

Public Prosecutor v Tan Ah Kit
[2000] SGHC 254

Case Number : CC 67/2000
Decision Date : 28 November 2000
Tribunal/Court : High Court
Coram : Tay Yong Kwang JC
Counsel Name(s) : Thong Chee Kun (Attorney-General's Chambers) for the prosecution; Accused in person
Parties : Public Prosecutor — Tan Ah Kit

JUDGMENT:

Grounds of Decision

THE CHARGES

1 The Accused, a 43 year old male, pleaded guilty to three Charges of having carnal intercourse against the order of nature, an offence punishable under Section 377 of the Penal Code. Two of these Charges alleged that he engaged in anal intercourse with a now 13-year-old boy (whom I shall refer to as "MF") in September 1999 and February 2000. The third Charge accused him of having performed an act of fellatio on a 14-year-old boy (whom I shall call "S") between 1st and 20th February 2000.

2 Six other Charges were admitted by the Accused and taken into consideration for the purpose of sentencing with his consent. Three of these Charges alleged that the Accused engaged in anal intercourse with MF in May or June 1999 and performed fellatio on MF in September 1999 and in February 2000, while one Charge alleged that he performed fellatio on S between 20 February and 15 March 2000. The remaining two Charges taken into consideration concerned the possession of obscene and uncensored and uncertificated video compact discs, offences under the Films Act.

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THE STATEMENT OF FACTS

3 The Accused, MF and S all reside in the Yishun public housing estate. At the material times, MF and S were students. All nine offences in question were committed in the Accused's flat.

4 The Accused introduced himself to and befriended the two boys in a games arcade at North Point Shopping Centre sometime in early 1999. He subsequently invited them to his flat. Since that time, the two boys would meet the accused at either of these two places.

5 In September 1999, MF went to the Accused's flat. The Accused, who was alone, invited MF to watch an obscene film together. While watching it in the living room of the flat, the Accused removed MF's shorts and asked him to bend forward with his hands placed on the sofa. He then inserted his penis into MF's anus and ejaculated later on MF's buttocks. He gave MF some money before the boy left the flat.

6 In February 2000, MF went again to the Accused's flat where the exact same story as above was repeated.

7 That same month, S also visited the Accused at his flat. The Accused was alone. He asked S to watch an obscene film with him. During the show, he pulled down S's shorts and underwear to knee level. He then performed fellatio on S until S ejaculated. He then gave S some money before the boy left the flat.

8 On 29 February 2000, at about 10.15 pm, MF lodged a police report in which he stated that earlier that evening, the Accused

brought him to his flat, showed him obscene films and then molested him. On 3 May 2000, the Accused was arrested by the police in his flat.

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PREVIOUS CONVICTIONS

9 The Accused had the following previous convictions:

| Date | Offence and Ordinance | Sentence | Court and Case No. |
|---------|---|---|------------------------------|
| 12.5.86 | Sec 379 r/w Sec 34 Cap 103 Theft with common intention | Fined \$800/- i/d 2 mths' impt (Fine not paid) | Court No. 26 MAC 8544/86 |
| | Sec 38(1) r/w Sec 34 Cap 102 Fraudulent possession of property with common intention | Fined \$100/- i/d 1 day's impt (Fine not paid) | MAC 8545/86 |
| | Sec 379 R/W Sec 511 & Sec 34 Cap 103 Attempted Theft with common intention | Taken into consideration with MAC 8544/86. | MAC 8546/86 |
| 3.9.86 | Sec 38(1) Cap 102 Fraudulent possession of property | Fined \$100/- (Fine paid) | Court No. 26 MAC 15383/86 |

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|---------|---|---|--------------|
| 21.9.87 | Sec 394 r/w Sec 397 & Sec 34 Cap 224 | 5 yrs' impt wef 26.5.87 and 12 strokes of the cane. | DAC 5178/87 |
| | Armed Robbery with hurt with common intention | 5 yrs' impt wef 26.5.87 and 12 strokes of the cane. | DAC 4876/87 |
| | | (Consecutively with DAC 5178/87) | DAC 5179/87 |
| | | 5 yrs' impt wef 26.5.87 and 12 strokes of the cane. | |
| | | (Concurrently with DAC 5178/87) | DAC 5031/87 |
| | | Taken into consideration with DAC 5178/87. | |
| 21.9.87 | Sec 394 Cap 224 | Taken into consideration with DAC 5178/87. | DAC 5177/87 |
| | Robbery with hurt | | |
| | Sec 379 Cap 103 | Taken into consideration with DAC 5178/87. | DAC 5498/86 |
| | Theft | | |
| 23.5.94 | Sec 8(a) Cap 185 | 3 mths' impt | Court No. 23 |
| | Possession of a controlled drug | | MAC 5083/94 |

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THE MITIGATION PLEA

10 The Accused, speaking in Hokkien, informed me that he was not married and was living with his 69 year old mother. His father had passed away. He urged me to be lenient so that he could be released earlier to take care of his mother. He also requested that his sentence be backdated to the date he was first remanded.

11 The Accused said he was remorseful and that he did not use force or violence on the boys in committing the offences. He

asserted that he was "not that sort of person". When I asked him to explain what he meant by this, he merely expanded the statement to "I am not the sort of person who likes to do these acts".

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THE DECISION OF THE COURT

12 Section 377 of the Penal Code provides:

"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animals, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.

Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

13 The Prosecution relied on the guiding principles in sentencing paedophiles involved in unnatural carnal intercourse enunciated by the Court of Appeal in *Lim Hock Hin Kelvin v P.P.* [1998] 1 SLR 801. In that case, Kelvin Lim pleaded guilty before the High Court to 10 Charges – four under Section 377 of the Penal Code for having carnal intercourse against the order of nature, one for attempted carnal intercourse against the order of nature and five under Section 377A for committing acts of gross indecency with another male person. He was sentenced to 10 years imprisonment on each of the four Charges under Section 377 of the Penal Code, five years imprisonment for the attempted offence and one year imprisonment for each of the five Charges under Section 377A of the Penal Code. The terms of imprisonment for the four Charges under Section 377 of the Penal Code were ordered to run consecutively while the remaining sentences were ordered to run concurrently with these four. The result was that the Accused in that case was sentenced to a total of 40 years in prison. 10 Charges under Section 377 and 20 Charges under Section 377A of the Penal Code were also taken into consideration.

14 Five victims were involved in that case and they were all young boys aged between 8 and 12 at the time of the offences. Kelvin Lim met and befriended the first two victims (who were brothers) at an amusement centre. He became their informal guardian and built up trust and confidence by bringing them on fun-filled outings and giving them free tuition in their HDB flat. He engaged in both anal and oral intercourse with the boys and promised them that he would purchase computer games as gifts for them as a reward.

15 Kelvin Lim got to know the other three victims through the two brothers. Through free tuition and outings, he also enticed those three boys to engage in unnatural carnal intercourse with him.

16 Upon his arrest, Kelvin Lim confessed readily to the offences. After his arrest, he was diagnosed as having paedophilia of the exclusive type and was recommended hormonal therapy. He refused this treatment and opted for psychological treatment with a psychologist but discontinued this after four sessions. He had previous convictions for similar offences. In 1988, he was convicted of two counts under Section 377 of the Penal Code and one count of gross indecency under Section 377A of the Penal Code, with three other counts under each of the said sections taken into consideration. The four victims there were aged between 9 and 12 years. In 1993, he was convicted on two Charges of gross indecency under Section 377A with two other Charges taken into consideration. The victim was a 9 year old boy.

17 The Court of Appeal said:

"14 This is a case of a paedophile who abused the trust and confidence placed by the young victims in him and who had callously manipulated their innocence to satisfy his perverse sexual instincts. ...

15 In addressing the question of whether the individual sentence imposed on the appellant on each charge under s 377 Penal Code was manifestly excessive, we would lay down some guidelines governing the sentencing for the offence of unnatural carnal intercourse involving children as victims, as well as set out the relevant mitigating and aggravating factors for such offences. These guidelines should not be taken as all-embracing or exhaustive. We emphasise that these guidelines would not apply in cases of offences of unnatural carnal intercourse committed between two consenting adults, which would carry wholly different considerations."

18 After pointing out that the Penal Code does not have separate provisions for the offence of unnatural carnal intercourse involving children and that involving adults, the Court of Appeal went on to state:

"20 However, the starting position must be that where the victims are vulnerable children, the offence becomes much more serious and the punishment meted on such offenders has to reflect the gravity of the offence. ...

21 In considering the appropriate tariffs for sentences, the gravity of the offence and the circumstances in which the offence was committed had to be taken into account.

Gravity of the offence:

(1) *Harm to the victims.* The harm to the victims include both the physical and the emotional harm. The physical injury may be caused as the direct result of penetration of the victim's anus (as in this case), which may be exceedingly painful. Where the victims are very young, it may leave them for life with embarrassing disabilities, as noted in the Wolfenden Report. In addition, the victims are exposed to the risk of sexually transmitted diseases. What is of greater concern is that violence or threats of violence may be used to compel the victims to submit to the offender. Where violence or threats of injury are used, the punishment should be more severe to deter offenders from re-offending. The long-term emotional harm and psychological scars to the victims cannot be underestimated, though there has been caution in *R v Willis* (1974) 60 Cr App R 146 that the courts should not readily assume that the victims will later develop homosexuality in life because they have been sexually abused when young. Much will also depend on the support the victims receive from their families.

(2) *Social danger.* Paedophilic offences are by their nature unpleasant and most distressing and the society has to express its marked disapproval for such harm to the young and vulnerable victims. The presumption is that the safety of the child must be paramount and chronic paedophiles who have a propensity to re-offend, because they are either totally unable or unwilling to control themselves, have to be put away for long periods.

...

24 Bearing in mind the gravity of the offence, we started from the position that a paedophile who commits unnatural carnal intercourse (in the form of anal intercourse) against young children below the age of 14 years, without any aggravating or mitigating factors, should be sentenced to ten years' imprisonment. There should not be any difference whether the victim is a young girl or a young boy. The court would then have to consider the aggravating and mitigating factors in increasing or reducing the sentence. Second or repeat offenders who are demonstrated to be a menace to society should be sentenced to a far longer period. We again emphasise that these sentencing guidelines do not necessarily apply to unnatural carnal intercourse between two consenting adults.

25 We considered the relevant circumstances of the offence in placing a particular offence according to its relative gravity.

Circumstances in which the offences are committed:

(1) *Abuse of trust and authority.* Where an offender is placed in a position of trust by the parents or by the victims, the breach of trust justifies a substantial sentence on the ground of general deterrence. All those who have charge of children cannot abuse their positions for the sake of gratifying their sexual urges.

(2) *Moral corruption.* Where the offender has enticed or cajoled the victims to indulge in unnatural carnal intercourse by the promise of gifts (for example, money) this has a very corrupting effect on the young victims, especially adolescents: *R v Willis*. This should be reflected by a more severe sentence."

19 Where chronic paedophiles are involved, the Court of Appeal expressed the following prospective guideline:

"35 ... The public protection justifies a long-term incarceration. In future, chronic paedophiles (such as the appellant) who are shown to be unable or unwilling to control themselves and who target children as victims should be sentenced to life imprisonment and if the offences have taken place after 20 August 1997, it would mean imprisonment for the remainder of the prisoner's natural life."

20 There was no evidence that the Accused in the present case was an "irrepressible" or "chronic" paedophile but a paedophile he clearly was. As noted by the Court of Appeal (at paragraph 31 of the judgment), paedophilia is a condition where there is recurrent and intense sexually arousing fantasies, sexual urges or sexual activities involving prepubertal children. Unlike Kelvin Lim, he did not have previous similar convictions. Life imprisonment in the circumstances would be too harsh for him. However, he did commit the unnatural offences from about May 1999 to about March 2000, a period of some 11 months or so.

21 It was clear that the Accused knew where to fish and what would make the fishes bite. He visited the games arcade where young boys were likely to gather without the presence of supervising adults. He titillated the boys' emergent erogenous zones with erotic films so that there was no need for coercion. He rewarded them with money with the obvious objective of enticing them into more such liaisons. All this required a predator's ability to target potential victims and to execute his perverse plan. While violence or threats would aggravate the offences, the seeming consent of the young, vulnerable victims did not make the offences any less repugnant. The law comes down hard on adults who take advantage of the youth and innocence of those who do not know better and who are easily led astray by enticing gifts or money. In fact, the victim MF has Moderate Mental Retardation.

22 Like the Court of Appeal in *Kelvin Lim's case*, I found no significant mitigating factors in the present case save for the plea of guilt which had spared the two victims here the embarrassment of recounting in Court the sordid acts which they had allowed the Accused to do to their bodies. However, as was made clear in *Fu Foo Tong v PP* [1995] 1 SLR 448 at page 455, it is not axiomatic that every such plea confers an automatic entitlement to a discount in the severity of sentence. Public interest has to be considered and where protection of the young and innocent is concerned, public interest practically reigns supreme.

23 The Court of Appeal's sentencing guidelines (at paragraph 24 of the judgment) apply to paedophiles performing anal intercourse on young children below 14 years of age. The guidelines apply squarely to the first victim, MF, who was 11 and 12 years old at the material times. Where the second victim S was concerned, he was almost 15 years old at the time of the offences but did not appear to have been materially more mature or intelligent than MF was. Moreover, the unnatural carnal intercourse involved in the two Charges concerning S was fellatio and not anal intercourse. In *Kelvin Lim*, the acts of fellatio were made the subject of Charges under Section 377A and not Section 377 of the Penal Code. Section 377A carries a maximum imprisonment term of only two years and Kelvin Lim received one year imprisonment for each of the five Charges under Section 377A. Whether fellatio is made the subject of a Charge under Section 377 or 377A of the Penal Code is a matter of prosecutorial discretion. As the Court of Appeal there noted (at paragraph 16 of the judgment), since *PP v Kwan Kwong Weng* [1997] 1 SLR 697, it is clear that fellatio is regarded as unnatural carnal intercourse within the meaning of Section 377 save for an

exception that has no application here. In my view, fellatio and anal intercourse involving two males are not really distinguishable when they are the subject of Charges preferred under Section 377. Everything said about anal intercourse applies to oral intercourse except for the potential physical injury caused by penetration of the victim's anus. Further, I do not think any distinction ought to be made on the basis of who is penetrating whom. I am therefore of the opinion that the guidelines set by the Court of Appeal should apply to the case of S in the same way as they patently do in the case of MF.

24 Since there were no significant mitigating factors in the Accused's favour, I sentenced the Accused to 10 years imprisonment in respect of each of the three Charges on which he was convicted.

25 In deciding how many of the sentences should run consecutively, I was not faced with the manifold permutations that presented themselves in *Kelvin Lim*. The application of Section 18 of the Criminal Procedure Code to the facts of this case dictates that either two or all three imprisonment sentences run consecutively. The "one transaction rule" was not applicable to the Accused's offences here as the three Charges were distinct in time and two involved different victims. I also had regard to the other aspect of consecutive sentences, the "totality principle". The nature and the circumstances of the offences were abhorrent. The Accused's antecedents were not carnal in nature but they showed that he was a man given to crime for the past 14 years. Society, especially the young and nave, must be protected from his predatory instincts and tendencies. He thrust the two boys into the deep, murky waters of sexual deviance before they were even ready to swim. The report dated 2 June 2000 by Dr Bernadine Woo of the Child Guidance Clinic showed that MF was exhibiting signs of emotional trauma. He was said to be depressed, fearful and irritable. He has also suffered loss of appetite and experienced interrupted sleep. He has been staying out late at night and has become withdrawn, refusing to talk to his parents. Although his school grades showed no deterioration, he has been irritable and inattentive since the beginning of the year and has been frequently fighting with schoolmates. Over the past two months before the report, he has been touching the genitalia of three schoolmates and has hit a younger schoolmate who refused to caress him.

26 Bearing all the circumstances in mind, I was of the view that the Accused should be kept out of society for 30 years. Accordingly, I ordered all three sentences of 10 years imprisonment each to run consecutively with effect from 3 May 2000, the date he was apprehended.

Tay Yong Kwang

Judicial Commissioner

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