



# CASE SUMMARIES

Ong Ming Johnson v Attorney-General and other matters [2020] SGHC 63

**SUPREME COURT OF SINGAPORE**

30 March 2020

## Case summary

*Ong Ming Johnson v Attorney-General and other matters [2020] SGHC 63*

*Originating Summons Nos 1114 of 2018; 1436 of 2018 and 1176 of 2019*

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### **Decision of the High Court (delivered by See Kee Oon J):**

Outcome: HC dismisses all three applications.

Pertinent and significant points of the judgment

- Section 377A of the Penal Code was intended to safeguard public morals generally and enable enforcement and prosecution of all forms of gross indecency between males. It was not targeted solely at male prostitution when it was enacted in 1938.
- Section 377A covers all forms of male homosexual activity including penetrative and non-penetrative sex, whether in public or in private and with or without consent.
- The presumption of constitutionality applies to s 377A as the provision was extensively debated and retained by Parliament in 2007.
- Section 377A does not violate Article 12 of the Constitution as it was not under- or over-inclusive. It is not appropriate to adopt a broader test of proportionality for Article 12(1) of the Constitution.
- Section 377A does not violate Article 14(1)(a) of the Constitution. The right to freedom of expression contained in Article 14(1)(a) must be understood to relate to the right to freedom of speech, encompassing matters of verbal communication of an idea, opinion or belief.
- There is no comprehensive scientific consensus as to whether a person's sexual orientation is immutable. The court is not the appropriate forum to seek resolution of a scientific issue that remains controversial.
- Issues relating to how s 377A is enforced are distinct from, and should be addressed separately from, issues relating to the constitutionality of s 377A.
- Non-enforcement of s 377A in respect of consensual male homosexual activity in private does not render it redundant. Legislation remains important in reflecting public sentiment and beliefs.

· The Court of Appeal's decision in *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 in relation to a number of the arguments raised in the present case is binding. In any case, the Court has reached the same conclusions that the Court of Appeal arrived at, even after taking into account the additional material put forth by the plaintiffs.

## Introduction

1 Mr Ong Ming Johnson, the plaintiff in HC/OS 1114/2018, sought a declaration that s 377A of the Penal Code was inconsistent with Articles 9(1) and/or 12(1) of the Constitution. Mr Choong Chee Hong, the plaintiff in HC/OS 1436/2018, sought a declaration that s 377A was inconsistent with Articles 12 and/or 14 of the Constitution. Dr Tan Seng Kee, the plaintiff in HC/OS 1176/2019, sought a declaration that s 377A violated Articles 9(1), 12(1) and 14 of the Constitution. All three matters were heard together with the consent of all the parties.

2 The Court of Appeal had, in *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 ("*Lim Meng Suang CA*") previously found that s 377A was meant to address public morality, as opposed to the specific problem of male prostitution only. Additionally, s 377A covered both penetrative and non-penetrative sexual activity. A key part of the plaintiffs' case consisted of challenging these findings.

## Issues raised

3 The issues raised for the court's consideration centred on:

(a) the purpose and object of s 377A, in particular whether it only covers non-penetrative male homosexual activity and is targeted only at male prostitution;

(b) whether the presumption of constitutionality applies to s 377A;

(c) whether s 377A was consistent with the reasonable classification test in connection with Article 12 of the Constitution;

(d) whether there was scientific consensus that male homosexuality was caused purely by biological factors such that s 377A violated Article 9(1) of the Constitution;

(e) whether s 377A violated a non-derogable right to freedom of expression under Article 14 of the Constitution;

(f) whether the continued criminalisation of male homosexual activity through the retention of s 377A was absurd or arbitrary and hence inconsistent with Article 9(1) of the Constitution; and

(g) whether the doctrine of *stare decisis*, which requires that a lower court follow the decision of an appellate court, applies and whether the Court of Appeal's decision in *Lim Meng Suang CA* ought to be departed from: at [19].

## The court's decision

4 The three-step framework towards statutory interpretation was articulated by the Court of Appeal in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*"). The first step requires ascertainment of the possible interpretations of a statutory provision, having regard to its text and context within the written law as a whole: at [32].

5 After applying the first step of the *Tan Cheng Bock* framework as a starting point, the High Court found that the ordinary meaning of "gross indecency with another male person" is wide enough to cover both penetrative and non-penetrative sexual activity between male persons. The words do not connote any limitation to activities involving male prostitution or to non-penetrative sexual activity only: at [ 94].

6 The Court found that s 377A was intended to be of general application, being aimed at male homosexual practices generally, to enforce a stricter standard of societal morality in 1938: at [96].

7 At the second and third steps of the *Tan Cheng Bock* framework, the court must attempt to ascertain the legislative purpose or object of the statute; and compare the possible interpretations of the text against the purposes or objects of the statute: at [101].

8 While the problem of male prostitution was undoubtedly the cause of much consternation among the British colonial administration, there was no mention of male prostitution in any of the relevant legislative material. The fact that a precise legislative solution was not crafted to tackle the specific problem of male prostitution suggests that s 377A was intended for broader application: at [112].

9 This was the case even after taking into consideration the new material that was adduced. These materials were not presented before the Court of Appeal in *Lim Meng Suang CA* and were not legislative materials but were nevertheless considered for the sake of completeness. The new materials were neutral and indeterminate – they did not indicate that the purpose or object of s 377A was targeted solely at male prostitution: at [ 52], [113] and [118].

10 The Court also found that s 377A was intended to cover penetrative sexual activity, in line with the Court of Appeal's conclusions in *Lim Meng Suang CA*. Section 11 of the English Criminal Law Amendment Act 1885, upon which s 377A was based, was used to prosecute both penetrative and non-penetrative sexual activity. The use of s 11 was also not confined to cases involving male prostitutes. The Penal Code itself contains numerous examples of overlapping offences: at [123], [130], [133] and [ 134].

11 The presumption of constitutionality may not operate as strongly for Singapore's pre-Independence laws (such as 377A) as it would compared to post-Independence laws. However, for s 377A in

particular, the presumption of constitutionality applies with equal (if not greater) force as it does to post-Independence laws. The purported unconstitutionality of s 377A had been extensively debated and comprehensively considered in Parliament in 2007, with Parliament ultimately deciding to retain it: at [ **150**], [ **152**] and [ **154**].

12 The presumption of constitutionality, which is not a uniquely Singapore creation, operates as a starting point for the court to consider a piece of legislation. While the question of whether the Constitution is violated is within the exclusive purview of the courts, the latter can recognise, as an underlying premise, that the Legislature is best placed to understand and represent the interests of Singapore citizens. Additionally, the presumption of constitutionality does not conflict with the presumption of innocence as one relates to the validity of a law while the other concerns proof of guilt: at [ **159**], [ **160**] and [ **162**].

13 The reasonable classification test under Article 12(1) requires the court to examine if there is an intelligible differentia and if the differentia has a rational relation to the object sought to be achieved by the legislation. The key question in relation to whether there is an intelligible differentia is whether targeting of sexual conduct between males is so unreasonable as to be illogical and/or incoherent. Considering that distinctions have been drawn between men and women in various areas within Singapore law, the differentia adopted in s 377A cannot be said to be so unreasonable such that it is unintelligible: at [ **170** ], [ **171**], [ **172**] and [ **174** ].

14 Section 377A also could not be said to be either under- or over-inclusive. There is no need for a perfect coincidence between the differentia used and the object sought to be achieved. The plaintiffs had argued that s 377A excluded female homosexual conduct and other conduct which harms public morals. At the same time, it targeted conduct in private that did not harm public morals. However, as the Court of Appeal noted in *Lim Meng Suang CA*, there was a complete coincidence in the differentia and object of s 377A. The purpose of s

377A is the criminalisation of male homosexual conduct to safeguard public morals generally and reflect societal morality. The differentia serves to criminalise only acts of gross indecency between male persons. It was for Parliament, rather than the courts, to be responsible for the determination of public morality: at [183], [188], [ 189] and [192].

15 As for the argument that s 377A was over-inclusive, the Court found that the plaintiffs had erred in presupposing that conduct in private could be divorced from precepts of public morality. This was not the case – private acts of incest or bestiality are criminalised under Singapore law due to concerns over the degeneration of public morality: at [193 ].

16 There are limitations to the reasonable classification test insofar as it operates as a threshold inquiry. The courts should not adopt a broader test of proportionality in relation to Article 12(1) of the Constitution as this would necessarily entail the risk of the courts usurping the legislative function or acting like a “mini-legislature”. The courts ought not take into consideration extra-legal arguments, regardless of how valid or plausible they may seem to be: at [210], [ 211], [216] and [223].

17 Section 377A did not violate Article 14(1)(a) of the Constitution. The right to freedom of expression in Article 14(1)(a) of the Constitution relates to the right to freedom of speech *ie* the verbal communication of an idea, opinion or belief. The marginal note to Article 14, the structure of Article 14 as well as principles of statutory construction demonstrate that freedom of expression is not a free-standing right divorced from freedom of speech. This is further supported by the Report of the Constitutional Commission 1966: at [246], [255], [258] and [ 259].

18 The Court found that there was no comprehensive scientific consensus that a person’s sexual orientation was biologically determined such that it is immutable. Instead, the scientific literature suggested that a person’s sexual orientation was determined by both

genetic and environmental factors. The court is not the appropriate forum to seek a resolution of a scientific issue that remains controversial. This is in any event an extra-legal argument that does not come under the proper purview of the courts: at [277] and [279].

19 The Court also found that the continued criminalisation of s 377A was not absurd or arbitrary and did not violate Article 9 of the Constitution. While the plaintiffs argued that s 377A criminalises male homosexuals on account of their ingrained identity or sexual orientation, s 377A criminalises acts of gross indecency rather than the identity or status of a male homosexual: at [281] and [282].

20 Additionally, the Singapore Government's decision not to proactively enforce s 377A did not mean that s 377A was absurd or arbitrary. The manner in which a provision is enforced, even if arbitrary, cannot, without more, result in the provision itself being rendered unconstitutional. Arguments on the absurdity and arbitrariness of the decision not to proactively enforce s 377A ought to be considered in an application for administrative review, not constitutional review. In any case, the Attorney-General had provided a degree of guidance as to when the police would take steps to conduct investigations to enforce s 377A in appropriate cases: at [ 287] and [288].

21 The Court held that s 377A could not be said to be redundant simply because of the Singapore Government's stance of non-enforcement in respect of consensual male homosexual activity in private. Statutory provisions serve an important role in reflecting public sentiment and beliefs. Section 377A, in particular, serves the purpose of safeguarding public morality by showing societal moral disapproval of male homosexual acts: at [ 295], [296] and [298].

22 The Court noted that pursuant to the doctrine of *stare decisis*, it was bound by the Court of Appeal's reasoning and conclusions in *Lim Meng Suang CA* in relation to the purpose or object of s 377A as well as its scope. The Court of Appeal's finding on the scope of s 377A was necessary in order to make out its finding as to the purpose of s 377A.



In any case, the Court had reached the same conclusions that the Court of Appeal arrived at, even after taking into account the additional material put forth by the plaintiffs: at [305], [ 306].

23 It would not be appropriate to depart from the well-established doctrine of vertical *stare decisis* in Singapore. The Supreme Court of Canada's decisions in *Canada (Attorney General) v Bedford* [2013] 3 S.C.R. 1101 ("*Bedford*") and *Carter v Canada (Attorney General)* [2015] 1 S.C.R. 331 sought to permit exceptions to vertical *stare decisis* where there was a new legal issue raised or a significant change in the circumstances or evidence. However, adopting this approach had the potential to severely erode certainty in the law. It would not be possible to confine an application of *Bedford* to constitutional law only. The integrity of vertical *stare decisis* ought to be preserved and maintained: at [310], [311], [313] and [ 314].

*This summary is provided to assist in the understanding of the Court's judgment. It is not intended to be a substitute for the reasons of the Court. All numbers in bold font and square brackets refer to the corresponding paragraph numbers in the Court's judgment.*