Buergin Juerg *v* Public Prosecutor
[2013] SGHC 134

Case Number : Magistrate's Appeal No 97 of 2013

Decision Date : 17 July 2013

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Selva K Naidu (Liberty Law Practice LLP) for the appellant; Isaac Tan and Toh Puay San (Attorney-General's Chambers) for the respondent.

Parties : Buergin Juerg — Public Prosecutor

Criminal Law – Elements of Crime – Mens Rea

17 July 2013

Choo Han Teck J:

1 The appellant is a Swiss national, aged 41. He was a former banker. Sometime in 2010 he came across a website called "The Vie Model" which offered escort services. The person running this business was Tang Boon Thiew ("Tang"). Through the telephone number provided, the appellant contacted Tang. The appellant arranged to meet one of the escorts known by the nickname "Chantelle". He met her twice and they had sexual relations on both occasions for which he paid the agreed fees of $600 and $650 respectively. Chantelle was 17 years and 6 months old on the first occasion and 17 years and 9 months old on the second. Consequently, when police investigations discovered the appellant's involvement they charged him with two counts under s 376B(1) of the Penal Code (Cap 224, 2008 Rev Ed). The appellant was convicted and sentenced to four months and three weeks imprisonment for each charge and the court below ordered the sentences to run concurrently with effect from 8 May 2013. The appellant was still serving his sentence when his appeal before me was heard. Section 376B(1) of the Penal Code reads as follows:

> Any person who obtains for consideration the sexual services of a person, who is under 18 years of age, shall be punished with imprisonment for a term which may extend to 7 years, or with fine, or with both.

2 There was no dispute that the charges had been proved saved for the point of law submitted before me in this appeal. The facts were straight forward. The appellant's defence was that he did not know that Chantelle was under the age of 18 at the time of the offences. The trial judge found that the appellant had asked for Chantelle's identification. The trial judge also found that Tang discussed this with Chantelle and they obviously thought that it might be a problem so Chantelle showed her elder sister's identity card to the appellant instead. Accordingly, the trial judge found that the appellant did not know that Chantelle was under-aged.

3 The appeal before me was on a narrow issue of law, namely, whether *mens rea* was a requirement for a s 376B(1) offence. More specifically, the issue in question was whether the prosecution was obliged to prove that the person accused of committing the offence of paid sex with a minor under 18 knew that the minor was under-aged. Counsel for the appellant, Mr Naidu, submitted that the law presumes that *mens rea* is a requisite element for all statutory offences. Citing Halsbury's Laws of England and the modern affirmation of that proposition in Lord Reid's judgment in

Sweet v Parsley [1970] AC 132, Mr Naidu submitted that this made it clear that the prosecution had to prove that the appellant intended to have paid sex with an under-aged person, and since the appellant was found to believe that Chantelle was not under-aged, he could not have had that intention. I have no difficulty with the proposition that there is a presumption that Parliament would not intend to make criminals of persons who were not blameworthy. Generally, the courts accept that *mens rea* is a requisite factor in all criminal offences unless it is clear from the legislation that the offence (as legislated) did not require proof of *mens rea*.

4 In this case, s 377D of the Penal Code stood in the way of the appellant's defence. Section 377D reads as follows:

> (1) Subject to subsections (2) and (3) and notwithstanding anything in section 79, a reasonable mistake as to the age of a person shall not be a defence to any charge of an offence under section 376A(2), 376B or 376C.
>
> (2) In the case of a person who at the time of the alleged offence was under 21 years of age, the presence of a reasonable mistaken belief that the minor, who is of the opposite sex, was of or above –
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> (a) the age of 16 years, shall be a valid defence to a charge of an offence under section 376A(2); or
>
> (b) the age of 18 years, shall be a valid defence to a charge of an offence under section 376B or 376C.
>
> …

5 I am of the view that s 377D(1) leaves no doubt that an accused like the appellant cannot raise in his defence that he did not know that the person he had paid sex with was under-aged. Mr Naidu submitted that this provision merely removes "reasonable mistake" as a defence but there are other aspects of *mens rea* not connected with "reasonable mistake". He argued that the prosecution therefore was obliged to prove the criminal intention in this case. He argued that the appellant not only did not know that Chantelle was under-aged, the appellant was in fact cheated by Tang and Chantelle into believing that she was not under-aged. Counsel argued that the appellant was a "victim", not an offender. I am not aware of any known defence in criminal law that a person is not guilty of an offence if he was a victim of some other offence. The offence in question was one of having paid sex with an under-aged person. The appellant might have been a victim of a cheating offence by Tang or Chantelle, but that is not a defence. It was a digression from the crux of the appellant's true defence, namely, that at the material time he made a reasonable mistake in believing that Chantelle was under-aged. But that belief, which the trial judge accepted, cannot be raised as a defence because of the clear wording of s 377D(1). The only exception to s 377D(1) is where the accused person was under the age of 21 years (see [4] above). The appellant was 39 years old at the time of his offences. The fact that the appellant was cheated by Tang or Chantelle only threw him into circumstances in which he could raise in his defence that he did not know that Chantelle was under-aged, but that was *precisely* the defence that s 377D precluded him from raising. Consequently, his appeal against conviction failed and was dismissed. The circumstances of his case might have been relevant in respect of sentencing but since there was no appeal against sentence and neither the prosecution nor defence raised it, I will not make any comment on the sentence.