

TAN SENG KEE AND OTHERS v. ATTORNEY GENERAL OF SINGAPORE

*Case Digest of Tan Seng Kee And Others v
Attorney General Of Singapore at the Court
Of Appeal of The Republic Of Singapore*

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Tan Seng Kee And Others v Attorney General Of Singapore

Court Of Appeal Of The Republic Of Singapore

[2022] SGCA 16, 28 February 2022

Appellants: Tan Seng Kee, Ong Ming Johnson, Choong Chee Hong

Respondent: Attorney General of Singapore

Background:

In 2018, Johnson Ming Ong and Choong Chee Hong filed Originating Summonses to the High Court of Singapore challenging the constitutionality of s377A of the Singaporean Penal Code. In 2019, Tan Seng Kee filed a similar challenge. The cases were heard together in November 2019.

The cases alleged that criminalising private, consensual sexual activity between adult males is unconstitutional and should therefore be removed.

In 2020, the High Court dismissed the cases, finding that the existence of s377A was not unconstitutional and did not breach the claimants' rights under Articles 9, 12 and 14. See [Ong Ming Johnson v Attorney-General and other matters \[2020\] SGHC 63](#).

All of the parties filed appeals against this decision and the case was heard at the Court of Appeal in January 2021.

On 28 February 2022, Court of Appeal issued the current judgment.

This is a final decision, there being no further means of judicial appeal in Singapore or at any regional or international tribunal.

Challenged provision:

The cases sought to challenge section 377A of Singapore's Penal Code:

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.

Remedies sought:

The Appellants sought declaratory relief and/or the voiding of s 377A to the extent of any inconsistency with the Constitution.

The cases argued that the criminalisation of private, consensual sexual activity between adult males violates the following provisions:

- Article 9 of the Constitution (right to liberty)
- Article 12 of the Constitution (right to equal protection of the law)
- Article 14 of the Constitution (right to freedom of speech, assembly and association)

Decision:

The Court declined to make findings on the constitutional questions before it. However, it made the significant ruling that s377A was unenforceable in its entirety. It did this by applying the doctrine of substantive legitimate expectation to the political statements made about arrests and prosecutions under s377A.

The Court set out (at paragraph 62) that there were five main issues before it: (a) whether sexual orientation is immutable; (b) the proper interpretation of s377A; (c) whether s377A violates Article 9; (d) whether s377A violates Article 14; and (e) whether s377A violates Article 12. However, before considering any of those questions the Court engaged with the legal relevance of the existing policy of non-enforcement.

Specifically, in paragraphs 65-95 the Court laid out what it considered to be the ‘political package’ reached by a ‘political compromise’ from government and representations by Attorney General Wong. The Court identified the ‘political compromise’ as arising from parliamentary debates in 2007 on s377A in the context of broader reform of the Penal Code of 1985. It originated in a 2007 statement by the Prime Minister alongside the retention of s377A in the Penal Code (“*we do not proactively enforce section s377A*”) but, according to the Court, took on new legal significance in 2018 when the Attorney General (who is also the Public Prosecutor empowered to set prosecutorial policy) set out a general policy of not prosecuting s377A offences “*where the conduct in question was between two consenting adults in a private place*”.

Having set out a number of reasons why it would be desirable to give legal effect to the Attorney General’s position, the Court went on to explain why the “*exceptional circumstances*” of s377A required an “*extremely limited recognition*” of the doctrine of legitimate expectation, a doctrine not previously recognised as an established requirement of administrative law in Singapore. Having established that all same-sex conduct legitimately deserving of sanction (for example, the abuse of minors) is covered by alternative existing offences, the Court also extended the non-enforcement policy beyond the subset described by the

Attorney General and held that s377A is unenforceable in its entirety.

It was on the basis that the appellants no longer faced any threat of prosecution that the Court (at paragraph 153) decided that they did not have standing to argue that their rights under Arts 9, 12 and 14 are violated by s377A. Consequently, the Court explicitly did not decide whether criminalisation was a violation of those rights. It went on to consider each of the five questions set out above in turn, but made clear that in doing so its analysis was “*purely obiter*”.

On the immutability of sexual orientation, the Court decided that it was not properly within its remit to adjudicate on this issue, it being a question of general scientific fact not suitable for determination by the judiciary. The Court also opined that the question of immutability was not conclusive of the constitutionality of criminalisation, reasoning by comparison with other potentially immutable characteristics that are nonetheless appropriate for criminalisation (paedophilia and kleptomania).

The Court then considered two arguments related to the proper interpretation of s377A with reference to the legislative history: namely, that s377A should be interpreted to cover only non-penetrative sex acts, and that s377A, properly interpreted, only applies to male sex workers. The Court rejected both arguments.

On Article 9 (right to liberty), the Court considered that the appellants’ argument that the rule of law was violated by the uncertainty surrounding the enforcement of s377A had been resolved by its decision to invest the moratorium with legal power. The Court further explained that Article 9 only protects from unlawful deprivation of life or unlawful detention, and does not protect the freedom to express one’s sexual identity. It also rejected the argument that the criminalisation of a class of persons because of their identity, without compelling justification, is absurd and therefore unlawful. The Court preferred a narrower approach to the doctrine of absurdity than the one argued for by the appellants.

On Article 14 (freedom of speech, assembly and association), again the Court applied a narrow interpretation of freedom of speech and expression. Guided by the marginal note to the constitutional provision, it decided that Article 14 primarily protects freedom of speech (“*that is to say, any form of communication that is expressed in words, whether spoken or written*”) and not an extraneous or additional concept of freedom of expression. Acts of sexual intimacy, therefore, were incapable of protection by Article 14. The Court also rejected the argument that s377A has a chilling effect on gay rights advocacy in the form of speech protected by the Constitution, primarily on the basis that gay rights activism does exist in Singapore and to the extent to which it is suppressed that is likely to be because of general societal attitudes rather than s377A specifically.

On Article 12 (right to equality), the Court analysed competing approaches within the Singaporean jurisprudence to identifying unconstitutional discrimination, but declined to rule in favour of one or the other, or to apply them conclusively to s377A. However, it did indicate that if one of the approaches was to be adopted

then there was good reason to argue that s377A would fall foul of Article 12 (paragraph 324).

Conclusions and Recommendations:

The Court concluded that the constitutional challenge to s377A failed because, following the Court's ruling that s377A is unenforceable, the appellants no longer had standing to bring the case. The Court also determined that in view of the important questions of public interest raised by the case, there would be no order as to costs.

Points to note:

The judgment recognises that it remains open to the current or any future Attorney General to change the non-enforcement policy at any time. However, the Court set out that, should such a change of policy take place, reasonable notice should be given beforehand in clear and unambiguous terms.

The decision focuses almost entirely on prosecution rather than the risk of gay and bisexual men being arrested and subjected to police investigation and interrogation on the basis of suspected s377A offences. By making clear that s377A cannot be prosecuted in any circumstances, the Court is clearly indicating that any arrest and/or investigation for s377A activity would be unjustifiable and therefore unlawful. However, the Court did also state that "*nothing in our holding affects the right of the police to investigate all conduct, including any conduct falling within the Subset and/or amounting to an offence under s377A*" (paragraph 150). There therefore remains a small possibility that the police may consider themselves empowered to investigate the activities of gay and bisexual men under s377A, despite the fact that no prosecution can follow.