Gwee Hak Theng *v* Public Prosecutor
[2013] SGHC 246

Case Number : Magistrate's Appeal No 155 of 2013

Decision Date : 15 November 2013

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Chelva Retnam Rajah SC, Tham Lijing, Chew Wei Lin (Tan Rajah & Cheah) (instructed), Vivienne Lim and Melissa Leong (Genesis Law Corporation) for the appellant; Terence Chua and Tan Si En (Attorney-General's Chambers) for the Public Prosecutor.

Parties : Gwee Hak Theng — Public Prosecutor

Criminal Law – Offences – Commercial sex with a minor under 18

15 November 2013 Judgment reserved

Choo Han Teck J:

1 The appellant was convicted in the District Court on a charge of commercial sex with a minor under 18, an offence under s 376B(1) of the Penal Code (Cap 224, 2008 Rev Ed). The trial judge found that the prosecution had proven beyond a reasonable doubt that on the evening of 19 July 2011 the appellant had obtained for consideration the sexual services of a Vietnamese female who was then below 18 years old. I shall refer to this female as "PW2", as she was referred to in the court below. The appellant was sentenced to four months' imprisonment. In his notice of appeal and petition of appeal, he indicated that he was appealing against both conviction and sentence. But before me his counsel Mr Chelva Retnam Rajah SC said that he was no longer appealing against sentence, and hence I heard his appeal on the basis that it was against conviction only.

2 Mr Rajah submitted that the prosecution did not prove beyond a reasonable doubt that PW2 was under 18 years old as of 19 July 2011. At the trial below, the prosecution relied on PW2's testimony that her date of birth was 17 December 1994, and adduced her passport which stated that she was born on that date. Counsel submitted that this was insufficient proof because the only evidence corroborating PW's bare testimony is the "third-tier evidence" of the passport. In the appellant's classification of evidence, the best-available evidence of PW2's age would be her birth certificate or her mother's testimony; the "second-tier" or second-best evidence would be her identity card, which based its date of birth on what was stated in the birth certificate; and as for the passport, which based its date of birth on what was stated in the identity card, it was mere "third-tier" evidence. I do not think that this helped in deciding whether the prosecution had proved its case. Something that is "third-tier" according to the appellant's classification may yet suffice to prove a fact beyond a reasonable doubt. It may be so, as counsel said, that where the alleged minor's age is the *raison d'être* of the offence – as it is under s 376B(1) of the Penal Code – her own testimony as to her age would not be sufficient proof, a view held in the Scottish case of *Lockwood v Walker* (1910) SC(J) 3 which counsel cited. Ultimately, the only question to be asked, shorn of technicalities such as the rules on corroboration, was whether it had been proven beyond a reasonable doubt that the alleged minor was below 18. In my judgment, this has been proven to the required standard of proof in this case based on the evidence adduced by the prosecution, and I do not think that I would be entitled to disturb the findings of the court below.

3 Counsel also challenged the trial judge's finding that the appellant obtained sexual services of PW2 for consideration. At this juncture it would be helpful to summarise the findings of fact which the trial judge made. Although the trial judge did not set out explicitly all his findings, the material findings were clear enough from his grounds of decision. The appellant first encountered PW2 where she worked at a bar called V2 in the Geylang area. They subsequently exchanged mobile phone numbers, and in the early afternoon of 19 July 2011, the appellant sent PW2 an SMS in the Vietnamese language, asking her if she wanted to "make love" that night. PW2 said yes. Accordingly they met at V2 that night, and after a while there, proceeded to a hotel in the vicinity. They checked into a room at 11.41pm, had sexual intercourse within, and checked out at 12.07am on 20 July 2011. The check-in and check-out times were reflected on a registration slip kept by the hotel recording the appellant's visit, which the prosecution produced in evidence. The appellant initially paid PW2 $200, but after they checked out, he brought her to his car which was parked nearby, and from his car he took out an additional $100 to give to her.

4 Broadly speaking, the appellant sought to do two things. First, he wanted to show that the prosecution's case was rife with deficiencies. Second, he sought to advance a positive version of the events of the night of 19 July 2011 which did not involve him and PW2. I accept that as it is the prosecution's burden to prove the offence beyond a reasonable doubt, it follows that even where an accused person's defence was implausible, he would be entitled to an acquittal if the prosecution's case was so weak that it did not meet the requisite standard of proof.

5 The appellant's version of events was attested to not just by him but also by one Arthur Chew ("Arthur"), who was the only other defence witness. The appellant, who is an advocate and solicitor, testified that he was at the time acting for Arthur in a legal dispute. On the afternoon of 19 July 2011, he called the law firm representing the opposing party in the dispute, and was informed that they wanted to settle. He then sent an SMS to Arthur arranging to meet that evening to discuss this and other matters. The appellant picked Arthur up in his car around 10.00pm and they drove to a Geylang coffeeshop located near V2. While at this coffeeshop they drank beer. At some point the appellant got up and left Arthur on his own for a few minutes. The appellant argued that the explanation for the hotel registration slip recording his visit to the hotel was that, during those few minutes, he went to the hotel to reserve a room, thinking that he might continue drinking with Arthur thereafter and would not wish to be driving home after that. He thus reserved a hotel room to rest and freshens up until he was able to drive safely. He thought it prudent to make a reservation because the hotel was often crowded. He paid the requisite $50 deposit to reserve the room. He did not take the room key, but the hotel staff nonetheless recorded him as having checked in at that time. He then returned to where Arthur was. But their meeting came to an end a short while after. Arthur testified that he saw the appellant drive off before he left in a taxi. This happened not long before midnight. The appellant claimed that he drove home without going to the hotel to seek a refund of his $50 deposit.

6 The trial judge had difficulty believing that the appellant's version of events was true and I did not think I could disagree with that. The primary reason was that it seemed a poor explanation of how it came to be that the hotel registration slip recorded that he checked in at 11.41pm on 19 July 2011 and checked out 26 minutes later at 12.07am. To begin with, it was improbable that the staff at reception would have recorded him as having checked in and collected the $50 deposit from him without handing over the room keys. The practice of the hotel was to collect $50 on check-in for a room that cost $30 for two hours. It would refund the excess of $20 if the guest checked out within two hours of check-in. If the guest did not check out by then the hotel would hold the room for him for another hour. The evidence of the check-out receptionist on duty on the night of 19 July 2011 was that the only situation in which a guest would be checked out automatically, loosely speaking, was if the keys remained unreturned three hours after check-in. If indeed the appellant did not collect

the room keys and did not return to the hotel thereafter, it was most improbable that the staff would have recorded him as having checked out 26 minutes later for no apparent reason. The appellant pointed out that the hotel registration slip was not signed by him, and neither was a receipt issued for the $20 that would have been refunded had he checked out within 26 minutes of check-in. However, in my opinion it is improbable that there would be in existence a hotel registration slip unsigned but contemporaneously filled in with his details if he did not in fact check into the hotel at 11.41pm on 19 July 2011 and check out at 12.07am on 20 July 2011 having used the room for not more than 26 minutes. The trial judge did not think it fit to give the benefit of doubt to the appellant on this point.

7 There were other, secondary reasons why it was difficult to believe the appellant's version of events. First, it was improbable that the appellant and Arthur arranged on the afternoon of 19 July 2011 to meet that night when their communication that afternoon was limited to one SMS sent by the former to the latter, to which the latter did not reply. On their evidence, this alleged meeting was arranged to discuss a development that had been made known to the appellant just that afternoon, and so it could not have been a meeting contemplated or tentatively arranged in advance of 19 July 2011 such as might have required no more than a single SMS to confirm. Second, it was improbable that the appellant would have said nothing to Arthur about reserving a hotel room, especially at two points in time – just before the appellant got up and left to reserve the room, and just after he returned from reserving the room. According to the appellant, this was not the first time that he reserved a room at the hotel in anticipation of further drinking and eventual inebriation, and he would sometimes invite the client he was drinking with to rest and freshen up in the room as well. Also, reserving a room would have raised the possibility that he would not be able to give Arthur a lift home as would likely have been his intention all along since, on their evidence, he offered to send Arthur home when it transpired that Arthur had to leave. Given this context, it might be expected that the appellant would have apprised Arthur of the reservation of the hotel room. Third, it was improbable that Arthur was both truthful and accurate when he said that he ended their meeting shortly before midnight because he had to go home to offer prayers in commemoration of "the day of Guan Yin" which fell on 19 July 2011, because this would have meant that his prayers were in fact offered on 20 July 2011 instead. It was possible, of course, that all these aspects of the appellant's defence which appear to undermine its overall plausibility were explicable on the basis of the appellant's and Arthur's idiosyncrasies. But it seemed to me to be improbable and, further, the trial judge had also clearly rejected the appellant's version of events. He had the advantage of observing the appellant and Arthur and compared their evidence with the prosecution's witness' testimonies. I would not disturb the findings of the trial judge in this regard.

8 I come now to the deficiencies which the appellant claimed bedevilled the prosecution's case. Here a more detailed narrative of the facts is needed. According to PW2 and the investigating officer, a mobile phone was seized from PW2 when she was arrested. PW2 testified that this phone belonged to her and that she had had it since she was in Vietnam. In the phone was a SIM card associated with the number XXXX3354. PW2 testified that she was given this SIM card upon arrival in Singapore, that she used this SIM card in her phone at all times prior to her arrest, and that she did not at any time lend her phone to any other person to use. According to her and the investigating officer, after her arrest she identified from her phone's contact list the names and phone numbers of five men to whom she had provided sexual services for consideration. The appellant's number, saved in PW2's phone under the name "A Huy", was one of the five identified. The investigating officer testified that he requested that SingTel provide the call and SMS records for the number XXXX3354. These enquiries revealed that on 19 July 2011 a few text messages were exchanged between the appellant's number and XXXX3354. An SMS was sent from the appellant at 1.05pm, and he received a reply at 7.52pm; the appellant sent another SMS at 7.54pm, and the reply to that was received at 7.55pm. The contents of these text messages could not be obtained. An extraction of text messages on the phone seized from PW2 was also carried out. A total of 57 messages were found, consisting of 54

found in the "Inbox" and three found in the "Sent" folder. The earliest of these 57 messages was dated 20 July 2011. None of them were received from or sent to the appellant's number.

9 The trial judge accepted that the mobile phone which was seized from PW2 belonged to her, and that the appellant's phone number was saved in her phone. He accepted that the SIM card associated with the number XXXX3354 was in PW2's phone, and that when the appellant exchanged text messages with XXXX3354 on 19 July 2011 he was communicating with PW2 and not anyone else. Counsel for the appellant challenged these findings. He argued that the evidence provided support for any of the following three hypotheses:

(a) the mobile phone seized from PW2 did not belong to her;

(b) the seized phone belonged to PW2 but other people used the phone too, such that it could have been someone other than PW2 who exchanged messages with the appellant on 19 July 2011; or

(c) the SIM card associated with the number XXXX3354 was not in PW2's phone on 19 July 2011 but was in another phone altogether.

Counsel pointed out that none of the 57 text messages extracted from the phone seized from PW2 was dated 19 July 2011, even though the officer who extracted the messages testified that the forensic software used had the ability to retrieve deleted messages. This could support all three hypotheses. Counsel also pointed out that a substantial number of the 57 text messages extracted from what was said to be PW2's phone were in English, including one of the three "Sent" messages, whereas PW2 testified that she did not know any English and would not have sent any text messages in English. Counsel argued that this rendered it doubtful that the person with whom the appellant communicated via SMS on 19 July 2011 was PW2. Counsel then argued that PW2's testimony was not credible for a few reasons. First, there was a discrepancy in her testimony on the content of the appellant's SMS to her — in her examination-in-chief, she said that it read "Tomorrow make love okay?" but under cross-examination she said that it read "Tonight make love okay?" Second, the appellant maintained that it was improbable that he would have communicated with her in Vietnamese, as she claimed he did. Third, it was improbable that she would have taken almost seven hours to respond to his alleged request for sex as the phone records appear to show.

10 Counsel also argued that the process by which PW2 identified the appellant after her arrest was flawed. The contact list in the phone seized from PW2, from which she purportedly picked out the appellant's number saved under "A Huy", was not put in evidence even though the prosecution had ample opportunity to do so. Moreover, PW2's evidence was that she was given a stack of "more than five" photographs of people from which she selected the five depicting the men she had provided sexual services to, the appellant among them. Yet these photographs were likewise not put in evidence. Counsel argued that, given the opacity of the identification process, it cannot be known whether PW2's identification of the appellant was reliable. For instance, there might not have been a proper identification parade involving an adequate number of photographs of men of the appellant's age-group and race for PW2 to choose from. Another reason to doubt that PW2 had identified the appellant correctly, counsel argued, was that she testified that the car he drove on 19 July 2011 had four doors and was silver or white in colour, but in fact he did not own any car answering that description. Rather, he and Arthur both testified that the car he drove that day was a dark grey two-door BMW. Finally, counsel pointed out that it could have been easily established whether the appellant was with PW2 on 19 July 2011 by reviewing the CCTV footage from the hotel, but by the time the investigating officer asked for this footage it had been deleted.

11 In my judgment, the correct approach to take in this case is not to focus on the minutiae of what more the investigators and prosecution could and/or ought to have done. In this respect, counsel's submission was really to ask that I allow the appeal on the ground that the trial judge's decision was against the weight of non-evidence. However, the court below was entitled to consider what were the broad possible explanations for all the evidence, and assess how probable each possibility was. The starting point was that PW2 and the investigating officer both testified that, upon her arrest, she identified the appellant's phone number as belonging to someone to whom she had provided sexual services for consideration. Of course, it may be that her identification was unreliable. One possibility was that she made the allegation in the erroneous but honest belief that what she alleged was true. But this did not seem at all probable. PW2 arrived in Singapore on 2 July 2011. She was arrested on 4 August 2011. When she assisted in the investigations following her arrest she would have been recounting events that occurred not more than a month and several days ago. This lapse of time was not of such length as would ordinarily attenuate the memory of a reasonable person to any substantial degree. Hence, it was difficult to believe that PW2 could have made an honest mistake in singling out the appellant's phone number. I also did not think that PW2 could have been honestly mistaken when testifying in court that this singling out of his number was how she first identified the appellant as her customer. This was clearly for the trial judge to decide whether it should be accepted.

12 This left the possibilities that PW2 lied. There were possible variations on this theme — she might have lied of her own accord, or she might have lied on the instructions of someone who was out to ensnare the appellant, or she might have conspired with the investigating officer to implicate the appellant falsely. The trial judge accepted that it might be that PW2 was not truthful when she testified that she had exclusive use of the mobile phone that was seized from her. Her categorical denial of even the most basic proficiency in English did not fit the fact that many of the 57 text messages extracted from the phone seized from her were in that language, and the inference was that other people had used that phone as well. But that does not follow that PW2 was untruthful in other aspects of her evidence. Insofar as it was alleged that she took the initiative to make a false accusation against the owner of the appellant's phone number, I can see no reason why she would personally have anything against him, since he would have been a complete stranger to her. I think it improbable that she would have acted out of malice when there was no motive. Alternatively, she might have made the false accusation at the instigation of either the investigating officer or an unknown antagonist of the appellant's. It might be worth asking what this would have entailed. The appellant postulated a number of hypotheses as set out earlier: perhaps the phone seized from PW2 did not belong to her at all; perhaps it was not her but someone else who used the number XXXX3354 to communicate with the appellant; perhaps she did not use the number XXXX3354 at all. I take the appellant's case at its highest and assume, first, that PW2 lied in alleging that she provided sexual services to the owner of the appellant's number, and second, that she never in her life used the number XXXX3354. It would mean that the persons seeking to frame the appellant benefitted from the serendipitous coincidence of two occurrences in a single day on 19 July 2011: the appellant exchanging text messages with an unknown number XXXX3354, and his checking into a hotel room that night and checking out 26 minutes later. I might not think this improbable if only the appellant could furnish some plausible explanation of why he exchanged messages with that number or why he was in the hotel room for that duration. He has not done so. In relation to the appellant's hotel visit, it could well be that he engaged there in some other activity which was not an offence under s 376B(1) of the Penal Code but which he had wished to keep secret for reasons known to him alone. However, it is not for me to speculate. In the absence of an explanation from him I am constrained to find that any hypothesis ascribing mendacity in PW2 is improbable. This would be so whether the allegation was that her duplicity was unilateral or that she acted in concert with either the investigating officer or an unknown antagonist.

13 The trial judge seemed to have no doubt that when PW2 identified the appellant's number as belonging to someone to whom she had provided sexual services for consideration she was both truthful and accurate in her recollection. I would not disturb that finding. I now address the arguments of counsel for the appellant directly. The failure of the prosecution to put in evidence the contact list in the phone seized from PW2, although seemingly strange, was not significant because the contact list was of limited probative value. It can prove only that the appellant's name and number was saved in the seized phone. It cannot prove that the seized phone belonged to PW2 or that she used the number XXXX3354 on 19 July 2011 or at all. And its absence did not make it very much more probable that the appellant's name and number was not saved in the seized phone. Next, I do not think it assisted the appellant that none of the 57 messages extracted from the seized phone pre-date 20 July 2011. The officer who conducted the extraction might have said that the forensic software could retrieve deleted messages, but this did not mean that it could retrieve every message that had ever been in the phone. Given that 54 messages were extracted from the "Inbox" but a mere three were extracted from the "Sent" folder, it appeared probable that there were more "Sent" messages than were extracted from the phone. Thus, in my view, the most likely explanation for the absence of messages dated 19 July 2011 or earlier was simply that the investigators for technical reasons could not extract every SMS that had ever been in PW2's phone, and not that PW2 did not use the phone to communicate with the appellant on 19 July 2011. As for the alleged discrepancies and improbabilities in PW2's testimony, I think that although she testified at one point that the appellant's SMS to her read "Tomorrow make love" but testified at another point that it was "Tonight make love", there was in substance no inconsistency because it was clear from the transcript that she when she said "Tomorrow" she meant "Tonight". I do not think it improbable that she responded to the appellant's request for sex almost seven hours later. I think that it was probable that the appellant had enough rudimentary Vietnamese to communicate with PW2 in that language, whether verbally or in text messages. I also think it probable that the appellant drove to the hotel on 19 July 2011 a car that had four doors and could appear under artificial lighting to be white or silver in colour, since there was no evidence that he drove a dark grey two-door BMW other than the unreliable testimonies of Arthur and the appellant himself. These are all matters of fact which were for the trial judge to decide.

14 As for the process by which PW2 identified the appellant after her arrest, the prosecution explained at the hearing before me that after PW2 pointed out five numbers saved in her phone which she said belonged to her customers, the investigators "screened" those numbers and came back with five photographs of her five alleged customers. PW2 proceeded to confirm that the people depicted in those photographs were her customers. However, it was not clear from the evidence adduced at the trial below that this was the process. In any event, I do not think there was merit in the appellant's argument that there was any obligation to conduct some form of identification parade. Counsel cited *Public Prosecutor v Ong Phee Hoon James* [2000] 2 SLR(R) 196 and *Public Prosecutor v Manit Wangjaisuk* [1994] SGCA 140 but I did not think that either decision supported his argument. Indeed, the former case would appear to run counter to it. There, Yong Pung How CJ at [42] found that the manner in which the accused was identified was improper and that minimal weight should attach to that identification evidence, but he held nonetheless that the conviction of the accused was not unsafe because the case against him did not rest entirely on the identification evidence. In every case the question is simply that of whether the identification of the accused as the person who committed the offence is so reliable that no reasonable doubt remains as to whether the accused committed the offence. In this case, PW2 saw the appellant in court and testified that he was someone to whom she had provided sexual services for consideration. It was possible that she might have been mistaken, but in my opinion this possibility was effectively negated by the fact that even before she saw what the appellant looked like she had already singled out his phone number as belonging to one of her customers. In the circumstances I do not think that the absence of identification parade was necessarily fatal to the prosecution's case. Finally, it was perhaps

unfortunate that the hotel's CCTV footage from 19 July 2011 could not be obtained, as that may have been highly probative evidence. But nonetheless, on all the evidence, the trial judge had no doubt that the appellant obtained for consideration the sexual services of PW2 on 19 July 2011, and that PW2 was at that time under 18 years of age and I do not think I would be justified in overturning the findings of the court below.