IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 61

Criminal Case No 41 of 2015

Between

Public Prosecutor

And

BAB

GROUNDS OF DECISION

[Criminal Law] — [Statutory offences] — [Penal Code]
[Statutory Interpretation] — [Construction of statute] — [Literal]
[Statutory Interpretation] — [Interpretation Act] — [Purposive approach]

Public Prosecutor
v
BAB

[2016] SGHC 61

High Court — Criminal Case No 41 of 2015
Kan Ting Chiu SJ
7 December 2015

12 April 2016

Kan Ting Chiu SJ:

1 The principal issue in this case is the meaning of s 376A(1)(*b*) of the Penal Code (Cap 224, 2008 Rev Ed) and the application of s 9A of the Interpretation Act (Cap 1, 1997 Rev Ed) to its construction.

2 A woman ("the Accused") was charged with 21 charges for offences against a minor girl ("G"): 20 charges under s 376A(1)(*b*) of the Penal Code ("the provision") — 15 of them were for using a dildo, and five for using her fingers to penetrate G's vagina — and one charge under s 7(*a*) of the Children and Young Persons Act (Cap 38, 2001 Rev Ed) ("CYPA") for committing an obscene act on G by kissing her on the lips and licking her breasts. At the commencement of her trial, the Accused pleaded guilty to six charges under s 376A(1)(*b*) and to the charge under s 7(*a*) and she agreed to have the remaining 14 charges under s 376A(1)(*b*) taken into consideration for the purpose of sentencing. However, after listening to the mitigation plea and

submissions on sentence and before I sentenced the Accused, a doubt whether a woman could be charged with an offence under s 376A(1)(*b*) arose in my mind and I directed counsel for the prosecution and the Accused to address me on this. In their written submissions, both counsel submitted that when s 376A(1)(*b*) is read with s 9A of the Interpretation Act and is given a purposive interpretation, a woman could be charged under s 376A(1)(*b*). After reading the submissions, after reading carefully the decisions of our courts and statutory interpretation and giving further thought to the question, I came to the conclusion that the provision does not cover women as offenders.

3 In the circumstances, the charges cannot stand even after the Accused had pleaded guilty to them. Section 228(4) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) obliges a court to reject a plea of guilt by an accused person who has pleaded guilty and has been convicted if his or her plea in mitigation raises any matter which materially affects "any legal condition required by law to constitute the offence charged." The basis for this provision is clear; a conviction should not stand if no offence has been committed. The principle has to be applied further; when a court finds that an accused who has pleaded guilty is actually not guilty, the court should not act on the guilty plea, and should reject the plea whether the realisation came out of the mitigation plea or from any other circumstances. Going still further, even in a situation where an accused person has not pleaded guilty, but is convicted after trial, the court should set aside the conviction if it finds that no offence has been committed. The court has the obligation and the power to set aside the conviction as long as it is not *functus officio*, as it would be if it has fully disposed with the case, and has lost the ability to recall the case to rectify the defect. As I have not sentenced the Accused, I am not *functus officio*, and I

reject the Accused's guilty pleas to the six s 376A(1)(*b*) charges, set aside the convictions thereon and acquit her of them.

4 I shall explain my decision on the s 376A(1)(*b*) charges.

S 376A(1) reads:

> Any person (A) who –
>
> (*a*) penetrates with A's penis, the vagina, anus or mouth, as the case maybe, of a person under 16 years of age (B);
>
> (*b*) sexually penetrates, with a part of A's body (other than A's penis) or any anything else, the vagina, or anus, as the case may be, of a person under the age of 16 years of age (B);
>
> (*c*) causes a man under 16 years of age (B) to penetrate, with B's penis, the vagina, anus or mouth, as the case may be, of another person including A; or
>
> (*d*) causes a person under 16 years of age (B) to sexually penetrate, with a part of B's body (other than B's penis) or anything else, the vagina or anus, as the case may be of any person including A or B,
>
> with or without B's consent, shall be guilty of an offence.

The question

5 The question which I have to resolve is whether the person **A** in s 376A (1) (*b*) can be a woman. The provision is a relatively new one enacted in 2007, and the question had not been decided before. On a plain reading of (*b*), **A** is a person who has a penis which **A** had not used to penetrate B, and had used another part of the body or something else to do that. The reference to a person who has a penis cannot be construed to include a woman without doing violence to common sense and anatomy.

Legislative history

6 As the prosecution is committed to the position that the Accused can be charged under s 376A(1)(*b*), it is apposite to review its legislative history.

This provision has a short history as criminal offences go. In 2006, the government took the unusual step of circulating a draft Penal Code (Amendment) Bill ("the draft bill") before the actual bill (Bill 38 of 2007) was tabled in Parliament, and invited public feedback on the proposed amendments. The Ministry of Home Affairs published a Consultation Paper on the Proposed Penal Code Amendments ("the consultation paper') which explained that the Penal Code was undergoing a review which "will bring the Penal Code up to date, and make it more effective in maintaining a safe and secure society in today's context".[1] In part A(ii) of the consultation paper which dealt with new offences, paragraph 22 stated:

> A new offence of sexual assault by penetration would be introduced. The intention is to prosecute non-consensual penetrative sexual acts, such as oral and anal sex and using body parts (other than the penis) and objects.

7 The provision in the draft bill (which was to evolve through the subsequent amendment bill and then into the form of the enacted provision) is s 376A (2):

> Any person (A) who –
>
> (a) sexually penetrates, with a part of A's body (other than A's penis) or anything else, the vagina or anus of a person under the age of 16 years of age (B);
>
> (b) causes a man under 16 years of age (B) to penetrate, with B's penis, the vagina, anus or mouth of another person (C); or
>
> (c) causes a person under 16 years of age (B) to sexually penetrate, with a part of B's body (other than B's penis) or anything else, the vagina or anus of A or B or of another person (C), with or without B's or C's consent, shall be guilty of an offence.

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[1] Consultation Paper on the Proposed Penal Code Amendments, para 3.

8 In the accompanying Explanatory Notes to Proposed Amendments to Penal Code Offences ("explanatory notes") to the draft bill, paragraph 11 is of particular relevance to the issue here:

> **Gender neutrality**
>
> In the review, we considered whether provisions which are currently gender-specific should be amended to provide for gender neutrality.
>
> Having considered the matter, we have decided not to take the approach that all offences should be "gender neutral". Many of our laws remain gender specific because they reflect situations where men tend to be the aggressors e.g. rape will remain an offence that only males can commit. The offence of rape is clearly understood to be non-consensual penile penetration perpetuated by a man on a woman. Due to the anatomical differences between men and women, the offence of rape should remain an offence that can only be physically be performed by a man. If a woman has sex with a minor, she can be prosecuted under section 7 of the Children and Young Persons Act (sexual exploitation of child or young person).
>
> However, for offences where both a man or a woman could be the aggressor, our approach is to make it gender-neutral e.g. a female could be prosecuted for using any body part or object to penetrate the anus of a male victim.

9 After feedback to the consultation paper was received and considered, the proposed amendments moved forward. The provision was revised when it appeared in the Penal Code (Amendment) Bill (Bill 38 of 2007). The revised version in the bill was enacted without modification as s 376A.

10 During the second reading of the bill, Senior Minister of State for Home Affairs Associate Professor Ho Peng Kee informed the House that:

> Feedback received highlighted concerns over female sexual abuse of male minors. On further consideration, we accept that these younger *male children* could be exploited by older women. Consequently, we have decided to make it an offence for a *woman* to engage in penile penetrative sexual acts with a *male minor* under 16 and to have commercial sex with a male

> minor under 18. Section 376A will be introduced to make oral and anal sex, whether consensual or non-consensual, with a minor under 16, an offence, attracting an imprisonment term of up to 10 years or fine or both. This new offence will also cover other penetrative acts such as penile-vaginal penetration and penetration of the anus or vaginal by any part of the body or object. [emphasis added]

(*Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at col 2175)

11 The Minister went on to say on the following day:

> We look at the provisions and look whether they ought to be made gender neutral. We have stated the position in this House before that do not take the position that all our criminal offences should be gender neutral because of the psychological and physiological differences between men and women. We had feedback saying that for some offences, perhaps, a female adult predator who "exploits" a *male minor* should be liable, like sexual assault by penetration. And we agreed. So, that is now proposed to be the law. [emphasis added]

(*Singapore Parliamentary Debates, Official Report* (23 October 2007) vol 83 at cols 2440–2441)

It was not explained why gender neutrality for the offender was only extended to situations involving male victims. The revised version in the bill was enacted as s 376A(1)(*b*) of the Penal Code with one vote against *vide* Act 51 of 2007.

Interpretation

12 The literal and grammatical meaning of the provision is clear. The person **A** referred to is a person with a penis which was not used to penetrate another person. If the intention was that **A** can be a man or a woman, that could have been made clear easily, for example, by adding a few words to the provision for it to read "a part of A's body (other than A's penis, if A is a man)".

13 How is a clear provision to be interpreted? This question has been addressed by our courts. I will refer to four cases which dealt directly with the question in chronological order. The first case is *Comfort Management Pte Ltd v Public Prosecutor* [2003] 2 SLR(R) 67 where Yong Pung How CJ held at [18] that:

> …the approach in both s 9A and the common law assume that the statutory provision in question is reasonably capable of more than one construction: in such a case, the meaning which promotes the statutory provision should be chosen. However, *if the word is capable of one meaning only, then the courts should not impose another meaning, even if the latter, in the opinion of the courts, will better promote the statutory purpose…* Otherwise, that will amount to performing the legislative function. A line must be drawn between purposive interpretation and law-making. [emphasis added]

14 In *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183, VK Rajah JA cautioned at [52] that:

> …it is crucial that the *statutory provisions are not construed, in the name of a purposive approach, in a manner that goes against all possible and reasonable interpretation of the express literal wording of the provision…*
>
> Courts must be cautious to observe the limitations on their power and to confine themselves to administer the law. Section 9A of the Interpretation Act should not be viewed as a means or licence by which judges adopt new roles as legislators; the separation of powers between the judicial branch and of government must be respected and preserved. [emphasis added]

15 In [57], he concluded that:

> …s 9A of the Interpretation Act mandates that a purposive approach be adopted in the construction of all statutory provisions, and allows extrinsic material to be referred to, even where, on a plain reading the words of a statute are clear and unambiguous, The purposive approach takes precedence over all other common law principles of interpretation. However, *construction of a statutory provision pursuant to the purposive approach stipulated by s 9A is constrained by the parameters set by the literal text of the provision.* The courts should

> confine themselves to interpreting statutory provisions purposively with the aid of extrinsic material within such boundaries and assiduously guard against inadvertently re-writing legislation.

16 The Court of Appeal dealt with the question in *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354. In its judgment delivered by Sundaresh Menon CJ, it quoted at [19] with approval a passage from Dawson J's dissenting judgment in *Mills v Meeking* (1990) 169 CLR 214 that

> …the approach required by s 35 [of the Interpretation Act of Victoria which corresponds with s 9A of the Interpretation Act] needs no ambiguity or inconsistency (in the provision to be interpreted); it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction. Reference to the purposes may reveal that the draftsman has inadvertently overlooked something which he would have dealt with had his attention been drawn to it and *if it is possible as a matter of construction* to repair the defect, then it must be done. [emphasis added]

17 The Court of Appeal revisited this question in *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 5 SLR 482. The Court in a judgment delivered by Chao Hick Tin JA, dealt with the effect of the Interpretation Act on the interpretation of s 37(1)(*a*) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed), referred to *Bennion on Statutory Interpretation* (LexisNexis, 6th Ed, 2013), and confirmed at [16] that:

> …it is a rule of statutory interpretation that *where a statutory provision is grammatically capable of one meaning only,….the legal meaning corresponds to the grammatical meaning of the provision, and is to be applied accordingly.* [emphasis added]

18 While it had been said

> When I use a word it means just what I choose it to mean – neither more nor less.

(Humpty Dumpty, *Through the Looking Glass*),

words in statutory enactments should be used and construed more carefully and responsibly.

The route to the answer

19 To arrive at an answer, it is necessary to ascertain if it is the purpose of s 376A(1)(*b*) to include women as offenders, and if it is, whether the provision should be interpreted to give effect to that.

Purpose

20 It can be seen from [6]–[11] that from the beginning of the process in 2006 leading to the parliamentary debates and the passing of the amendment bill in 2007, the question of making it an offence for a woman to use a part of her body or an object to penetrate the vagina or anus of a minor was under discussion. Attention was drawn to the question, and it can be assumed that much thought was given to the gender-specificity of the provision by the time it was enacted.

21 Against this background, different views can be taken on whether provision is extended to women offenders. On the one hand, the fact that the provision was passed with only one vote against may be seen as evidence that the purpose expressed in the explanatory notes and the Minister's speeches was adopted for the provision. On the other hand, the choice of the words "a part of A's body (other than A's penis)" could be taken as an indication that the offence is intended to apply to men only, on the very reasonable assumption that Parliament understands the laws it passes, and we should be slow to suggest or infer the contrary.

Interpretation

22 Section 9A(1) of the Interpretation Act states that:

> In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.

23 This should be read in conjunction with explanations and clarifications from our courts which are set out at [13]–[17]. A statutory provision which is grammatically and literally capable of only one specific meaning should be given that interpretation. Where the wording of a provision is broad enough for there to be more than one interpretation, an interpretation which promotes the purpose of the provision is to be preferred to an interpretation which does not promote the object. Section 9A(1) does not require or allow a provision to be given a purposive interpretation which is inconsistent with its natural meaning.

24 In this instance the enacted words are that person **A** is a person with a penis. This is not a case where **A** can be read to be a man, and can also be read to be a woman. If a court were to read **A** to include a woman, it would have gone beyond interpreting the law, and would be re-writing it. By doing that it would be assuming a legislative power it does not have, and even Parliament may not have, if we agree with Jean-Louis de Lolme's wry statement in *Constitution de l'Angleterre* (The Constitution of England) that "parliament can do everything but make a woman a man and a man a woman". At the same time, it is not discharging its judicial responsibility when it gives the law an interpretation which is incompatible with its literal and grammatical meaning to give effect to a purpose gleaned from the explanatory notes and

ministerial speeches. We must guard against bending backwards and straining the judicial spine to give a purposive interpretation, and not reading the law as it is. The better course is to leave drafting to the draftsman, and to leave it to the legislature to amend the provision to make it clear that person A includes a woman, if that is its intention.

The facts of the case

25 The Accused was 36 years old at the time of the offence and 40 years old at the present time, and had passed herself off as a male from a young age. G and her family stayed in a flat two doors from the Accused's flat. The Accused and G became acquainted in 2011, and G would visit and spend time at the Accused's flat. As time passed, their friendship and affection for each other developed.

26 The charge under s 7 CYPA was that the Accused

> sometime in February 2012, at……., Singapore, did commit an obscene act with a young person, one [G], aged 13 years, to wit, by kissing her on the lips and licking her breasts, and you have thereby committed an offence punishable under section 7 of the Children and Young Persons Act, Chapter 38.

27 The Statement of Facts ("SOF") presented by the prosecution and admitted by the Accused elaborated that the Accused had brought G to the kitchen of the flat and kissed her on the lips before taking her to the master bedroom where she removed her T-shirt and bra, and licked her breasts and nipples. In April 2014, in the course of investigations, G was sent for a medical examination at the Singapore General Hospital. The examination did not reveal anything significant. G had no medical problems, and was calm at the clinical appointment. She was not sent for psychological or psychiatric examination.

28 The Accused underwent psychiatric examination in the course of investigations. A psychiatric report put up by Dr Poon Ngar Yee of the Institute of Mental Health ("IMH"), stated that

> Psychosexual and Relationship History:
>
> 12 [The Accused] reported that prior to kindergarten she thought she was a boy as she was often mistaken as a boy by others. Although her mother had been telling her that she was a female, she said the first time she actually realised she was a female was when she was dressed in a kindergarten uniform which was a dress.
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> Mental State Examination:
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> 44 [The Accused] presented as a young cooperative adult of Malay origin. Her psychomotor activity was normal. She maintained appropriate eye contact. She was tearful at times. Her attention and concentration was normal. She was able to focus in all the interviews. Her affect was euthymic and appropriate to her thought content. Her memory function was normal. She was orientated to time, place and person and was aware of the nature of his [*sic*] charges. There were no overt signs or symptoms of depression or psychosis. She was not suicidal.
>
> Opinion:
>
> [The Accused] suffered from Gender Dysphoria. This was evident by her strong desire to be of male [*sic*]. Since childhood she had been having strong preference for wearing only typical masculine clothing. She dislikes of her female sexual characteristic [*sic*]. She has a desire of having a penis. She has consumed [*sic*] a role as a male to the extent of obtaining a factitious identity and married to females.

29 Counsel for the Accused also arranged for her to be examined by two other psychiatrists. The first psychiatrist was Dr Subhash Gupta of the IMH, who also found that the Accused suffered from Gender Dysphoria, and that there was no history suggestive of any paraphilia such as fetishism frotteurism, transvestism, sado-masochism, voyeurism or exhibitionism.

30 The Accused was also seen by Dr Tommy Tan, formerly Senior Consultant of the IMH and presently in private practice. Dr Tan diagnosed the Accused to have Transexualism or Gender Dysphoria. He stated that the Accused did not have hebephilia or paedophilia (sexual preference for adolescent children) and did not seek out young victims, and that she does not require psychiatric treatment. He recommended sexual reassignment surgery instead, so that she can continue life as a man.

Factors relevant to the sentence to be imposed

31 There are some mitigating circumstances. The Accused had no antecedents, she had surrendered herself to the police, and had co-operated in the investigations. With regard to her actions, she did not force herself on G. The fact that she was afflicted with Gender Dysphoria is not a mitigating factor, neither is the fact that she did not have hebephilia or paedophilia.

32 The prosecution submitted that there were aggravating factors. The first aggravating factor put forward is that the Accused had abused the position of trust reposed in her as set out in paragraph 10 of the SOF, which reads:

> The victim, her younger sister and elder brother began to spend most of their time at the Accused's flat from **March 2012**. The three of them would go back to their own home from time to time throughout the day to shower, get changed and dressed from their own flat every morning before leaving to attend their respective schools. The victim's father was aware of this and allowed it to continue as he trusted the accused and both families were on good terms at the time. [emphasis added]

33 The SOF related to all the charges the Accused had pleaded guilty to. Chronologically, these charges commenced in February 2012 with the charge under s 7 CYPA, followed by the charges under s 376A(1)(*b*) which were from March 2012 to September 2013.

34 With the setting aside of the convictions on the s 376A(1)(*b*) charges, we are left with the offence under s 7 CYPA which took place in February 2012. In February 2012, G and her siblings had not yet started to spend time at the Accused's flat, and paragraph 10 of the SOF did not make it clear whether their father had reposed trust in the Accused at that time. When we talk about trust, it is not only about whether there was trust; the extent of the trust reposed in the offender should also be considered. In this case, any trust reposed in the Accused in February 2012 would not have been significant.

35 The second aggravating factor relied upon by the prosecution is the sexual grooming of G by the Accused, as disclosed in the SOF. While sexual grooming in relation to s 7 CYPA is not defined, kissing on the lips and licking of the breasts and nipples would come within the ambit of grooming as initiation towards sexual activity. Counsel for the Accused however disputed that there was sexual grooming because there was no element of coercion, pressure or abuse by the Accused, without explaining why any of those elements is necessary to make up grooming.

36 The prosecution referred me to the recent decision by Sundaresh Menon CJ in *AQW v Public Prosecutor* [2015] 4 SLR 150 ("*AQW v PP*") and the decision of the Court of Appeal in *Public Prosecutor v ABJ* [2010] 2 SLR 377 ("*PP v ABJ*"), and submitted that a sentence of one year imprisonment would be a just and appropriate sentence for the Accused. The first case in time, *PP v ABJ*, is a bad case. The accused was convicted for nine offences perpetuated over seven years against a girl, when the victim was between eight and 15 years of age. The offences included rape, anal sex, and indecent penetration of the vagina with a banana and a stick. The accused, a temple medium, had trust reposed in him in that he was regarded by the victim's family as a spiritual advisor, as well as a closed and trusted family friend. The

victim was examined by a psychiatrist and was found to have suffered severe psychological harm in the form of promiscuous behaviour, self-mutilation and low self-esteem, and that it would be difficult for the victim to recover from the afflictions. The accused was sentenced by the trial court to one year's imprisonment for the offence. Taken in totality, he was sentenced to 24 years for the nine offences. On appeal by the prosecution, the Court of Appeal enhanced the total sentence to 32 years by ordering that three of the sentences imposed by the trial court were to run consecutively in place of the two consecutive sentences ordered at the trial. The one-year sentence for the offence under s 7 CYPA was not disturbed. This case did not offer much guidance for the determination of the sentence.

37 In the second case, *AQW v PP*, the appellant was a 35 year old man, and his victim was a boy who was almost 15 years old. The appellant had pleaded guilty to two charges under s 7 CYPA for using his hands to masturbate the boy. On both occasions, the acts were consensual with no coercion used. The appellant was sentenced to ten months' imprisonment on each charge. When the case went on appeal, Menon CJ held at [50] that:

> …a sentence of between six and eight months' imprisonment was appropriate where
>
> (a) the sexual act that took place between the offender and the minor involved the touching of naked genitalia, regardless of whose genitalia it was,
>
> (b) the minor is 14 years old or above, and does not appear to be particularly vulnerable,
>
> (c) the offender did not coerce or pressure the minor into participating in the sexual act, and
>
> (d) there was no element of abuse of trust.

and he reduced the sentences of ten months' imprisonment to six months for each offence.

38 In their submissions on sentence, defence counsel asked for a sentence of six months' imprisonment, while the prosecution pressed for a term of 12 months.

Sentence

39 In setting the sentence for the Accused, I take into account the fact that the Accused had surrendered herself to the police when the offence came to light, and had co-operated in the investigations and had pleaded guilty to the charge at the first opportunity, saving G from having to recount the unrecorded and uncorroborated events which took place years ago. There was no penetration or touching of naked genitalia, and the acts were consensual. The Accused had not coerced or preyed on G and is unlikely to prey on other minors, and she had not left any severe or lasting psychological harm on G as far as we know.

40 This case does not call for the same one-year sentence which was imposed in *PP v ABJ*. A sentence within the six-to-eight-months range is more appropriate, and after taking into consideration all the facts I sentence the Accused to serve eight months imprisonment.

Kan Ting Chiu
Senior Judge

Dwayne Lim and John Lu (Attorney-General's Chambers) for the prosecution;
N Sudha Nair (M/s Lexcompass LLC) for the accused.
