heard the evidence tendered on oath;

Having seen the consent of the Attorney General and that of the accused for the case to be treated with summary proceedings;

Having seen the note of submissions of the Commission of Police dated 21st of June 2010 and that of the accused dated 26th of October 2010;

Having heard the oral submissions of the parties;

Deliberates:

The accused is being charged with possession of child pornography, possession which was elaborated on by PS 266 Stefan Decelis.

PS 266 Stefan Decelis, in his testimony informed the Court, with the precise details of the amount of images of child pornography as well as the gravity of levels of pornography according to Copine Taxonomy (vide Dok.PS).

Furthermore, according to Dok.MC, which is the statement released by the accused, the same accused admitted to sending over pornographic images over the MSN and that he had viewed child pornography on the internet.

The accused chose not to give evidence.

Deliberates:

In the note of submissions, the Defence reiterates that the accused was in possession of child pornography without any positive interaction on his part, in the sense that the images found on the accused's computer was a result of images which pop-up on the computer and are stored in 'temporary internet' file folders.

Indeed the Defence cited amongst others **Barton vs. The State**, where the Court of Appeal of the State of Georgia, USA, held:

“all computers will store pictures or other information viewed over the internet on the computer's hard drive, in temporary internet file folders. There is nothing that such a user can do to prevent the computer from storing such items. Murray also explained that not everything stored in a computer's temporary internet file folder results from the affirmative conduct of a computer user. Rather, even those images which 'pop-up' on a computer screen, even though neither sought nor desired by the computer user, are stored on the computer's hard drive. Furthermore, Murray testified that no one using the computer can retrieve information stored in the temporary internet file folders without special forensic software.”

In the case under review, the Prosecution, by means of the report Dok.PS (vide pages 7, 8 and 9), proved that several images of child pornography of children under the age of nine (9) were last accessed on the 16th of January 2010. Furthermore, the particular website, which the accused admits to visiting i.e. 'www.lubeyourtube.com' is a very specific site (not the ordinary adult pornographic site) where it is more in the nature of a social contribution network site, where young males exchange intimacies and become vulnerable in the hands of psychologically disturbed older males. Moreover, in his statement, the accused, whilst confirming that he is the exclusive user of his computer, admitted that he sent some pornographic pictures on MSN and that he saw some child pornographic pictures on the internet.

Therefore the Court finds the accused **David John Mortimer Gross** guilty as charged, and after having seen Article 208A (1)(b), (1)(c), (3), 28A and 28G of Chapter 9 of the Laws of Malta, Article 7(5) of Chapter 446 of the Laws of Malta, **condemns the accused to a period of eighteen (18) months imprisonment suspended for a period of two (2) years.**

In addition, the Court is issueing a **Supervision Suspended Order against the accused, for a period of two (2) years**, under the supervision of the Director of Probation Services or any other Probation Officer so nominated.

Furthermore the Court is issueing a Treatment Order against the accused, for the duration of two (2) years, under the medical care of Psychologist Roberta Holland who shall be responsible for the Treatment Plan which best suits the requirements of the accused, such that however there shall be, at least, one (1) therapeutic session per month for the proscribed period above mentioned.

Furthermore, the Court orders the confiscation and the destruction of the illegal pornographic material found in the possession of the accused and which has been seized in these proceedings.

The Court orders that a copy of this judgement be notified to Director of Probation Services and Psychologist Roberta Holland.

The Court, in according punishment, took into consideration the fact that the accused is a first offender, the fact that he pleaded guilty to all charges in the early stages of the proceedings and in view of the amount of images of child pornography found on the accused's computer as well as to the gravity of images found as per the report Dok.PS exhibited by the Officer within the Cyber Crime Unit of the Police.

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