Adam bin Darsin v Public Prosecutor
[2001] SGCA 25

Case Number : Cr App 28/2000

Decision Date : 16 April 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Lai Kew Chai J; L P Thean JA

Counsel Name(s) : Appellant in person; Jaswant Singh and Mohamed Nasser Ismail (Deputy Public Prosecutors) for the respondent

Parties : Adam bin Darsin — Public Prosecutor

Criminal Procedure and Sentencing – Appeal – Carnal intercourse against order of nature – Fellatio – Whether sentence manifestly excessive and/or crushing – s 377 Penal Code (Cap 224)

(delivering the grounds of judgment of the court): The appellant, Adam bin Darsin, before the High Court, pleaded guilty to eight charges for committing the offence of carnal intercourse against the order of nature under s 377 of the Penal Code (Cap 224). Fifteen other similar charges were taken into consideration for the purpose of sentencing. He was sentenced to ten years` imprisonment on each of the eight charges, and four of the eight terms of imprisonment were ordered to run consecutively and the remaining four terms to run concurrently with the four consecutive terms of imprisonment. This resulted in an aggregate term of imprisonment of 40 years. The appellant appealed against the sentence. We allowed the appeal and reduced the term of imprisonment for each of the charges to five years, and following the order below we ordered four of the terms of imprisonment to run consecutively and the remaining four to run concurrently with the four consecutive terms of imprisonment. In aggregate, the term of imprisonment was reduced to 20 years. We now give our reasons.

The facts

The appellant is 32 years old and worked as a delivery man for Kentucky Fried Chicken. He is a self-professed male homosexual. In January 1997, he befriended one of his victims (`V6`), while the latter was playing street soccer in a street soccer court. In July of the same year, the appellant told V6 that he needed a place to live and asked if he could stay with him. V6`s mother agreed, and the appellant moved into their flat, Block 53 Lorong 5, Toa Payoh [num ]06-06, paying a monthly rent of $150 to $200. Later, in early 1999, the appellant had a quarrel with V6`s brother, and as a result he moved out of the flat to his flat, Block 52 Lorong 6 Toa Payoh [num]04-20.

Thereafter, V6 became a regular visitor to the appellant`s flat. He spent much of his time there and played computer games on the appellant`s Sony Play Station. On occasion, he would bring food from his mother to the appellant. V6 even had a set of keys to let himself into the flat.

The appellant met his other victims at the street soccer court through V6`s introduction, who referred to him as `uncle`. Normally, after the soccer games, the appellant would invite the boys to his flat to play computer games. In June 2000, the boys gathered in his flat to watch the Euro 2000 football tournament.

It was at his flat, Block 52 Lorong 6 Toa Payoh [num]04-20, where the offences were committed. The acts of carnal intercourse committed by the appellant were acts of fellatio which he performed on the victims and these took place over a period of 12 months, between July 1999 and June 2000. His victims were boys between the ages 12 and 15 years old. He committed the offence on each

occasion when his victim was alone with him, and he forced himself on his victim and performed the act of fellatio. It is unnecessary to narrate each of the offences which he committed and with which he was charged. For our purpose, it is sufficient to set out below the summary of such offences as given by the judge at first instance, which we respectfully adopt:

> *7 The Accused would accost the victims when they were alone in his flat. He would proceed or continue to suck the penis of the respective victims despite their mild protests. In some cases, the victims were too afraid or too shocked to resist. They did not tell anyone about the incidents. On one occasion, he accosted Victim 7 in the kitchen of the flat while some of the other boys were playing the video games elsewhere in the flat. He pulled down Victim 7`s shorts when the latter emerged from the toilet in the kitchen and proceeded to suck his penis, stopping only when the victim shouted "Jangan" (or "Don`t"). Victim 7 returned to join the others without telling them about the incident in the kitchen.*
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> *8 In another incident, when Victim 8 was in the Accused`s flat past midnight playing the video games, the Accused sat beside him and talked about his financial woes and work-related problems. Suddenly, the Accused unbuckled Victim 8`s pants and pulled them down to his knees. He then proceeded to perform fellatio on Victim 8 who was too shocked to react and did not struggle but told him to stop. The Accused ignored him and continued with his act until Victim 8 ejaculated. The Accused then swallowed the semen.*

On 21 June 2000, one Muhammad Kamal Ariffin bin Osman, the complainant, who is a friend of the victims, confronted the appellant and accused him of having fellated them. An argument between them took place which was followed by a fight. The complainant then went to the home of one of the victims (`V8`) and told the latter`s parents what the appellant had done to him. V8 then admitted that the appellant had indeed fellated him. V8, his parents and the complainant then lodged a police report. On 22 June 2000, the appellant was arrested.

The decision below

In the instant case, there were 23 charges against the appellant and the charges were that he committed carnal intercourse against the order of nature under s 377 of the Penal Code. All these acts of carnal intercourse were fellatios which he performed on the eight boys, whose ages ranged between 12 and 15 years old, at various times in his flat. Only eight charges, each involving a different boy, were proceeded with. The appellant pleaded guilty to the eight charges and admitted to the other charges, which were taken into consideration for the purpose of sentencing.

The judge, following **PP v Kwan Kwong Weng** [1997] 1 SLR 697 , held that fellatio between two male persons is unnatural carnal intercourse within the meaning of s 377 of the Penal Code, and in the instant case consent was irrelevant. In deciding on the sentences the judge bore in mind the decision of this court in **Lim Hock Hin Kelvin v PP** [1998] 1 SLR 801 . He referred to the guidelines laid down in that case. It was there held that the starting point for unnatural carnal intercourse committed by way of anal intercourse is ten years` imprisonment and the term should then be increased or decreased depending on the presence of aggravating or mitigating factors respectively. For chronic paedophiles, it was said that life imprisonment would be the appropriate sentence. On the facts of the

case, the judge concluded that the appellant was not a `chronic paedophile`, and accordingly a sentence of imprisonment for life was not appropriate.

The judge then referred to the very recent case of **PP v Tan Ah Kit** (Unreported) , which he decided, and repeated what he said there. He equated the act of fellatio with that of anal intercourse, holding that they are `not really distinguishable when they are the subject of charges preferred under Section 377`. He therefore applied the guidelines in Kelvin Lim (supra) and sentenced the appellant to ten years` imprisonment on each of the eight charges, and ordered four of the eight terms of imprisonment to run consecutively and the remaining four terms to run concurrently with the four consecutive terms of imprisonment. The aggregate term of imprisonment was therefore 40 years.

The appeal

We turn first to ***Kelvin Lim*** (supra) and the guidelines laid down by this court. In that case, the accused pleaded guilty to and was convicted by the High Court of ten charges: four charges under s 377 of the Penal Code for having carnal intercourse against the order of nature, one charge under s 377 read with s 511 of the Penal Code for attempting to have carnal intercourse against the order of nature, and five charges under s 377A of the Penal Code for committing acts of gross indecency. The acts of unnatural carnal intercourse were acts of anal intercourse committed on the victims, and the acts of gross indecency were acts of fellatio performed on him by the victims. In addition, there were 30 similar charges: ten charges for unnatural carnal intercourse (which were acts of anal intercourse performed on his victims) under s 377 and 20 charges of acts of gross indecency (which were acts of fellatio performed on him by his victims) under s 377A, which were taken into consideration for the purpose of sentencing. The victims involved were five young school boys, aged between eight and twelve years at the time of the offences. Further the accused had previous convictions for similar offences. He was sentenced by the High Court to ten years` imprisonment on each of the four charges under s 377 of the Penal Code, five years` imprisonment on the charge under s 377 read with s 511 of the Penal Code, and one year`s imprisonment on each of the five charges under s 377A of the Penal Code. The terms of imprisonment on the four charges under s 377 were ordered to run consecutively and the terms of imprisonment on the remaining six charges were to run concurrently with the terms of imprisonment of the four charges under s 377. He appealed against his sentence and his appeal was dismissed by this court.

That clearly was an extreme case of an `irrepressible paedophile` who repeatedly committed offences of having carnal intercourse against the order of nature and also offences of gross indecency on the five young school boys. Indeed all the acts of gross indecency were acts of carnal intercourse against the order of nature and charges under s 377 of the Penal Code could have been brought against him. This court observed at [para]2 of the grounds of judgment:

> *The charges arose out of a series of sexual abuses inflicted by the appellant on five young victims. The appellant was a irrepressible paedophile who had repeatedly committed offences of having carnal intercourse against the order of nature and committed acts of gross indecency on five school-going boys between the ages of 8 and 12 years at the time of the commission of the offence. All the boys attended the same primary school. (We will refer to the victims as V1 to V5). The appellant had accepted all the facts in the statement of facts tendered by the prosecution. The modus operandi of the appellant in the commission of each offence was similar and this was a horrific case of how a paedophile systematically manipulated and abused the trust placed in him by the five naive young boys and then had them subjected to humiliating and unnatural carnal intercourse with him in order to satisfy his perverse sexual instincts.*

The court having considered the gravity of the offences said at [para]23 and 24:

> *23 ... [T]he offence of unnatural carnal intercourse (in the form of anal intercourse) represents the gravest form of sexual abuse. It is unfortunate that no provision has been made for caning for offences under s 377 Penal Code, in contrast to rape offences. Anal intercourse constituted by penetration of the anus contains, by its very act, an element of violence. In England, the offence of buggery of a boy below 16 years and the offence of rape carry the maximum punishment of life imprisonment. Under the UK Sexual Offences Act 1956, as amended by the Criminal Justice and Public Order Act 1994, a man who has sexual intercourse (anal) with another man without his consent commits rape and is charged accordingly ... In Singapore, the guidelines for sentencing rape offenders are found in* ***Chia Kim Heng Frederick v PP*** *[1992] 1 SLR 361 , where the Court of Criminal Appeal held that the starting point is ten years` imprisonment and six strokes of the cane.*
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> *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.*

The guidelines laid down in that case apply in determining the appropriate sentence for an offence of carnal intercourse against the order of nature committed by anal intercourse. As observed by the court (at [para]21), carnal intercourse committed by way of anal intercourse on children, whether young boys or young girls, is a grave offence. It inflicts physical harm or injury on the victim caused by the penetration of the victim`s anus which is exceedingly painful and subject them to severe emotional trauma. By its very nature, such an offence involves some degree of coercion and violence. Additionally, there is the risk of transmitting sexual disease. Furthermore, as the ***Wolfenden Report*** (Cmnd 247, 1957), points out, where the victims are very young, it may leave them for life with embarrassing disabilities. In terms of the gravity of the offence, it is equated with rape.

In the instant case, all the charges laid before the court involved acts of fellatio performed by the appellant on his victims. The eight charges the prosecution proceeded with against the appellant involved eight different boys, whose ages ranged from 12 to just over 15 at the time the offences were committed, and all the acts in question involved fellatio performed by the appellant on the boys. An act of fellatio in these circumstances is carnal intercourse against the order of nature falling within s 377 of the Penal Code: **PP v Kwan Kwong Weng** [1997] 1 SLR 697 at [para]25.

There were past cases, where the High Court dealt with offences of unnatural carnal intercourse committed in the form of fellatio involving young children. But the sentences meted out were not quite consistent with each other.

In **Kanagasuntharam v PP** [1992] 1 SLR 81 , the accused pleaded guilty to a charge of rape and two charges of carnal intercourse against the order of nature under s 377 of the Penal Code. The first of the two charges under s 377 was for the fellatio, which the accused forced his victim to perform on him, while the second was for the anal intercourse he committed on the victim. The victim was a 17-year-old girl. In respect of the rape charge, the trial judge sentenced the accused to 14 years of imprisonment and 24 strokes of the cane. As for the two charges under s 377 the accused was sentenced to imprisonment for six years (for the fellatio) and eight years (for the anal intercourse) respectively. The term of imprisonment of 14 years for the rape charge was ordered to run consecutively with the term of imprisonment of eight years, thus making a total of 22 years. The accused appealed, and this court dismissed the appeal.

In **PP v Sikendar Sellamarican** (Unreported) , the accused pleaded guilty and was convicted on two charges under s 377 of the Penal Code. The first charge was for having anal intercourse with a 13-year-old boy and the second charge was for fellating the boy. He was sentenced to ten years` imprisonment on each charge and the sentences were ordered to run consecutively. He had a previous conviction for similar offences of unnatural carnal intercourse with young victims.

In **PP v Norli bin Jasmani** (Unreported) , the offender claimed trial to the following charges: three charges for committing unnatural carnal intercourse under s 377 of the Penal Code; one charge of attempting to commit rape under s 376(2) read with s 511 of the Penal Code, and one charge of rape under s 376(2) of the Penal Code. The victim was a young girl of 12 years old at the time of the commission of the offence and was the niece of the offender. He was found guilty of the three charges of unnatural carnal intercourse and the charge of rape but was acquitted of the charge of attempting to commit rape. He was sentenced to a term of imprisonment of three years for each of the three charges under s 377 and nine years of imprisonment with caning in respect of the rape charge. The sentence for the rape offence and one of the three sentences for the offence under s 377 were ordered to run consecutively, thus making a total of 12 years` imprisonment.

In **PP v Radhakrishna Gnanasegaran** (Unreported) , the accused claimed trial to three charges under s 377 for causing and coercing his daughter to perform fellatios on him and four charges of raping his daughter under s 376(2)(b) of the Penal Code. He was found guilty as charged. All the offences were committed over a period of some four years. The victim was 14, 16 and 17 years old at the time of the offences under s 377. The trial judge sentenced the accused to five years` imprisonment on each of the three charges under s 377 and 15 years` imprisonment and 12 strokes of the cane on each of the four charges of rape under s 376(2)(b). Two of the imprisonment terms for the rape charges were ordered to run consecutively and the other terms to run concurrently with these two terms. Thus the total term of imprisonment was 30 years.

We now turn to the very recent case of **PP v Tan Ah Kit** (Unreported) . In that case, the accused pleaded guilty to three charges for offences of carnal intercourse against the order of nature. Of these offences, two were offences of anal intercourse on a boy, MF who was about 13 years old at the time of the offences, and one was fellatio which he performed on another boy, S who was 14 years old at the time. Four other similar charges and two charges under the Films Act were admitted by the accused and were taken into consideration. Of the four charges, three of them were anal intercourse on MF and the fourth was a charge for fellatio performed on S. The judge at first instance followed the guidelines in ***Kelvin Lim*** (supra) and applied the guidelines in determining the sentences for all the three charges. He sentenced the accused to ten years on each of the three charges, and these sentences were ordered to run consecutively, making in aggregate a term of 30 years. The judge said at [para]23:

> *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 out by the Court of Appeal should apply to the case S in the same way as they patently do in the case of MF.*

The accused appealed and his appeal was dismissed by this court in CA 22/2000. It should be noted that in that case, apart from the charge of fellatio which the offender performed on the victim, S, there were two very serious charges of anal intercourse which he performed on the young victim, MF, and in addition to these two charges, there were, inter alia, three other similar charges of anal intercourse committed on MF which were taken into consideration. The accused had inflicted great pain and emotional harm on MF who had to seek psychiatric treatment. The judge made the following comments on the psychiatric assessment of MF:

> *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 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.*

Taking all these circumstances into consideration, this court was of the opinion that, although the sentence for the act of fellatio was excessive, the aggregate term of imprisonment of 30 years for the three charges was not excessive, and for that reason the court was not disposed to interfere with the sentences.

The instant case was not one of unnatural carnal intercourse committed by way of anal intercourse. Nor was it a case in which the accused coerced or cajoled a young victim to perform the revolting act of fellatio on him. Both these types of acts of unnatural carnal intercourse were committed by the offender in Kelvin Lim (supra). The present case was one where the accused himself performed the acts of fellatio on his victims. Of the three forms of unnatural carnal intercourse, in terms of gravity of an offence, the form of unnatural carnal intercourse in the present case (ie the accused himself performing the act of fellatio on his victim) undoubtedly stands at the bottom of the scale and the sentence imposed for such an offence should reflect this distinction also. The guidelines laid down in ***Kelvin Lim*** (supra) are, with respect, not applicable here, though they were of assistance to us in our deliberation. Lest it be misunderstood, we do not dissent from that decision. On the contrary, we agree with it entirely.

The judge in imposing the terms of imprisonment on the appellant applied the guidelines laid down by this court in ***Kelvin Lim*** (supra) principally on the ground that fellatio involving two males and anal intercourse are not really distinguishable, when they are the subject of charges preferred under s 377 of the Penal Code. In his view, everything said about anal intercourse applies to oral intercourse, except the potential physical injury caused by the penetration of the victim`s anus. With respect, we were unable to agree with the judge on this point. It is true that fellatio involving two males and anal intercourse are in each case carnal intercourse against the order of nature and are capable of being made the subject of charges under s 377 of the Penal Code. They are indistinguishable only in the sense that they are both offences falling within s 377. Apart from that, they are plainly distinguishable in terms of the nature and physical aspect of the act involved in the commission of the offence. Looking at the offences from this point of view and also from the victim`s point of view, there is no doubt that between the two, namely: subjecting a young victim to anal intercourse - whether such victim be male or female - and performing an act of fellatio on a young male victim, the former is definitely a far more serious offence than the latter. In the case of the former, a great deal of pain and suffering is caused to the victim, and the court, depending on the circumstances, has equated it to rape. In the case of the latter, the act of fellatio per se does not cause or inflict any pain or physical harm or injury on the young victim.

In our judgment, an appropriate sentence for an offence of unnatural carnal intercourse such as that committed by the appellant in this case would be in the region of five years, subject to any mitigating or aggravating circumstances that may be present. In this case, the appellant had no previous conviction of similar offence and no harm or injury had been inflicted on the victims. Nor are there any significant mitigating or aggravating factors.

Lastly, in this case, having regard to the nature of the offences committed by the appellant, we were of the opinion that the total term of imprisonment of 40 years imposed by the court below, was a crushing sentence and not in proportion to the overall gravity of the criminal conduct of the appellant. On this point we echo the following observation of Yong Pung How CJ in **Maideen Pillai v PP** [1996] 1 SLR 161 at p 196:

> *[T]he sentencing court will bear in mind at all times the second limb of the totality principle, that is, the need to avoid an aggregate sentence so harsh as to be `crushing` in its effect on the offender. Where consecutive sentences are imposed on an offender, the overall punishment should be in proportion to the overall gravity of his criminal conduct, taking into account the circumstances in which he offended and also the pattern of his previous behaviour.*

In the circumstances, we reduced the term of imprisonment to five years for each of the offences

and ordered four of them to run consecutively and the remaining four to run concurrently with the four consecutive terms of five years, thus making in aggregate a total term of 20 years.

Outcome:

Order accordingly.