Tay Kim Kuan v Public Prosecutor
[2001] SGHC 241

Case Number : MA 65/2001

Decision Date : 28 August 2001

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Jimmy Yim SC and Suresh Divyanathan (Drew & Napier) for the appellant; Anandan Bala and Thong Chee Kun (Deputy Public Prosecutors) for the respondent

Parties : Tay Kim Kuan — Public Prosecutor

Criminal Procedure and Sentencing – Sentencing – Carnal connection with underaged girl – Internet sex case – Relevance of English authorities – Difference in social and moral considerations – Whether consent a mitigating factor – Whether sentence manifestly inadequate – Whether need for deterrent sentence – Whether sentence to be enhanced – s 40(1)(i) Women's Charter (Cap 53, 1997 Ed)

: This was the first case to reach the High Court in a recent series involving the engaging by adult men in sexual intercourse with young, teenage girls whom they had met over the internet. The appellant in the present case was charged under s 140(1)(i) of the Women`s Charter (Cap 353, 1997 Ed) with one count of having carnal connection with the complainant who was at the material time under 16 years of age. He pleaded guilty to the charge, and after hearing submissions on sentence, the district judge sentenced him to nine months` imprisonment. At the end of the hearing before me, I dismissed his appeal against sentence and ordered that the sentence be enhanced to a term of 12 months` imprisonment instead. I also slapped the appellant with the maximum fine of $10,000 to demonstrate the severity and abhorrence with which the court viewed his actions. I now give my reasons.

Brief facts

The salient facts of this case were not disputed and were in fact admitted to by the appellant in the court below without qualification. They were as follows. The appellant was a 45-year-old salaried director of a construction cost consultancy company. Sometime in April or May 2000, he met the complainant, then a 15-year-old secondary school student, online via the internet relay chat (`IRC`) function in a chatroom called `Singapore 30+`. Although the chatroom was principally intended for users in their thirties, the complainant told the appellant specifically that she was only 15 years old. Thereafter, the appellant and the complainant kept in touch via both the IRC and the telephone.

Subsequently, on an afternoon in June 2000, the appellant picked the complainant up from the void deck of the block of flats in which she lived and drove her to the car park of the old Changi Hospital at Halton Road whereat they engaged in sexual intercourse. He then sent the complainant home.

Thereafter, the appellant continued to keep in touch with the complainant, although they did not meet again. On 8 November 2000, the complainant invited the appellant over to her place, but before he could make it there, he was arrested by a team of police officers at the car park.

The decision below

In sentencing the appellant to nine months` imprisonment, the district judge took into account his

plea of guilt, which undoubtedly saved the complainant from the trauma and embarrassment of having to testify in court. While he was further mindful of the fact that the appellant had no history of antecedents and had hitherto been of good character, the district judge felt, however, that public policy required that such young victims as the one in this case were justifiably well-deserving of protection from sexual exploitation, regardless of whether or not the intercourse was consensual. Consequently, he placed little weight on the fact that the complainant was a willing party to the act nor was it relevant in his view that she had had a long history of sexual activity with older men. General deterrence, it appeared, was upmost in the district judge`s mind when he further proclaimed that:

> *... using the internet as a tool by unscrupulous matured men to scour for young persons to exploit sexually must be discouraged as almost every young person in Singapore has access to the internet and will be easy targets.*

The appeal

Before me, senior counsel submitted that the sentence of nine months` imprisonment was manifestly excessive. While he recognised that a custodial sentence was still nevertheless apposite, he urged that a lesser term be substituted instead. First, he contended that the appropriate sentence for offences under s 140(1)(i) of the Women`s Charter depended on the criminal behaviour involved and the relevant surrounding circumstances. In other words, there is a wide spectrum encompassing the different degrees of severity of the offence of carnal connection with an underaged girl. Several district court decisions on s 140(1)(i) were then cited to me which counsel said supported his view that the offence in the present case fell at the lowest end of the spectrum which in turn called for a much shorter prison sentence. With respect, I could not agree with counsel. In the first place, the decisions cited were that of a lower court, and as such, I did not find myself bound by them. That they were unreported diminished their authoritative value even further, since the detailed facts and circumstances of these cases are hardly disclosed or documented with sufficient clarity to enable any intelligent comparison to be made. At the highest therefore, they served as mere guidelines only. In any event, I was not convinced that the cases cited supported the view that a shorter prison sentence was warranted in this case. Counsel himself pointed out that the lower courts have consistently meted out sentences of between 20 months` and four years` imprisonment in cases which involved such aggravating factors as an abuse of trust or authority, a mentally challenged victim, the practise of deception or the use of force. I could not see therefore, how the sentence of nine months` imprisonment in the present case which did not involve any of these factors could be said to be unjustified, given that it is already on the lower end of the spectrum, and was indeed much lower than the minimum given by the lower courts in cases with aggravating features.

Counsel next sought to draw my attention to a host of English cases which he argued supported his proposition that the sentence in the present case was excessive. The first case was **R v Taylor** [1977] 3 All ER 527. The three appellants in that case had engaged in regular sexual intercourse with the 15-year-old complainant over a prolonged period of a few months. The complainant, however, was described by the court as being undoubtedly a wanton. She was very experienced in sexual matters and even recorded her sexual exploits with some degree of particularity in a diary. The English Court of Appeal dismissed the men`s application for leave to appeal against their sentences of four and two months` imprisonment respectively. The following passage from the judgment was relied upon by counsel (at p 529):

> *This court now has the task of deciding how the law should be administered. It*

is clear from what the learned trial judge said that there is doubt amongst many at the present time, as to what is the proper way of dealing with these cases. What does not seem to have been appreciated by the public is the wide spectrum of guilt which is covered by the offence known as having unlawful sexual intercourse with a girl under the age of 16. At one end of that spectrum is the youth who stands in the dock, maybe 16, 17 or 18 years of age, who has had what started off as a virtuous friendship with a girl under the age of 16. That virtuous friendship has ended with their having sexual intercourse with one another. At the other end of the spectrum is the man in a supervisory capacity, a schoolmaster or social worker, who sets out deliberately to seduce a girl under the age of 16 who is in his charge. The penalties appropriate for the two types of case to which I have just referred are very different indeed. Nowadays, most judges would take the view, and rightly take the view, that when there is a virtuous friendship which ends in unlawful sexual intercourse, it is inappropriate to pass sentences of a punitive nature. What is required is a warning to the youth to mend his ways. At the other end, a man in a supervisory capacity who abuses his position of trust for his sexual gratification, ought to get a sentence somewhere near the maximum allowed by law, which is two years` imprisonment. In between there come many degrees of guilt. A common type of offender is the youth who picks up a girl of loose morals at a dance, takes her out into the local park and, behind the bushes, has sexual intercourse with her. That is the kind of offence which normally is dealt with by a fine. When an older man in his twenties, or older, goes off to a dance and picks up a young girl, he can expect to get a much stiffer fine, and if the girl is under 15 he can expect to go to prison for a short time. A young man who deliberately sets out to seduce a girl under the age of 16 can expect to go to detention. The older man who deliberately so sets out can expect to go to prison. Such is the wide variety of penalties which can be applied in this class of case.

While the English court accepted that the men did not corrupt the girl as she already had loose morals to begin with, the conduct of the men were still nevertheless reprehensible as it continued the `debauching of the girl, knowing how young she was`. They had further treated her like the village whore and used her continuously to satisfy their lust.

The next case cited by counsel was **R v Asher Lloyd Alston** (Unreported) , which concerned a 42-year-old appellant who had had carnal connection with a 13-year-old girl. In sentencing the man to six months` imprisonment, the court appeared to have been greatly influenced by the fact that the victim was a virgin at the material time.

The third and last case relied upon by counsel was **R v Lane David Robert** (Unreported) . The appellant in that case was 31 years old, and had had sexual intercourse with a 15-year-old girl twice. He also indecently assaulted two of her friends who were around the same age. On appeal, his sentence on the charge of unlawful sexual intercourse was reduced from 15 to nine months` imprisonment. The court noted, however, that he had gotten to know the girls `when he was in a position of trust, working for the parents of one of them`. They noted further, and this was the point counsel urged earnestly for me to adopt, that the extent to which the victims agreed to and encouraged what was done is relevant to an accused`s mitigation.

While I was grateful for the insightful discourse on the current state of English criminal law and sentencing, I nevertheless found the reliance on English authorities to be wholly misguided for the purposes of the case before me. First, it is a trite proposition that English cases, while useful and sometimes even highly persuasive, are not technically binding on Singapore courts, and especially so when the decision is only one of the English Court of Appeal rather than the House of Lords or the

Privy Council. Second, and more importantly, the legislation in the present case is markedly different in the two jurisdictions in at least one material respect. The relevant English statute with which the above cases were concerned was the English Sexual Offences Act 1956, which provides that the maximum punishment for sexual intercourse with an underaged girl is two years` imprisonment. In Singapore, under s 140(1)(i) of the Women`s Charter, the maximum punishment of five years` imprisonment is more than twice that of its English counterpart. In addition, the local statute also provides for a maximum fine of $10,000. As such, the guidelines laid down in the English cases on the range of sentence which should be passed in any given sort of case cannot and should not be applied mutatis mutandis to the same facts had they occurred locally. It is obvious that the Singapore Parliament in drafting s 140(1)(i) of the Women`s Charter recognised that our social climate and conservationist culture was such that the treatment of men who preyed on the youth and relative naivete of young girls should be of the severest degree. One has to recognise that different jurisdictions hold, and are entitled to hold, different ideas about the principles and rules which their citizens are enjoined to live and abide by. For example, certain countries may place a higher emphasis on rehabilitation of the offender while to others, general deterrence and the protection of the community at large takes precedence to the rights and freedom of the individual accused. In this respect, I have no doubt that the sentencing philosophy of our legislature has always been to take a tough stand against criminals. We have been described as having one of the strictest and harshest sentencing regimes in the world, but that is something which, albeit paternalistic to some, has nevertheless worked well for us in ensuring that the safety and security of our citizens and the generations after them are never compromised.

I did not think therefore that it was useful or practicable to adopt blindly the attitudes evinced by the English courts on sentencing. On the contrary, I was mindful of the different social and moral considerations which prevail in the two countries, and in particular of the divergence between Asian conservatism and the more liberal western society. In the result, I did not find any of the sentencing figures extracted from the English cases to be directly relevant to the present case. In any event, I was of the view that those figures, even if they were to be considered, could not be taken in the abstract, but had to be looked at in proportion to the maximum sentence prescribed for the offence in question, if any meaningful comparison to the present case was to be made at all. In ***R v Lane*** David Robert (supra) therefore, a case which involved some measure of aggravation, the substituted sentence of nine months` imprisonment must be looked at as being in effect three-eighths of the maximum punishment permissible in England. On the other hand, a sentence of nine months in the present case was in effect only three-twentieths of the statutory maximum term of five years, thus already more than amply compensating for the admitted lack of similar aggravating features. Similarly in ***R v Asher*** Lloyd Alston (supra), the sentence of six months was a full quarter of the maximum sentence prescribed as compared to three-twentieths in this case. In the premises, I was not convinced that the sentence of nine months` imprisonment in the present case, given our diverse social and cultural norms, was in any way excessive. If anything, I was inclined to the view that nine months was in fact on the low side.

Counsel finally sought to highlight to me certain mitigating factors which he felt warranted a reduction in his client`s sentence. He pressed upon me, in particular, the fact that the sexual activity was consensual, that the complainant had had a long history of sexual intercourse with a string of older men and it was further implied that she had to a large extent sought out or tempted the appellant by sharing her lurid experiences with him. In addition, I was also reminded of the appellant`s early plea of guilt and the fact that social admonition and shame was by far the greatest form of punishment for the appellant, a hitherto happily-married family man.

While I appreciated counsel`s able and forceful arguments in the above regard, regretfully, I could not agree with him. In my view, issues of consent are entirely irrelevant to offences under s 140(1)(i) of

the Women`s Charter, the policy of which is to afford blanket protection to young girls who are regarded by the statute as being mentally and emotionally unprepared to handle relationships of a sexual nature. Girls under the age of 16 are thus deemed by the law to be incapable of giving valid consent to a sexual act, and, in my view, rightly so, as many at that age are ill-equipped to handle the serious social consequences which often arise out of just one single night of reckless passion. These girls often lack not just the resources but the emotional strength of mind to cope with the heavy responsibilities of an unplanned pregnancy and worse, the physical and psychological trauma of having to undergo an abortion. The spectre of unwanted children, its links to juvenile delinquency and the concomitant effects on the progress of modern society all collectively favour the legislative policy of strict liability where sexual intercourse with underaged girls is concerned. Much as these girls may have procured or actively initiated the encounter, the purpose of s 140(1)(i) is to place the onus on the male adult to exercise restraint and discipline in curbing his carnality. In this respect, the law may be said to be paternalistic, and perhaps even overprotective in seeking to guard young girls from a precocious desire for sexual experience. Nevertheless the social and humane reasons for such a welfare state of the law are too compelling to be ignored. In my view, the court has to send out a clear signal to the public that men who engage in sexual intercourse with girls under 16 do so at their own peril. In particular, where the age difference between the parties is significant, the man can be expected to be punished more severely as his offence can then no longer be regarded as merely the result of the false steps of youth but rather the conscious and calculated decision of a mature adult.

I do not think it is necessary for me to lay down, as the English cases have done, the range or type of sentences that should be passed according to the nature of the offender or the circumstances of the parties` relationship. In my view, each case should be looked at and decided on its own facts, and I do not think it is possible or wise to lay down fixed or closed categories of the spectrum of sentences which should be passed. Suffice it for me to say that adult men of mature years who have carnal connection with young girls can without doubt expect to have stiff custodial sentences imposed on them.

Reverting to the facts of the present case, I felt, in spite of counsel`s assertions that his client was truly contrite and remorseful as evidenced by his early plea of guilt, that the sentence of nine months` imprisonment was still nevertheless somewhat inadequate. This was but one of an alarming number of recent cases to involve men who meet young girls over the internet and thereafter have sexual intercourse with them. While I have no doubt that the internet is and has been an efficient medium of communication and its uses and functionalities highly contributory to the progress and development of the new economy, I also had to be mindful of the fact that it is a medium that is easily accessible and is in fact frequently accessed by persons of all ages, particularly in an information-technology savvy nation like Singapore. As such, it is not surprising that it was only a matter of time before abuse of the web became rampant, and the law has to develop in such a way as to keep such abuse in check. While parents have the primary responsibility of educating and warning their children of the inherent dangers posed by the internet, the law too has an accompanying duty to ensure that our children and young persons are allowed to exploit the wonders of modern technology with as little risk as possible to the safety and security of both their minds and bodies. The easy availability of the internet and its services to the ordinary man and child in the street on the one hand and the emboldening security that it provides to the unscrupulous who are allowed to hide their true identities and remain faceless whilst preying on the young, gullible and immature on the other, both led me to the conclusion that a deterrent sentence was warranted in the present case. Indeed I felt it my duty to arrest the rising trend of such internet sex cases which, if they were not eradicated early, would result in the utter disintegration of the moral fabric of our yet conservative society.

While I accepted counsel`s argument that the extent to which a victim agreed to and encouraged

what was done is relevant to an accused`s mitigation, it was not the be-all and end-all of the matter. Many other factors also have to be looked at at the same time. As already alluded to, consent per se is not a defence to an offence under s 140(1)(i) of the Women`s Charter. Quite frankly, I found the whole argument about consent to be difficult to comprehend since a lack of consent in the first place would have attracted a charge of rape under the more serious provisions of the Penal Code (Cap 224), rather than merely the statutory offence prescribed by the Women`s Charter. Similarly if there had indeed been any trickery, deception or violence, then any consent given by the woman would clearly have been vitiated, thus warranting a charge of rape as well. As a result, I am of the view that consent of the girl should not be treated as a mitigating factor in cases under s 140(1)(i) as it appears to me that such consent would in any event have been forthcoming in a majority of the cases brought under s 140(1)(i) anyway.

Having said that, I had no doubt that the complainant in the present case was no innocent virgin to begin with and admittedly, had had her fair share of sexual experiences before sleeping with the appellant. Nevertheless, the offence committed by the appellant with a girl just one-third his age remained a serious one for which the law provides no excuse. If the appellant was indeed anything as sensible and mature as his counsel made him out to be, then all the more he should have known better than to further the moral corruption of one whom he knew or thought was already debauched. Instead, he had no reservations about taking advantage of the easy opportunity which presented itself to him and exploited it fully to gratify his lust. What was most reprehensible was the fact that he remained completely devoid of guilt or remorse whether towards himself or his family after the incident as evidenced by his continuing association with the complainant over the next few months. The circumstances further suggest that he would probably have had no qualms about sleeping with her again a second time had he not been apprehended by the police before he could make it to her flat.

In the light of the appellant`s patently irresponsible behaviour, both towards the complainant and her family and society at large, I had no hesitation that a deterrent sentence was necessitated in the present case in order to serve as a stern warning to like-minded men who seek to use the medium of the internet to gain, falsely, the trust of young immature girls and thereafter to sexually exploit them. In my view, the benchmark sentence for offences of the nature of the one here committed should be one year`s imprisonment and a fine to reflect the court`s intolerance of the conduct exhibited. Upon a review of all the circumstances in this case, I was of the view that a 12-month prison term was more appropriate and substituted the sentence accordingly. I should add that such a sentence, being but one-fifth of the maximum possible, should be considered as being at the lower end of the spectrum and that the lower courts ought to have little hesitation in enhancing it further in future cases which contain more severe aggravating factors. I also imposed the maximum fine of $10,000 on the appellant in order to remind him and others of the heavy price that they would have to pay even for one solitary moment of indulgent foolishness.

Outcome:

Appeal dismissed; sentence enhanced.