

Leu Xing-Long v Public Prosecutor
[2014] SGHC 193

Case Number : Magistrate's Appeal No 110 of 2014
Decision Date : 03 October 2014
Tribunal/Court : High Court
Coram : Chan Seng Onn J
Counsel Name(s) : Terence Tan Li-Chern and Christine Low (Peter Low LLC) for the appellant;
Ramesh Ethan and Crystal Tan (Attorney-General's Chambers) for the respondent.
Parties : Leu Xing-Long — Public Prosecutor

Criminal law – Elements of crime – Mens rea

Criminal law – General Exceptions – Accident

Criminal law – General Exceptions – Mistake of fact

3 October 2014

Judgment reserved.

Chan Seng Onn J:

Background

1 The Appellant, Leu Xing Long, was convicted on one charge under s 376B(1) of the Penal Code (Cap 224, 2008 Rev Ed) ("PC") for having commercial sex with a minor under 18 years of age. He was sentenced to 15 weeks' imprisonment by the District Court. The Appellant appealed against his conviction.

2 The Appellant admitted to having sexual intercourse with the minor whom he procured from an online vice ring and paid \$450 for her sexual services. His defence was that he had taken proper care and caution to ascertain that she was above 18 years of age by asking her for her age and identity card. She lied to him that she was 18 years of age and produced the identity card of her elder sister to prove that she was above the age of 18. He believed her. If he had known that the minor was below 18 years of age, he would not have gone through with the sexual engagement.

3 Under the circumstances, the Appellant submitted that he was entitled to be acquitted because he had taken all proper care and caution to avoid the commission of the offence. The statutory defence of "Accident in the doing of a lawful act" under s 80 of the PC ("defence of accident") was available to him as he had satisfied all the elements necessary to make out the defence. The Appellant's main contention was that the trial judge erred in finding that the defence of accident is inoperable in law in relation to this offence.

Findings of the trial judge

4 The trial judge held that:

(a) under s 377D of the PC, a mistake as to the age of the commercial sex provider cannot be

pleaded as a defence where an accused person was 21 and above at the time of receiving the service, regardless of how the mistake came to be made and how reasonable the mistake was;

(b) although s 377D makes no direct reference to s 80 of the PC, the defence of accident is inoperable in law for this offence;

(c) even if the defence of accident could possibly be invoked, it was not applicable given that he did not act with proper care and caution as required in the provision; and

(d) the common law defence of "due diligence" and/or "reasonable care" was similarly inapplicable.

Main Issues

5 The Appellant raised the following issues of law:

(a) Whether there is a presumption that *mens rea* is an ingredient of an offence under s 376B(1)? If so, has this presumption been displaced?

(b) Is s 376B(1) an absolute or a strict liability offence?

(c) Can s 80 PC be raised in defence to a charge under s 376B(1)?

My decision

Issue 1: Whether there is a presumption that mens rea is an ingredient of an offence under s 376B(1)? If so, has this presumption been displaced?

6 In *M V Balakrishnan v Public Prosecutor* [1998] SGHC 169, Yong Pung How CJ observed that where a statutory provision creates an offence, there is a presumption that *mens rea* is an essential ingredient of the offence (at [8]). This presumption thus imputes a mental fault element where the offence creating provision itself does not expressly indicate a fault element by inclusion of words such as "dishonestly", "knowingly" and "intentionally". The courts will have to determine the form and content of that imputed fault element, which the legislature supposedly meant the offence to have. However, this presumption may be displaced expressly or by necessary implication by the language of the statute or by the subject matter with which the statute deals: Thean J in *PP v Phua Keng Tong* [1986] SLR 168 adopting the approach of the Privy Council in *Lim Chin Aik v R* (1963) 29 MLJ 50 and the House of Lords in *Sweet v Parsley* [1970] AC 132.

7 In *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1985] 1 AC 1 at 14 ("*Gammon v AG of HK*"), the House of Lords held that the presumption can be displaced "where the statute is concerned with an issue of social concern, and public safety is such an issue". Even where the statute is concerned with such an issue, the presumption of *mens rea* still remains "unless it can be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act".

8 The nature of the crime, the punishment, the absence of social obloquy, the particular mischief and the field of activity in which it occurs and the wording of the particular section and its context, may show that Parliament intended that the act should be prevented by punishment regardless of intent or knowledge (per Lord Pearce in *Sweet v Parsley* pg 156). The court will dispense with the necessity for *mens rea* if it is satisfied that Parliament had so intended.

9 Before analysing Issue 1, it is important to set out the content of the *mens rea* and *actus reus* for the following offence of “Commercial sex with a minor under 18” under s 376B(1):

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.

...

(4) In this section, “sexual services” means any sexual services involving —

(a) sexual penetration of the vagina or anus, as the case may be, of a person by a part of another person’s body (other than the penis) or by anything else; or

(b) penetration of the vagina, anus or mouth, as the case may be, of a person by a man’s penis.

10 Although s 376B(1) is silent on the requisite mental fault elements for the offence, I do not doubt that the presumption applies as it is an offence of a serious criminal nature which carries a prescribed maximum imprisonment term of up to 7 years. The prosecution must therefore prove that the accused had the following *mens rea* at the material time:

(a) the consideration was intended by the accused to be given in exchange for the “sexual services” as defined in s 376B(4);

(b) the act of penetration of the vagina, anus or mouth, as the case may be, was done intentionally; and

(c) the accused knew that the person was below 18 years of age.

11 The prosecution must also prove the following *actus reus*;

(a) The consideration was provided;

(b) the accused had penetrated the person; and

(c) the person was below 18 years of age at the time of the penetration.

12 However, when the PC amendments were made to criminalise commercial sex with minors under 18 years of age, Parliament found it necessary to enact s 377D specifically to deny accused persons aged 21 years and above from having the benefit of a defence of a reasonable mistake as to the minor’s age. Section 377D provides that:

Mistake as to age

377D.—(1) **Subject to subsections (2) and (3) and notwithstanding anything in section 79, a reasonable mistake as to the age of a person shall not be a defence** to any charge of an offence under section 376A(2), **376B** or 376C.

(2) In the case of a person who at the time of the alleged offence was under 21 years of age, the presence of a reasonable mistaken belief that the minor, who is of the opposite sex, was of or above —

(a) the age of 16 years, shall be a valid defence to a charge of an offence under section 376A(2); or

(b) the age of 18 years, shall be a valid defence to a charge of an offence under section 376B or 376C.

(3) For the purposes of subsection (2), the defence under that subsection shall no longer be available if at the time of the offence, the person charged with that offence has previously been charged in court for an offence under section 376A, 376B, 376C or 376E, or section 7 of the Children and Young Persons Act (Cap. 38) or section 140(1)(i) of the Women's Charter (Cap. 353).

[emphasis added in bold]

13 Parliament made it very clear that a mistake as to the age of the minor is no defence for an accused person who is 21 years of age and above, even if the mistake was a reasonable one. Having regard to the clear statutory wording and the obvious purpose behind these provisions, which is to protect children from the sex trade and to curb the commercial exploitation of children for sex, I am satisfied that the *mens rea* element (c) above has been specifically displaced by statute for an offence under s 376B(1). However, *mens rea* elements (a) and (b) are not affected by the enactment of s 377D and they remain as essential elements of the offence. In other words, s 377D has not displaced the presumption in relation to the mental elements (a) and (b).

14 Accordingly, if an accused person is able to show that his payment is intended exclusively for reimbursement of the hotel charges, he may succeed in raising a reasonable doubt that he has obtained the sexual services for consideration. The Prosecution's case may well fail because the *mens rea* element (a) is not proved beyond a reasonable doubt.

15 Consider another hypothetical scenario where an accused person pays a minor to masturbate him with her hands. He has no intention whatsoever to penetrate the minor in any way. Whilst in the very dark room and unknown to him, the minor of her own volition suddenly fellates him. Penetration of the minor's mouth occurs. However, the accused honestly but mistakenly believes that the minor is still masturbating him. If the accused person manages to show that his penetration is not intentional, the Prosecution may well fail to prove the charge because the *mens rea* element (b) is not established beyond a reasonable doubt.

Availability of a separate defence under s 79

16 Section 79 is one of the General Exceptions in Chapter IV of the PC and is applicable by virtue of s 40(2) of the PC to offences which are "punishable under the [Penal Code]" and "any other law for the time being in force". It provides that:

Act done by a person justified, or by mistake of fact believing himself justified by law

79. Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it.

...

17 Unless expressly excluded by statute, s 79 applies to all offences whether within or outside of

the PC. It has a wide application. As can be seen, mistakes of fact can come in many forms. What mistakes of fact are relevant as being exculpatory will depend on the nature of the alleged offence in question. Section 377D has only excluded one form of mistake as a defence, *ie* a mistake as to age, in relation to a charge for an offence under ss 376A, 376B or 376C. Other possible forms of mistake of fact have not been excluded. Notwithstanding that the words "notwithstanding anything in section 79" are present in s 377D, I do not think they are meant to exclude the application of s 79 entirely for an offence under s 376B. Section 79 continues to have role to play as an available defence to a charge under s 376B so long as the exculpatory facts relied upon do not relate to the age of the minor.

18 Accordingly, where other forms of mistake of fact are established, the accused person is not precluded from raising them to cast a reasonable doubt on any essential mental element other than (c), or from relying on them to establish a defence under s 79 on a balance of probabilities as the case may be.

19 But where the exculpatory facts do touch upon or relate to the state of knowledge, belief or reasonableness of the mistake of an adult or repeat offender as to the age of the minor (*ie* mental element (c)), they become entirely irrelevant for the purpose of defending a charge brought under s 376B, even if s 79 is also made out on those same exculpatory facts. Only to this limited extent has the specific provision s 377D ousted the operation of s 79 but not otherwise as a general exception. The legal maxim "*lex specialis derogate legi generali*" applies. It means that where several laws apply to the same situation, the more specific one(s) take precedence over more general ones.

20 The accused person in the hypothetical at [15] above is therefore not precluded by s 377D from arguing in the alternative that s 79 remains as a separate defence available to him because the mistake that he is relying on does not relate at all to the age of the minor. His mistake is in believing that he is being masturbated when in fact, he is engaged in sexual penetration of the mouth of the minor. But establishing a defence under s 79 on a balance of probability may be more onerous than simply raising a reasonable doubt in relation to the *mens rea* element (b) as explained at [15].

21 I will give another illustration where the mistake of fact relates to the consideration for sexual services, which has nothing to do with the age of the minor. An accused person agrees with the minor that there will be no consideration for the sexual intercourse to be provided. However, he will bear the hotel room charges and no more. The hotel informs the accused person that the room costs \$300. After the sexual intercourse, the accused person hands \$300 over to the minor who has agreed to settle the hotel charges for him. Unknown to the accused, there is a private arrangement where the minor is only charged \$200 for the hotel room. The minor keeps \$100 and treats that as payment for her sexual services. The accused person here is not precluded by s 377D from relying on s 79 as a defence to the charge with respect to the \$100 as consideration for the sexual services of the minor. The accused person's mistake is in honestly believing that he is justified in paying \$300 exclusively for the hotel room charges although in reality, the minor had received \$100 from the accused person as consideration for her sexual services. As explained at [14], the accused may additionally raise these same facts to cast a reasonable doubt in relation to the *mens rea* element (a) in that he has no intention to pay any consideration to secure the sexual services.

Issue 2: Is s 376B(1) an absolute liability or a strict liability offence?

22 What is the difference between an absolute liability and a strict liability offence? Offences which do not require the prosecution to prove a specific fault element but allow the accused to avoid criminal liability on proof of due diligence or a reasonable mistake of fact are termed strict liability offences whereas those which do not allow the accused to raise due diligence or reasonable mistake

of fact as a defence are regarded as absolute liability offences (see Stanley Yeo, Neil Morgan, W.C. Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2nd Ed, 2012), at pp 170-171 ("*Criminal Law in Malaysia and Singapore*")).

23 As Parliament has seen it fit to expressly exclude the defence of reasonable mistake as to the age of the minor, it is clear to me that the offence under s 376B(1) has essentially been fashioned into an offence of absolute liability, in so far as the issue of the minor's age is concerned, in respect of all adult offenders and certain repeat offenders below the age of 21.

24 For offenders below 21 years of age who have never been previously charged in court for similar offences, Parliament has adopted a calibrated approach by allowing them to raise the defence of "reasonable mistaken belief" as to the age of a minor of the opposite sex. As a concession for such first time youthful offenders, s 376B(1) will not be regarded as an absolute offence but one which carries strict liability in relation to the minor's age.

25 There are precedent cases involving adult offenders where the court treated s 376B(1) as an absolute liability offence. It was held that s 377D(1) "leaves no doubt that an accused like the appellant [who was above 21 years of age] cannot raise in his defence that he did not know that the person he had paid sex with was under-aged" (see *Buergin Juerg v Public Prosecutor* [2013] 4 SLR 87 at [5]). In *Tan Chye Hin v Public Prosecutor* [2009] 3 SLR(R) 873 at [12], the High Court was of the view that even if the accused checked the age of the minor and was given a good forgery of an identity document that showed she was above 18 years of age, this would only be a point relevant for mitigation and not exculpation.

26 The reasons why an absolute liability offence of such nature was created for adults and repeat offenders engaging in commercial sex with minors can readily be discerned from the Parliamentary Materials. During the Second Reading of the Penal Code (Amendment) Bill (*Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83, the then Senior Minister of State for Home Affairs (Associate Professor Ho Peng Kee) stated: [\[note: 1\]](#)

Sir, whilst prostitution per se is not an offence, 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, therefore, should be protected from providing sexual services.** [emphasis added in bold]

27 Other Members of Parliament also emphasised the need to curb sexual exploitation of minors by stemming the demand for child prostitution. Dr Teo Ho Pin urged that: [\[note: 2\]](#)

As for commercial sex against a minor under 18, **we should send a clear message to curb the demand for child prostitution both in and outside Singapore. Sections 376B, C and D will enhance the protection of child's rights, and hopefully, reduce child trafficking or abduction for sexual services.** As reported in today's *Straits Times*, the child sex industry is thriving in South-East Asia, despite some high profile prosecution of child sex abuse cases. **The key failures are due to homegrown demand for child sex** and the lack of cooperation among governments. Sir, I am indeed very concerned about the effectiveness of sections 376B, C and D. **We must do more to curb demand for child sex and punish child sex offenders heavily.** [emphasis added in bold]

28 It is clear from the Parliamentary Reports that ss 376B and 377D were enacted to protect young and vulnerable persons from the commercial sex trade and to curb the demand for child prostitution by imposing absolute liability against those who engage in such exploitative sexual

activity. For the protection to be effective, criminal liability for an offence under s 376B is made absolute in the sense that absence of knowledge that the prostitute is below 18 years of age or a mistaken belief, reasonable or otherwise, that the prostitute is above 18 years of age, a common excuse of those caught engaging child prostitutes, is made completely irrelevant by s 377D, and even if those excuses are genuine, they are not exculpated. It is the prerogative of Parliament, after weighing all the policy considerations, to create an offence of absolute liability for adult and repeat offenders, and to calibrate it down to a strict liability offence for first time young offenders below the age of 18. The words of the statutory provision used to express absolute liability for an offence under s 376B committed by certain categories of offenders are also plain in their meaning and unambiguous. There is hardly any room for me to interpret the provision in any other manner. It would be wrong for me to construe the provision in a way that goes against the clear wording of s 377D and Parliament's policy intent and purpose for enacting the provision in the way that it did.

29 With the explicit removal of "reasonable mistake as to age" as a possible defence, the reasonableness or extent of the precautions that might have been taken to ascertain the correct age of the minor has become strictly *irrelevant* for the purpose of determining guilt for adult and repeat offenders, although it remains relevant for sentencing. It must follow that the prosecution is no longer obliged to prove that the accused person actually knew or honestly believed that the person providing the commercial sexual services was below the age of 18 at the time the sexual services in question were provided to him. The prosecution simply has to prove that the minor was in fact below the age of 18 at the time of the alleged offence.

30 Accordingly, if an adult accused person has been deceived into believing erroneously that the minor is above 18 years of age, the deception affords him no defence to the charge. The fact that his belief might have been honestly or reasonably held is also irrelevant for the purpose of determining guilt. The fact that he took proper care and caution and had made careful investigations of the age of the minor is again irrelevant. His mistaken belief cannot operate as a defence. It is in this sense that the offence is to be regarded as one of absolute liability for adult and repeat youthful offenders. An exception is made only for youthful first time offenders (*ie* those below 21 years of age), where the offence is to be treated as a strict liability offence in which the presence of a reasonable mistaken belief that the minor is of or above 18 years of age can still be relied upon as a valid defence to be established on a balance of probability. Whether it is an absolute or a strict liability offence, the prosecution need not prove the *mens rea* element (c) because I construe s 377D to have the effect of displacing any presumption of mental element (c) as an essential ingredient of an offence under s 376B(1).

Issue 3: Can s 80 be raised in defence to a charge under s 376B(1)?

The Appellant's arguments

31 The Appellant's counsel strenuously argued that the defence of accident under s 80 is available to the Appellant as a matter of law.

32 Unlike s 79 of the PC, Parliament did not expressly withdraw or preclude s 80 from being used as a defence in respect of a charge under s 376B(1). No member of the Legislature had made any clear, express or categorical statement during the relevant debates that the offence should be treated as one of strict or absolute liability. The enactment of the offence was ostensibly to be in line with the United Nations Convention on the Rights of the Child 1989 and the Stockholm Declaration and Agenda for Action 1996, both of which however make no demand of signatory states to impose absolute and/or strict liability but merely ask for appropriate measures to suppress or eliminate the sexual exploitation of children.

33 Keeping s 80 as an available defence to a charge under s 378B(1) is consistent with the ultimate objective intended by the Legislature to suppress and eliminate such crime against children. The Appellant submitted that determining the offence as an absolute offence does not assist by way of general deterrence. Allowing this defence would aid the suppression and elimination of this offence if members of the public are encouraged and reminded to take active steps of proper care and caution.

34 Appellant's counsel referred me to the views put forth by Cheah Wui Ling in Chapter 13 of the *Singapore Academy of Law Annual Review of Singapore Cases* (2013) 14 SAL Ann Rev 273 at [13.34] that:

... [I]f Parliament's objective was to require a higher standard of care from those paying for commercial sex, this would not be achieved by making the offence under s 376B(1) one of absolute liability. In doing so, individuals will be held liable regardless of the care they exercised.

35 The Appellant referred to the case of *R v City of Sault Ste Marie* (1978) 85 DLR (3d) at 161 and 171, wherein Dixon J opined:

... [The argument for imposing liability without fault] rests upon assumptions which have not been, and cannot be empirically established. There is no evidence that a higher standard of care results ... If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of a breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on this part and on the part of others? These are among the questions asked. ...

36 The Appellant therefore submitted that the acceptance of the applicability of s 80 will promote, advance and encourage the prevention or avoidance of occurrences of the offence by encouraging members of the public to take proper care and caution when they engage in commercial sex. Those who merely claim that they did not act deliberately or were misled, without taking active steps to mitigate the risk will be precluded from relying on the s 80 defence.

General availability of s 80 as a defence

37 It will be useful to set out the statutory defence of "Accident in the doing of a lawful act" found in s 80 of the PC:

Accident in the doing of a lawful act

80. Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution.

Illustration

A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence.

38 Being one of the general exceptions in the PC, I am of the view that s 80 remains applicable as a possible statutory defence to exculpate an accused person for an offence under s 376B(1),

provided that the alleged exculpatory facts do come within s 80 in the first place and provided that there is no specific statutory provision to curtail the scope of application of the statutory defence in whole or in part in respect of that particular offence.

39 The Court of Appeal in *Tan Chor Jin v Public Prosecutor* [2008] 4 SLR(R) 306 at [30] highlighted that s 80 operated as an exception to criminal liability in that it:

... exempts the doer of an innocent or [a] lawful act in an innocent or [a] lawful manner from any unforeseen evil result that may ensue from accident or misfortune. ... The primordial requirement ... is that the act should have been done with 'proper care and caution'.

40 Indeed, "the accused's conduct and its effect remain wrongful but the criminal law is prepared to exculpate him or her for that wrong on account of the extenuating circumstances comprising the accident" (see *Criminal Law in Malaysia and Singapore* at [18.3]).

41 In the commentary by Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, Ratanlal & Dhirajlal's *the Indian Penal Code (Act XLV of 1860)*, (LexisNexis Butterworths Wadhwa, 33rd Ed, Reprint 2011) at p 111, it is stated that s 80 of the Indian Penal Code (which is in *pari materia* with s 80 of the PC) exempts the doer of an innocent or lawful act in an innocent or lawful manner and without any criminal intention or knowledge from any unforeseen evil result that may ensue from accident or misfortune.

42 The term "accident" is not defined in the PC. In *Rex v Ong Choon* [1938] MLJ 227 at 229, the Singapore Court of Criminal Appeal adopted the following definition for "accident" by Stephens in his *Digest of Criminal Law* 3rd Ed at p 143:

[A]n effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it.

43 The conditions to be fulfilled for the defence of accident to succeed are:

- (a) the act done by the accused constituting the alleged offence was the result of or arose from a misfortune or an accident;
- (b) the act constituting the alleged offence took place or occurred in the course of the accused performing or doing of a lawful act "X" in a lawful manner, by lawful means;
- (c) the act "X" was done with proper care and caution; and
- (d) the act "X" was not done with any criminal intention or knowledge.

44 Hence, the accused's act "X" itself is the intentional act done with reasonable precautions but without any criminal intent or knowledge. It is the unexpected or unforeseen effect or result of the accused's act "X" that is the accident or misfortune, which constitutes the alleged offence. In other words, that unexpected or unforeseen effect or result cannot be said to be the accused's act *per se*. Consequently, he cannot be made criminally liable for the alleged offence. It is purely an accident.

45 The illustration in the PC makes it clear how s 80 should be construed. "A" is at work with a hatchet, which is the lawful act "X" that "A" is performing or doing at that time. If "A" had taken

reasonable precautions having regard to the risk of being lawfully at work "X" with the hatchet, then the *actus reus* of killing a man standing nearby resulting from the head of the hatchet coming loose, flying off and hitting the man, is excusable and no offence is committed by "A". Put simply, it is an unfortunate accident that happened unexpectedly despite all the reasonable precautions having been taken by "A". Although that killing remains wrongful, no fault element can be traced to "A". Therefore "A" has to be excused due to extenuating circumstances.

46 As can be seen from the above, the elements to establish the s 80 defence are usually different from the elements of the alleged offence. The s 80 defence is not meant to negate the elements in the alleged offence. The elements of the s 80 defence must be established on a balance of probability by the accused to be acquitted of the charge, whereas the essential elements of the alleged offence are to be proved by the prosecution beyond a reasonable doubt for the accused to be convicted of the charge, although some of the exculpatory facts relied upon to establish the s 80 defence may in themselves be capable of raising a reasonable doubt on the elements (*eg* the subjective mental state of intention and knowledge) relevant to the alleged offence in question to prevent the Prosecution from succeeding in proving the offence elements beyond a reasonable doubt.

Ambit of s 80 as a defence to a charge under s 376B

47 I accept that s 377D has not expressly ruled out s 80 as a possible defence to a charge under s 376B. The phrase "notwithstanding anything in section 80" does not appear anywhere in s 377D unlike that for s 79.

48 I am of the view, that even without a preceding phrase such as "notwithstanding anything in section 80" or for that matter a phrase "notwithstanding anything in sections 79 and 80", the extremely clear statutory language for s 377D(1) that --- "a reasonable mistake as to the age of a person **shall not be a defence** to any charge of an offence under section ... 376B ..." --- is sufficient to exclude the applicability of any defence that relies on any exculpatory facts that relate to any mistake made as to the age of the minor, the reasonableness of that mistake or the manner in which it was made. Should the statutory defences of ss 79 or 80 be premised on these same exculpatory facts in relation to the age of the minor, they are rendered inoperable by virtue of s 377D. However, if the exculpatory facts relied upon to establish a defence under ss 79 or 80 have nothing to do with the age of the minor, then these statutory defences can be used to exculpate the accused person charged with an offence under s 376B.

49 As explained earlier, although s 376B(1) is said to be an offence of absolute liability, the criminal liability is absolute for adults and repeat offenders only for **one aspect** of the *mens rea ie* mental element (c) due to the unambiguous statutory exclusion of a defence of reasonable mistake as to age for this offence for adult and repeat offenders. But the criminal liability is certainly not absolute with regards to the other mental elements (a) and (b).

50 I will give another illustration where a s 80 defence may well operate because the exculpatory facts giving rise to it do not engage the statutorily excluded defence of reasonable mistake as to age. The accused person pays a girl below 18 years of age to give him a body massage using her naked body and not her hands. The accused person has no intention of penetrating the minor nor has he paid her to have sexual intercourse with him. During the course of the body massage and despite precautions having been taken, the girl somehow slips and the accused person accidentally penetrates her vagina with his penis. The penetration is the result of an accident which occurred in the course of the accused having a body massage in his hotel room, which I assume is not unlawful for the purpose of this illustration. If the accused is able to show that he has taken proper precautions to avoid penetration when he is being massaged and the penetration is shown to be the result of an accident,

the accused may be able to raise a s 80 defence to a charge under s 376B(1).

51 It must be noted that proving the existence of a s 80 defence on a balance of probability can be more difficult than simply using these same exculpatory facts, which are unrelated to the minor's age:

- (a) to raise a reasonable doubt on the *mens rea* element (a) on the basis that he intended the consideration to be exclusively for the massage and not for any sexual penetration; and
- (b) to raise a reasonable doubt with respect to *mens rea* element (b) on the basis that he never intended to penetrate the vagina of the minor and the penetration was entirely accidental.

52 As can be seen, to construe s 377D(1) as having excluded a s 80 defence in every respect is, I think, an extreme position to take and is not borne out by the statutory language of the provision. I am also not prepared, on a purposive interpretation of the relevant provisions in the PC, to adopt the position that s 376B(1) is an offence of absolute liability in every respect such that all possible accident defences under s 80, even though they may have nothing to do with the age of the minor, can never be mounted.

Facts in the Present Case

53 It is not disputed that the Appellant paid for the sexual services of the minor and pursuant to that payment, he had sexual intercourse with the minor. The Appellant had the basic intent to commit the physical act, *ie*, have sexual intercourse with the minor and provide consideration for the sexual services obtained. What is disputed however is whether the Appellant had taken proper care and caution in ascertaining the age of the minor. However, for the purpose of analysis, I will first *assume* that the Appellant's contentions are validly supported on the evidence.

54 The Appellant essentially contended that it was an accident or misfortune that the sex provider he engaged turned out to be a minor. It was a totally unexpected event because he had already exercised due care and caution to (a) ensure that the sex worker provided to him was above 18 years of age; and (b) eliminate any possible mistake in finding out the minor's true age. He never set out to engage a minor in the first place. He had no intention to do so. He went through his mental check list to ascertain the prostitute's age prior to engaging in any commercial sex. When the minor showed up at the hotel, he had asked her for her age but was told she was 18 years old. To be sure, he had also asked to inspect the minor's identity card but unknown to him, the minor showed him the identity card of her elder sister instead. He honestly believed that she was above 18 years old at that time. He did not think that the minor would mislead him as to her age. Under the circumstances, it was not reasonably foreseeable that he would encounter a minor and be completely misled as to the minor's age. His encounter with a minor for commercial sex was purely the result of an accident and a misfortune.

55 Based on these alleged facts, counsel submitted that the Appellant should not be denied the benefit of a s 80 defence because the act the Appellant ultimately committed was the result of an accident or misfortune and would otherwise be a lawful act that he had done in a lawful manner and by lawful means, given that he had exercised proper care and caution. Counsel pointed out that it is not an unlawful act *per se* for a person in Singapore to obtain for consideration the sexual services of a person. It may be viewed by many as immoral but it remains permissible by law. Counsel referred to the following passage in *Abdullah v R* [1954] MLJ 195:

What the law does not forbid, it allows, and what a law allows is I think justified by law. I do not

think it possible to have an intermediate area that is not forbidden but not justifiable.

56 In my view, there can be factual circumstances where both s 79 and s 80 defences are applicable. I find the following passage from *Criminal Law in Malaysia and Singapore* at [18.22] illuminating:

Accident and mistake of fact

There may be circumstances where either the defence of accident under s 80 or of mistake of fact under s 79 could apply. This is because the circumstances which caused an accused person to misconceive the facts and to act in a certain way, might also cause an ordinary person in the accused's position not to foresee the effect of that act. Since the effect is not reasonably foreseeable, it could be described as an accident. A case example is the Orissa High Court decision in *State v Khora Ghasi* 1978 Cri LJ 1305. The accused was a farmer who had shot an arrow at what he reasonably believed to be a **bird** which had entered his maize field. It turned out to be a **man** who had stealthily gone among the crop to steal maize. The court held that the accused should be acquitted either on the basis of s 79 or s 80. It is noteworthy that these two defences do not operate in combination but rather serve as alternatives. Since the elements of each defence are not the same, there may be cases where one defence will succeed but not the other. [Emphasis added in bold.]

57 The Appellant basically has aligned his case along the facts in *State v Khora Ghasi* 1978 Cri LJ 1305. The "man" is now substituted with the "minor below 18 years of age" and the "bird" is substituted with a "prostitute above the age of 18". The farmer shot an arrow at what he reasonably believed to be a "bird" but the "bird" turned out to be a "man." The Appellant had sex with whom he reasonably believed was a "prostitute above the age of 18" but the prostitute turned out to be a "minor below 18 years of age". It was purely an accident that the "prostitute" turned out to be a "minor" because it is not reasonable for the Appellant to have foreseen that the "prostitute" would be a "minor" especially after he had taken all the precautions in his mental checklist to ensure a low risk of that event happening to him. Counsel argued that the Appellant is entitled to rely on either a s 79 or s 80 defence as they are alternative defences available to him on the same set of facts. Since Parliament only excluded a s 79 defence but not a s 80 defence, the Appellant should nevertheless be acquitted under the s 80 defence although s 79 is not available to him.

58 However such an argument as the trial judge had astutely recognised is in substance the same as the defence of reasonable mistake of fact as to the age of the minor but under a different label. He held that s 377D necessarily excludes any defence which includes any form of s 80 defence that hinges or is built upon a mistake as to the age of the commercial sex provider. I agree.

59 In fact, the exculpatory facts relied upon by the Appellant are all about his mistaken view or belief of the minor's age being above 18, which was formed as a result of him not foreseeing or expecting that the prostitute could ever be below 18 since so much care and caution had been taken by him to reduce the likelihood of that event happening.

60 The exculpatory facts nonetheless fall squarely within the defence which Parliament deemed fit to expressly exclude in no uncertain terms having regard to the objective of the provision to protect the young and vulnerable from prostitution and commercial sexual exploitation. It is therefore not open to the Appellant to argue that having taken proper care and caution to verify the victim's age, and not having foreseen or expected he could have been wrong in his belief that the prostitute was above 18, he should nevertheless be excused pursuant to s 80 for his "accident" in getting the minor's age wrong. In my view, all this is nothing more than a mistake made in ascertaining the

correct age of the prostitute and that is precisely the very defence that s 377D precludes him from raising. The trial judge was therefore right to find that the Appellant's submission of a s 80 defence hinged or was built upon a mistake as to the age of the commercial sex provider. The trial judge rightly found that even if the accused's version of the facts was fully accepted that he had been misled and he had genuinely believed that the minor was above 18, the fact remains that it has turned out to be a mistaken belief. Thus, no matter how reasonably the mistake came to be made, it was no defence to the charge. To allow the Appellant to circumvent s 377D in this manner would be to subvert Parliament's intention and severely undermine the enforcement and purpose of s 376B read with s 377D. The conviction of the Appellant must necessarily be upheld.

61 Since there is no appeal against the sentence, which in any event has been served, there is no real need for me to assess whether the trial judge's findings of fact were plainly wrong or against the weight of the evidence, so that I can thereafter make a determination whether a manifestly excessive sentence has been imposed. Even if all the disputed facts were to be decided in favour of the Appellant, they are relevant only to the determination of the appropriate sentence. They do not provide a valid defence to a criminal charge under s 376B(1) of the PC for the reasons I have stated.

62 In any event, after a careful perusal of the Record of Appeal and after giving full consideration to the submissions, I do not think that the trial judge had erred in his factual findings. His conclusion that the minor did not show any identity card to the Appellant is supportable on the evidence and I agree with his finding that the Appellant could not show that he had acted with "proper care and caution". The defence of accident under s 80 would in any event have failed on the facts as found by the trial judge. The appeal against conviction is accordingly dismissed.

[\[note: 1\]](#) Parliamentary Debates (Sing, Parliamentary Reports, Vol. 83, Col. 2187 – 2188, 22 October 2007)

[\[note: 2\]](#) Parliamentary Debates (Sing, Parliamentary Reports, Vol. 83, Col. 2206, 22 October 2007)

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