Tan Chye Hin v Public Prosecutor
[2009] SGHC 111

Case Number : MA 308/2008

Decision Date : 06 May 2009

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : R S Bajwa (Bajwa & Co) for the appellant; Mark Tay (Attorney-General's Chambers) for the respondent

Parties : Tan Chye Hin — Public Prosecutor

Criminal Procedure and Sentencing – Sentencing – Benchmark sentences – Accused obtained for consideration sexual service of person under 18 years of age – Benchmark sentence for offence under s 376B(1) Penal Code (Cap 224, 2008 Rev Ed)

6 May 2009

Lee Seiu Kin J:

1 The appellant, a 55-year-old contractor, was charged with committing an offence under s 376B(1) of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code") for obtaining, for consideration, the sexual services of a 17-year-old female. He pleaded guilty to the offence, was sentenced to 12 months' imprisonment by the district judge and appealed against the sentence imposed. At the conclusion of the hearing, I allowed the appeal and reduced the sentence to 9 months' imprisonment.

Summary of Facts

2 The female victim was a Chinese national and I will refer to her as "B". B came to Singapore together with another 19-year-old female Chinese national ("C") to work as a prostitute. B and C were under the "care" of Wang Minjiang ("Wang") and Wang Youyi in Singapore, who provided food, lodging and assisted B and C in negotiating the charges for sexual services. At the material time, B was 10 days shy of turning 17 years of age.

3 On 4 August 2008, Wang received a call from the appellant asking for B's sexual services. The appellant told Wang that he was recommended by a friend and wanted the sexual services of the 17-year-old girl, B. The appellant met Wang and B at a coffee-shop in Geylang. Thereafter, the appellant left the coffee-shop with B. They went to a hotel and the appellant had sexual intercourse with B. The appellant paid B $100 for the sexual service.

The Appellant's Arguments

4 The appellant's counsel argued that the sentence of 12 months was manifestly excessive for the following reasons:

(a) Wang was more culpable and had played a bigger role by being involved at an earlier stage, placing the victim into the flesh trade and making money out of her earnings as compared to the appellant, who was only a customer. Yet the appellant received the same sentence of 12 months' imprisonment as Wang.

(b) Prostitution *per se* was not illegal in Singapore and the appellant's only failing was that he had failed to realise that B was a minor and s 376B of the Penal Code had outlawed such conduct. Although there was publicity on this subject in the newspapers, there were no warnings placed in Geylang to warn people that engaging under-18s for commercial sex was an offence. Furthermore, there was no indication that commercial sex with females under 18 was a problem in Singapore. A short imprisonment sentence would sufficiently serve as a strong denunciation of the offence and provide general and specific deterrence.

The Prosecution's Arguments

5 The DPP submitted that it was clear, from the Parliamentary debates, that Parliament intended for s 376B offences to be viewed and enforced strictly. In particular, the DPP stressed that the principle of general deterrence was especially relevant given that the victim here was a vulnerable victim.

6 The DPP also highlighted the fact that the appellant had actively sought B's sexual services with full knowledge of her age and therefore had designs to sexually exploit minors. Given that Parliament had intended to protect these vulnerable victims, the appellant's substantial role in sexually exploiting B merited the sentence imposed. The DPP also pointed out that there was a wide age disparity between the appellant and the victim of almost 40 years, and that was an aggravating factor. The DPP further relied on *Tay Kim Kuan v Public Prosecutor* [2001] 3 SLR 567 ("*Tay Kim Kuan*") and *Annis bin Abdullah v Public Prosecutor* [2004] 2 SLR 93 ("*Annis bin Abdullah*") to argue that the fact that the victim had willingly came to Singapore to prostitute herself ought not be given weight because Parliament had clearly intended to protect this group of vulnerable persons.

Analysis

7 Section 376B(1) of the Penal Code was enacted in late 2007 and the appellant was the first person to be charged and convicted under this new section. Since there were no sentencing precedents for this new section, it became necessary for me to discuss, in some detail, the relevant sentencing considerations under this new section.

8 The starting point of the analysis is to consider the scope of s 376B(1) of the Penal Code, which provides as follows:

> **Commercial sex with minor under 18**
>
> **376B**. —(1) 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. [emphasis in original]

9 Section 376B(1) of the Penal Code is worded very widely, in that a person is caught under the section if he/she obtains sexual services for consideration of a person who is under 18 years of age. The reasons for enacting s 376B(1) were explained by the Senior Minister of State for Home Affairs, Associate Professor Ho Peng Kee in the second reading of the Penal Code (Amendment) Bill (Bill 38 of 2007) (*Singapore Parliamentary Debates*, *Official Report* (22 October 2007) vol 83 at col 2175) as follows:

> [W]hilst prostitution per se is not an offence, [the] new section 376B will make it an offence for a person to solicit, communicate or obtain sexual services from a minor under 18 years of age. *Young persons, because they are immature and vulnerable and can be exploited and, therefore,*

should be protected from providing sexual services. Although there is no evidence to suggest that we have a problem with 16- and 17-year-olds engaging in commercial sex in Singapore, we decided to set the age of protection at 18 years so as to protect a higher proportion of minors. By doing so, we join other countries such as the UK and Australia which have also adopted the approach of criminalising commercial sexual activities with persons under 18 years of age, in line with the United Nations Convention on the Rights of the Child 1989 and the Stockholm Declaration and Agenda for Action 1996 whilst maintaining the age of consent for consensual non-commercial sexual activities at the age of 16.

[emphasis added]

10 Parliament, in enacting laws to protect such minors from sexual exploitation, had outlawed a wide range of conduct in connection with persons who are below 18 years of age in order to protect a greater proportion of minors. Section 376B of the Penal Code makes it an offence to obtain sexual services from a person under 18 years of age. Section 376C makes it an offence for citizens and permanent residents to engage in such activities overseas. In addition, s 377D provides that the defence of reasonable mistake as to age shall not apply in relation to these offences, except in the limited circumstances prescribed. Section 376D goes even further and makes it an offence to organise or promote tours for the purpose of sexual services with persons under 18 years. It is beyond doubt that Parliament had deemed persons under the age of 18 to be deserving of strong and effective protection from commercial exploitation. The dominant consideration in enacting s 376B was clearly to protect the young and vulnerable. Therefore any sentence imposed for such offences must necessarily reflect these considerations and provide a strong deterrence to discourage people from engaging in commercial sex with minors.

11 Having considered the Parliamentary intent behind the section, I now turn to consider what the appropriate punishment would be in the present circumstances. The starting point would be to consider the punishment prescribed by the section itself. An offence under s 376B of the Penal Code is punishable with a fine, or imprisonment extending up to 7 years, or both. Given that s 376B was drafted to cover a wide range of conduct, it is therefore necessary for me to determine where the appellant's conduct stood in this wide spectrum of sentences.

12 At the least blameworthy end of the spectrum would be an accused who unwittingly and unintentionally engages the sexual services of a person who is just below the age of 18 years but whose appearance and demeanour do not suggest that he or she is below 18 years of age. The accused checked the age of the minor but was given a good forgery of an identity document that showed that he or she was over 18 years old. In those circumstances, a fine could be appropriate in the absence of other aggravating factors.

13 At the most blameworthy end of the spectrum would be an accused who actively seeks sex with young prostitutes by specifying to the pimp that he wants them young, paying large sums of money if the pimp is able to procure very young ones, and engaging in sex with them even with the knowledge that they had been coerced into the trade. With additional aggravating factors such as the manner in which the accused treated the minor and a long list of relevant antecedents, the sentence under these circumstances may well be at or near the maximum provided for under s 376B of the Penal Code.

14 The fact that the victim had willingly come to Singapore to work as a prostitute is not a mitigating factor. Article 6 of The Stockholm Declaration and Agenda for Action, which the Minister referred to in the second reading of the Penal Code (Amendment) Bill (see [9] above), provides the following:

6. *Poverty cannot be used as a justification for the commercial sexual exploitation of children, even though it contributes to an environment which may lead to such exploitation*. A range of other complex contributing factors include economic disparities, inequitable socio-economic structures, dysfunctioning families, lack of education, growing consumerism, urban-rural migration, gender discrimination, irresponsible male sexual behaviour, harmful traditional practices, armed conflicts and trafficking of children. All these factors exacerbate the vulnerability of girls and boys to those who would seek to procure them for commercial sexual exploitation.

[emphasis added]

15 Given that the intent of the section is to protect vulnerable and immature victims, it would be meaningless to rely on the victim's perceived willingness to enter the trade as a mitigating factor. Such 'willingness' would, in all likelihood, stem from the victim's immaturity or lack of economic, social or familial support. The fact that the victim was a willing party, therefore, should not be a relevant consideration in determining the appropriate sentence for the appellant. However, the fact that the victim was coerced into prostitution could well be an aggravating factor if the accused knew or ought to have known or suspected this.

16 Next, I turn to consider the sentences imposed in similar and related offences. In *Public Prosecutor v Wang Minjiang* [2009] 1 SLR 867, Wang was charged (*inter alia*) under s 376B(1) of the Penal Code (read with s 109 of the Penal Code) for aiding the appellant in the procurement of B's sexual services for consideration. The district court fined Wang a total of $8,000, or 8 weeks' imprisonment in default, for the charge. On appeal, Choo J increased Wang's sentence to 12 months' imprisonment for his role as a pimp. Choo J observed (at [3]):

It does seem to me, however, that a more rigorous sentence might be needed to discourage international prostitution involving persons the law regards as young and vulnerable. A fine might not be an adequate sentence in the present circumstances. Although Parliament had provided for a fine as the lowest end of the sentence (and seven years' imprisonment as the highest end), a fine should be reserved for cases of exceptional circumstances, but nothing in the present case indicated that there were any such factors. Neither were there any exceptional factors that might suggest that a long term of imprisonment was necessary. In the circumstances, I am of the view that the fine of $8,000 should be set aside and a term of imprisonment of 12 months imposed.

17 I agree emphatically with Choo J that a fine for Wang would be inadequate, in my view monstrously so, in the light of the objectives behind the enactment of s 376B of the Penal Code. As the pimp, Wang had exploited the vulnerabilities of young and vulnerable persons and derived monetary benefit from trading their flesh. In the present case, the aggravating factors are that the appellant knew that B was 17 years of age and that the appellant had specifically asked for B's sexual services when he called Wang. However, save for these, there is no other aggravating factor.

18 In *Tay Kim Kuan*, the accused, a 45-year-old married man, pleaded guilty to a charge under s 140(1)(i) of the Women's Charter (Cap 353, 1997 Rev Ed) ("the Women's Charter"), which reads as follows:

Offences relating to prostitution

140. —(1) Any person who —

(i) has carnal connection with any girl below the age of 16 years except by way of marriage;

shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding 5 years and shall also be liable to a fine not exceeding $10,000.

[emphasis in original]

19 The accused in *Tay Kim Kuan* had met the victim through an internet chat service. The victim had told him that she was only 15 years old. Subsequently he picked her up from her flat and engaged in sexual intercourse with her. Thereafter, the accused continued to keep in touch with the victim. About 5 months later, the victim invited the accused to her home, but before he got there, he was arrested at the car park. The accused pleaded guilty to the offence and was sentenced to nine months' imprisonment. He appealed, arguing that the sentence was manifestly excessive.

20 The appeal court in *Tay Kim Kuan* held that the benchmark sentence for such offences should be one year's imprisonment and a fine "to reflect the court's intolerance of the conduct exhibited" (at [18]). Yong Pung How CJ ("Yong CJ") accordingly dismissed the appeal and enhanced the sentence to 12 months' imprisonment and a fine of $10,000. In arriving at his decision, Yong CJ took into account the following factors. First, while the victim was no innocent virgin herself, the appellant had continued to associate with the victim over the next few months and would probably have had no qualms about sleeping with the victim again had the police not intervened, which showed that the appellant was not remorseful and devoid of guilt. Next, the victim was one-third the appellant's age. A deterrent sentence was necessary to serve as a stern warning to like-minded men who used the Internet to gain, falsely, the trust of young immature girls and thereafter sexually exploit them. Further, the court rejected the argument that the sexual encounter was consensual and that the victim had a long history of sexual intercourse with older men. The court reasoned (at [13]):

> In my view, issues of consent are entirely irrelevant to offences under s 140(1)(i)of the Women's Charter, the policy of which is to afford blanket protection to young girls who are regarded by the statute as being mentally and emotionally unprepared to handle relationships of a sexual nature. Girls under the age of 16 are thus deemed by the law to be incapable of giving valid consent to a sexual act, and, in my view, rightly so, as many at that age are ill-equipped to handle the serious social consequences which often arise out of just one single night of reckless passion. These girls often lack not just the resources but the emotional strength of mind to cope with the heavy responsibilities of an unplanned pregnancy and worse, the physical and psychological trauma of having to undergo an abortion. The spectre of unwanted children, its links to juvenile delinquency and the concomitant effects on the progress of modern society all collectively favour the legislative policy of strict liability where sexual intercourse with underaged girls is concerned. *Much as these girls may have procured or actively initiated the encounter, the purpose of s 140(1)(i)is to place the onus on the male adult to exercise restraint and discipline in curbing his carnality*. In this respect, the law may be said to be paternalistic, and perhaps even overprotective in seeking to guard young girls from a precocious desire for sexual experience. Nevertheless the social and humane reasons for such a welfare state of the law are too compelling to be ignored. *In my view, the court has to send out a clear signal to the public that men who engage in sexual intercourse with girls under 16 do so at their own peril*. In particular, where the age difference between the parties is significant, the man can be expected to be punished more severely as his offence can then no longer be regarded as merely the result of the false steps of youth but rather the conscious and calculated decision of a mature adult.
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> [emphasis added]

21 In *Annis bin Abdullah*, the appellant ("A") was charged under s 377 of the Penal Code for having carnal intercourse against the order of nature with a 15 year old victim. A was a 25-year-old police

sergeant at the time of the offence and had met the victim online on an internet chat service. A later met the victim in person at a barbeque and they kept in touch. Thereafter, the victim initiated a date with A and they went for a drive in A's car. Subsequently, A parked his car and they became intimate while in it. A suggested having sexual intercourse, but the victim refused. A then suggested the victim fellate him, and the victim agreed. After the victim had performed fellatio on A, he drove her home and there was no further contact thereafter. The victim later made a police report and A was arrested and charged.

22 A pleaded guilty to the charge under s 377 of the Penal Code and was sentenced to 24 months' imprisonment. In arriving at his decision, the district judge had considered (*inter alia*) the fact that A was a police officer to be a strong aggravating factor. A appealed against the sentence imposed on the ground that it was manifestly excessive. Yong CJ agreed that the sentence was manifestly excessive and allowed A's appeal, reducing the sentence of imprisonment to 12 months.

23 Broadly, there were three reasons why the court in *Annis bin Abdullah* had viewed the sentence of 24 months' imprisonment to be manifestly excessive. First, A's plea of guilt should have been accorded due weight as a mitigating factor, since A was a first time offender (and was not a paedophile) and had spared the victim the trauma of testifying in a contested trial by pleading guilty. Second, the district judge erred in considering the fact that A was a police sergeant to be an aggravating factor since the offence was completely unrelated to A's status as a police officer. Third, the sentence imposed on A was found to be incongruent with that imposed in cases involving related offences. Of particular relevance to the present case was how Yong CJ compared the case before him with *Tay Kim Kuan*. The only material difference found in those two cases was that in *Annis bin Abdullah*, the subject matter of the charge was unnatural sexual intercourse, whereas in *Tay Kim Kuan*, the subject matter of the charge was ordinary sexual intercourse. However, given that both offences (under s 377 of the Penal Code and s 140 of the Women's Charter) were aimed at protecting young victims from exploitative sexual activity (whether unnatural or not), Yong CJ took the view that there ought not be an overly large disparity between the sentences under the two provisions.

24 However, it is also worth noting that Yong CJ had rejected A's argument that the act of fellatio was consensual and obtained without use of trickery or force. Yong CJ took the view that the consent of young victims (which he generally took to be those under 16 years of age) was irrelevant for the purposes of sentencing given that the underlying principle was that such girls may not have "the experience or the maturity to make decisions in their own best interests about their own sexuality and that the law must step in to prevent their exposure to sexual activity regardless of their purported consent" (at [50]). Yong CJ also took into account the fact that the Internet had facilitated the offence by providing an avenue for A to get acquainted with the victim and, very quickly thereafter, to ask her to perform fellatio on him, and considered this to be an aggravating factor which warranted a deterrent sentence.

The appropriate sentence for the present appeal

25 The aggravating factors in the present case were that the appellant had intentionally sought the sexual services of B, despite knowing that she was 17 years of age. The age of the victim (she was nearly 17 years of age at the material time) and the wide disparity between the appellant's age and the victim's age (there was a 40 year age difference) were also relevant considerations. I note that Yong CJ, in *Annis bin Abdullah* (at [50]), had suggested that "as a general guide, "young victims" should be those under 16 years of age". Therefore, in *Annis bin Abdullah*, the victim's consent was of no mitigating value since she was only 15 years old. On the facts of the present case, B was nearly 17 years of age at the material time. However, given Parliament's clear intent to protect all victims under 18 years of age and for the reasons above (see [14]), I did not think that B's purported

consent could be accorded any mitigating value.

26 I took into account the accused's mitigation plea, that the accused was traumatised, ashamed and deeply regretful for having committed the offence, and the fact that he had pleaded guilty to the offence. I did not place any weight on his antecedent as the previous offence occurred many years ago and had no bearing on the present offence.

27 As Choo J had observed (at [16] above), a fine alone should not be imposed for such offences, except in the most exceptional circumstances. A custodial sentence should be the norm in order to sufficiently deter such behaviour and to reflect the seriousness of such offences. Given all the above circumstances, I was of the view that a sentence of nine months was the appropriate sentence. First, the sentence of nine months would reflect the appellant's lower level of culpability as compared to that of Wang's, who had been given 12 months' imprisonment. Second, I was mindful of the need to achieve parity of sentencing, and that there should not be a large disparity between the present offence and that in *Tay Kim Kuan* or *Annis bin Abdullah*, since these provisions were all broadly targeted at protecting young and vulnerable victims. Both the accused in *Tay Kim Kuan* and *Annis bin Abdullah* received sentences of 12 months, with the accused in *Tay Kim Kuan* receiving an additional fine of $10,000.

28 I also took into account the fact that the appellant was the first to be convicted under s 376B(1) of the Penal Code and that he had not known that it was an offence to engage in commercial sex with minors, though I must emphasise that the facts of the present case were very special in this respect. I reiterate that ignorance of the law is not a defence and that future offenders will not be allowed to raise ignorance as a mitigating factor. This case should serve as a strong reminder to the general public that offences involving vulnerable victims will not be tolerated by the courts and that future offenders can expect similar or lengthier periods of incarceration for such offences.