Tan Eng Hong v. Attorney-General

[2012] SGCA 45

Country: Singapore
Region: Asia
Year: 2012
Court: Court of Appeal
Health Topics: Sexual and reproductive health
Human Rights: Freedom from discrimination

Facts

Tan and another man were arrested for engaging in oral sex in a public bathroom. They were charged under section 377A for the commission of an act of gross indecency with another male person.

Tanâ€™s attorney argued that section 377A was inconsistent with Article 9 of the Singapore Constitution. Soon after, the Prosecution amended the complaint to charge Tan under section 294(a) of the Penal Code for the commission of an obscene act in a public place.

The lower Court found that Tan did not have a cause of action because of concerns about res judicata; however, the higher Court could not reconcile the lower Courtâ€™s findings that â€œon one hand, â€˜Tanâ€™s con rights [might] arguably have been violatedâ€™ (see the Judgment at [19]) and â€˜Tanâ€™s case was not completely without meritâ€™ (see the Judgment at [30]) with her finding that, on the other hand, the Application did not disclose a real controversy to be adjudicated,â€• and so the higher Court decided to adjudicate the case.

Furthermore, the higher Court decided to adjudicate Tanâ€™s case because it felt that declaratory orders are important for issues of public interest even if the parties concerned may not benefit directly.

Decision and Reasoning

The primary concerns in the judgment were procedural, although the Court did analyze the development of section 377 of Singapore law. It found that there have been changes in the law to reflect changes in Singaporean ethics. For example, it found that Singaporeans â€œby and large do not find oral and anal sex between two consenting male and female [persons] in private offensive or unacceptableâ€• and therefore this section was amended to reflect this standard.

The Court then examined section 377A and found that it was arguably inconsistent with Tanâ€™s right to equal protection under Article 12 of the Singapore Constitution. Because it was arguably inconsistent, Tan had standing to pursue a claim.

The Court then turned to the facts of Tanâ€™s case to determine if there was a jurisdictional or discretionary issue. It found that while Tan was arrested and detained under section 377A (which would have allowed him to bring a claim) he could have been just as easily arrested and detained under section 294(a) (which would have been a constitutional action and prevented Tan from bringing a claim). The Court found that, even though the executive could have taken the same action under legitimate means, the appellant could still bring a case. He was therefore allowed to amend his Application to include a prayer that he ought not to have been arrested, investigated, detained and charged under section 377A.

Decision Excerpts

â€œIt can thus be seen that the over-breadth of s 377, which criminalised consensual heterosexual oral and anal sex in private, was a key reason for its repeal. The gender neutrality of s 377 was affirmed in Public Prosecutor v Kwan KwongWeng[1997] 1 SLR(R) 316 (â€œKwan KwongWengâ€•), which held (at [17]) that s 377 was an â€œall-embracing provision concerning â€˜unnatural offencesâ€™â€•. The scope of s 377 was clarified by th to cover more than just the offences of sodomy and bestiality (at [17]), and to include consensual fellatio between a man and a woman where fellatio did not lead to consensual sexual intercourse (at [31]). Where fellatio was a substitute for â€œnatural sexual intercourseâ€•, the womanâ€™s consent to perform the act of fellatio â€œ[could not] save it from being an offence under s 377â€• (at [32]). Kwan KwongWengwas followed in the later

case of Annis bin Abdullah v Public Prosecutor [2003] SGDC 290 (â€œAnnis bin Abdullahâ€•), which Assoc Prof Ho referred to in the October 2007 parliamentary debates (see above at [31]). In Annis bin Abdullah, the accused engaged in the act of fellatio with a female (â€œthe complainantâ€•). The fellatio did not lead to sexual intercourse. The complainant subsequently lodged a police report, and the accused was charged under s 377. He pleaded guilty, and was convicted and sentenced to two yearsâ€™ imprisonment, a sentence which was subsequently lowered to one yearâ€™s imprisonment on appeal (see Annis bin Abdullah v Public Prosecutor [2004]2 SLR(R) 93). The charge sheet and the statement of facts stated that the complainant was 16 years old at the time of the offence. While there was a side issue regarding the complainantâ€™s age (it was subsequently revealed that the charge sheet and the statement of facts were erroneous, and that the complainant was actually 15, rather than 16, years old at the time of the offence), this had no effect on the accusedâ€™s conviction under s 377. The complainantâ€™s age would only have been relevant to the accusedâ€™ conviction if the complainantâ€™s consent had been a defence to the charge under s 377 (the age of consent is 16 years of age). Pursuant to Kwan KwongWeng, the District Court in Annis bin Abdullah held (at [2]) that consent was irrelevant to a charge under s 377 where fellatio was performed â€œas a substitute for natural sexual intercourseâ€•. Nonetheless, the fact that the complainant had voluntarily performed fellatio on the accused was published by the media, leading to an intense public debate (see, eg, Tanya Fong &GlenysSim, â€œOral sex ruling vexes manyâ€• The Straits Times (8 November 2003) at p H1). The tenor of the views publicly expressed was largely supportive of the repeal of s 377, and this did not go unnoticed by the Legislature, which consequentially undertook the updating of the 1985 Penal Code to â€œreflect societal norms and valuesâ€• (see Singapore Parliamentary Debates, Official Report (22 October 2007) vol 83 at col 2198). The archaic wording of s 377 was also found to be too vague to be effective, and more precise provisions were enacted to cover cases which were thought to be deserving of criminal sanction and which would formerly have been within the ambit of s 377 (see now ss 376Aâ€“376G and 377B of the current Penal Code).â€• Para. 32.

â€œIn the result, we affirm the Judgeâ€™s determination (albeit on different grounds) that Tan has locus standiÂ to make the Application (see [125]â€“[127] above). The way in which this case has been argued ties the issues of locus standiÂ and certainty of failure together, and, thus, we find that the Application is not certain to fail, given that Tan has locus standiÂ to pursue it. Further, we also find that that there is an arguable case on the constitutionality of s 377A that ought to be heard in the High Court (see [185] above). We emphasise that our finding of the existence of a real controversy to be determined in this case arises from a combination of two factors. Firstly, Tan was at the outset arrested, investigated, detained and charged exclusively under s 377A. This squarely raises the issue as to whether Tanâ€™s initial detention and prosecution were â€œin accordance with lawâ€• within the meaning of Art 9(1) as s 377A was the only provision relied on by the investigators and the Prosecution at all material times prior to the substitution of the s 377A charge with the s 294(a) charge. The subsequent substitution of the s 377A charge only after the Application was filed could not excise any earlier â€œwrongâ€• which might have been committed vis-Ã -vis Tan (see [163] and [172] above). Secondly, there is a rea and credible threat of prosecution under s 377A (see [173]â€“[183] above). Our finding that there is a real controversy to be adjudicated in this case removes the anomaly referred to at [15] above as now, Tan, an applicant who has locus standiÂ based on a finding of an arguable violation of his constitutional rights, will be allowed to vindicate his rights before the courts. The principle of access to justice calls for nothing less.â€• Para. 186.