

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

Magistrates' Appeal)
No. 3778 of 2018)

PUBLIC PROSECUTOR

v.

OSCAR WHYLE

Coram: Desiderius Erasmus J.

Joseph bin Ali Akhbar and Fei Chang Zhi (Deputy Public Prosecutors) for the Prosecution.

Herman Melville and Yukio Mishima (Lambda LLC) for the Accused.

GROUND FOR DECISION

1. As far as the prosecution are concerned, this is a simple matter of an offence under section 377A. The Defence held a contrary view. These were the facts that the Defence considered relevant.

2. The Accused is a well-known personality in Singapore both for being a prominent and highly successful dental surgeon specializing in aesthetic enhancement, and a dentist to the stars, as well as for being an outspoken activist for human rights. He is the founder of many non-profit advocacy groups for the rights of migrant workers, domestic helpers, single mothers and the environment. He contributes frequently to online and press forums, weighing in all issues relating to human rights.

3. It is well known that the Accused has a steady partner with whom he has formed a household since 2000. This person is of the same gender as the Accused. They appear together at social and public functions and gatherings and introduce each other as life partners. The law in Singapore does not permit them to marry, and they are not married. But they own all their property jointly and share joint accounts, much as any married couple would.

4. The Accused took no part in the debates surrounding the amendments to the Penal Code in 2007 nor the most recent debates. He has made no comments on any social media nor any public forum on any LGBT issues. His focus is on human rights of foreign workers. He has been involved in several high-profile debates over the human rights of foreign domestic workers in Singapore. In a series of highly charged public debates starting in April 2018, he accused the Singapore government of breaching the basic human rights of these foreign domestic workers by failing to impose a minimum wage and minimum requirements to ensure basic living conditions.

5. As part of this campaign, through one of his non-profit organizations, (Men Against the Abuse of Maids) MA'AM, he organized a series of weekly lectures over 10 weeks covering maid abuses. Each lecture featured a prominent international human rights activist, and someone from a government body. Attendance at each lecture was by invitation only, and all lectures appeared in full on You Tube within hours of their conclusion.

6. The lectures proved to be highly popular and spawned a series of discussions that were increasingly critical of the lack of protection for foreign workers.

7. On 1 July 2018, the day before the final lecture, the Accused and his life partner were arrested by the police as they walked, hand-in-hand, out of their house, at 7 am. They were both charged under Section 377A of the Penal Code (Cap. 224, 1985 Rev. Ed.). Section 377A is set out in full below.

Outrages on decency.

377A. Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.

8. Both the Accused and his life partner were charged with committing an act of gross indecency on the night of 30 June 2018.

9. The charge against the Accused's life partner was later dropped. No reasons were given for that decision. The Accused's life partner became a key witness for the Defence. At trial below, the Accused denied that he had taken part in any acts of gross indecency. His defence was that whatever transpired between his life partner and himself were private acts between two consenting adults, and that there was no indecency in their actions. There was incontrovertible physical evidence that the two gentlemen had engaged in at least one act of sexual penetration.

10. Reference was made to the decision of the then Chief Justice Yong Pung How in *Ng Huat v Public Prosecutor* [1995] 2 SLR 783; [1995] SGHC 124, at para. 27

What amounts to a grossly indecent act must depend on whether in the circumstances, and the customs and morals of our times, it would be considered grossly indecent by any right-thinking member of the public (per Egbert J in the *Supreme Court of Alberta, R v K & H*). The court does not sit to impose its own moral standards or precepts, but to enforce the morals of the general public. From the evidence, I have no doubt that the acts complained of in the present case would be considered grossly indecent by any right-thinking member of the public.

11. The Defence argued that in the light of the debates in Parliament over the retention of Section 377A, and in light of the most recent revived debates arising from

the developments in India, it was clear that there was a significant number of members in Parliament and of the public in Singapore, including prominent persons, who did not consider the sexual acts between consenting homosexual adults to be acts of gross indecency. It was argued that the pronouncements in Parliament made it clear that Parliament's intention in retaining section 377A was not to actively prosecute offences under section 377A but to reflect the fact that there was still a segment of society that would not be comfortable with doing away with Section 377A altogether.

12. In particular, the Defence pointed to the fact that, in answer to a question by Mr Siew Kum Hong, the Deputy Prime Minister Mr Wong Kan Seng reported in Parliament that, in 2005, of the 4 persons who were convicted under section 377A of the Penal Code, 2 were convicted for cases involving victims below the age of 18. He also said that in 2006, of the 7 persons who were convicted under section 377A, 4 preyed on victims below the age of 18. The argument was that section 377A was not intended to be actively prosecuted. For this, the Defence further relied on pronouncements in the Parliamentary debates and the pronouncements of the former Attorney-General, which the Defence argued has strong persuasive value.

13. In the alternative, the Defence argued that if the acts complained of were acts falling within section 377A of the Penal Code, then either Section 377A is unconstitutional for being inconsistent with Article 12 of the Constitution, or his prosecution was politically motivated, and therefore in contravention of Article 12 of the Constitution.

14. The Magistrate disagreed with the Defence arguments that the acts complained of did not fall within section 377A of the Penal Code, and convicted the Accused. The Magistrate further held that section 377A was constitutional, because the Prime Minister had said it was in Parliament.

15. In the appeal before me, I disagreed with the Magistrate on both counts. The concept of decency changes over time. I believe that there are other acts which would better fall within s 377A but a consensual act of sexual penetration in private between two consenting adults is not grossly indecent.

16. In arguments before me, the Deputy Public Prosecutors referred me to the pronouncements by the Prime Minister in Parliament on 23 October 2003 in relation to Section 377A where he said at Cols. 2469-2472,

... I take my legal advice from the Attorney-General, and his advice to the Government is quite clear.

The continued retention of section 377A would not be a contravention of the Constitution.

17. I disagree. It is not for the Attorney General to make such a determination. The supremacy of the Constitution demands that it is the Judiciary that must make the determination.

18. In my view, section 377A is inconsistent with Article 12 of the Constitution. In *PP v Taw Cheng Kong* [1998] 2 SLR 410, the Court concluded that under Article 12, like cases must be treated alike. A person's sexual preference is no legitimate basis for classification for different treatment under the law, particularly when the sexual preferences are a private matter. It is different if a person's sexual proclivities harm others, but there are sufficient provisions in the Penal Code to deal with those situations. In my view, the continued retention of section 377A is contrary to Article 12 of the Constitution.

19. In any event, I am firmly of the view that the Accused's prosecution was arbitrary. While prosecutorial discretion is vested in the Public Prosecutor, the exercise of that discretion must be based on clear and cogent grounds. The very fact that the Accused was singled out for prosecution, when there are many other practicing homosexuals in Singapore, not least his life partner, is indicative that the prosecution of the Accused was nothing less than arbitrary. This is particularly since the Executive has itself indicated that it would not prosecute these offences. During the debates on Parliament on section 377A, the Senior Minister of State for Home Affairs (Assoc. Prof. Ho Peng Kee) said, (at Col. 2175)

... "Police has (sic) not been proactively enforcing the provision and will continue to take this stance. But this does not mean that the section is purely symbolic and thus redundant. There have been convictions over the years involving cases where minors were exploited and abused or where male adults committed the offence in a public place such as a public toilet or back-lane. Sir, whilst homosexuals have a place in society and, in recent years, more social space, repealing section 377A will be very contentious and may send a wrong signal that Government is encouraging and endorsing the homosexual lifestyle as part of our mainstream way of life. ..."

20. There is more to be said on the matter, and it is right that the Court of Appeal will make its own pronouncement.

Desiderius Erasmus J.
24 September 2018