***Case Title: Ong Ming Johnson v. Attorney General and other matters***

**Case Analysis**

***Meta-Data*:**

* **Case Number**: Originating Summons No. 1114 of 2018, Originating Summons No 1436 of 2018, Originating Summons No 1176 of 2019.
* **Corresponding Law Reference**: Ong Ming Johnson v. Attorney General and other matters, [2020] SGHC 63.
* **Date of decision**: March 30, 2020
* **Featured case**: N/A
* **Region**: Asia and Asia Pacific
* **Country**: Singapore
* **Type of expression**: Non-Verbal Expression
* **Judicial Body**: High Court of The Republic of Singapore
* **Type of law**: Constitutional Law/ Criminal Law
* **Main Themes**: Gender Expression
* **Outcome**: Law Upheld/Deemed Constitutional
* **Status**: Decided
* **Tags**: Gender Expression, Freedom to express one’s sexual-orientation

***Analysis:***

* **Summary and Outcome**:

A challenge was made before The High Court of The Republic of Singapore against the constitutionality of Section 377A of the Penal Code of Republic of Singapore. Section 377A of the Penal Code criminalizes homosexual conduct between two males, performed either in public or in private. The provision was challenged based on the right to equality, the right to freedom of speech and expression, as well as the right to life and liberty. The High Court while upholding the constitutionality of the provision reasoned that the right to express one’s sexual orientation or desires, either in public or in private, was not a part of the freedom of speech and expression as guaranteed under Article 14(1)(a) of the Constitution of Singapore. The court held that the term “expression” within the phrase ‘freedom of speech and expression’ had to be read in light of the term “speech”, and was therefore limited only to verbal speech or verbal communication. Accordingly, actions or homosexual conduct had to be denied the protection of the freedom of speech and expression under Article 14(1)(a). The court also held that the provision was not an “identity offence” and that it did not punish homosexuals based on their identity, since a heterosexual person who engaged in homosexual activities would be equally liable under Section 377A, a reasoning which the court used to justify the non-arbitrariness of the provision based on the right to life and personal liberty.

**Facts**:

The Plaintiffs in this case filed three individual Originating Summons [“OS”] applications before the High Court of The Republic of Singapore challenging the constitutionality of Section 377A of the Penal Code (Cap 224, 2008 Rev Ed) [“Penal Code”] and consented for a joint hearing. Section 377A criminalizes acts of “gross indecency” between two male persons and has been interpreted and used by authorities to punish, with imprisonment (of a term of up to two years), male homosexual conduct, whether penetrative or non-penetrative, performed either in public or in private. The Plaintiffs challenged the provision on the touchstone of Article 9 (Right to Life and Personal Liberty), Article 12 (Right to Equality), and Article 14 (Freedom of Speech and Expression) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) [“Constitution”].

A similar challenge to the constitutional validity of Section 377A had earlier been made in Lim Meng Suang and another v. Attorney General [2015] 1 SLR 26 [“Lim Meng”], where the Court of Appeal had affirmed the decision of the High Court by dismissing the challenge to the provision. However, the Plaintiffs argued that since there were significant developments that had taken place after Lim Meng (some new historical evidence about the legislative history of Section 377A had come to light), their challenge to the constitutionality of 377A should be heard afresh. They also maintained that Section 377A was not challenged based on the grounds of human dignity, a ground which the court ought to have considered. The matter was accordingly admitted afresh by the court.

The first OS application was filed by Mr. Ong, an international disc jockey who was homosexual and had been in a long term relationship with a man. He argued that the provision violated the right to life and personal liberty, since it arbitrarily punished a person based on their identity. Furthermore, it was argued that the provision lacked an intelligible differentia [“intelligible differentia point”] in as far as the classification between homosexual and heterosexual conduct was concerned, since it only punished the former, while excusing the latter. It was also stated that the provision only punished homosexual conduct between two males, while excluding from its ambit homosexual conduct between two females, which was claimed to be another unintelligible classification. Additionally, it was claimed that there existed no rational nexus [“rational nexus point”] between the object which the provision tried to seek and the classification it made, hence arguing it to be a violation of right to equality. Finally, Mr. Ong claimed that Section 377A violated his freedom of speech and expression since the criminalization of his homosexual conduct prevented him from freely expressing his sexual orientation while also putting a limitation on the exchange of ideas pertaining to his sexuality and sexual orientation. He relied on the Supreme Court of India case of Navtej Singh Johar v. Union of India, AIR 2018 SC 4321 [“Navtej”], which decriminalized homosexual conduct in India.

The second OS application was filed by Mr. Choong, a homosexual man. He argued on grounds of right to equality and the freedom of speech and expression by raising similar contentions as Mr. Ong. Additionally, he also argued that the objective of Section 377A was to prevent commercial homosexual conduct, and hence sexual conduct performed in “private” between two consenting adults did not serve the purpose with which the provision was enacted.

The third OS application was filed by Dr. Tan, a homosexual man. Arguments similar to the contentions raised by the other two plaintiffs in their OS applications were raised by Dr. Tan, all three of which applications were clubbed together for a joint hearing.

The main issues for determination, therefore, related to the: [i] determination of the legislative object behind Section 377A and if it was limited only to commercial homosexual conduct (male prostitution), [ii] an assessment of the provision based on the reasonable classification test (for purposes of the right to equality), [iii] the determination of whether the right to freedom of speech and expression encompassed the expression of one’s sexual orientation and sexual preference, and [iv] determination of whether one’s sexual orientation was innate and immutable (for purposes of the right to life and personal liberty), *inter alia*.

The plaintiffs, while submitting for the first issue, stated that the true legislative object behind enacting Section 377A was to deal with non-penetrative sexual activities performed in public (male prostitution). They relied on the fact that Section 377 was in fact the provision which dealt with penetrative homosexual activity, a provision, which was already repealed by Singapore. Since it could not have been the intention of the legislature to enact two different provisions for the same offence, the object of Section 377A could not have been to punish homosexual conduct, which Section 377 already did. It was also highlighted that the punishment under Section 377 was different (and heavier) compared to the punishment under Section 377A and that the legislature could not have intended to impose different punishments for the same conduct. In relation to this argument, the defendants relied on Tan Liang Joo v. Attorney-General [2019] SGHC 263 [“Tan Liang”] and stated that penal laws often overlapped and that there was nothing anomalous in having two offence provisions proscribing similar types of conduct, one “wider” and the other “narrower”.

While submitting for the second issue, the plaintiffs argued that Section 377A was manifestly discriminatory since it punished only male-to-male homosexual conduct, as opposed to male-female heterosexual or female-female homosexual conduct, a proposition which meant a violation of Article 12 (relying on Yong Vui Kong v. Public Prosecutor [2015] 2 SLR 1129) [“Yong Vui Kong”].

The plaintiffs then argued that Section 377A violated the right to freedom of speech and expression guaranteed under Article 14 of the Constitution. They argued that the freedom of expression under Art 14(1)(a) encompassed the right of all adult Singaporeans to engage in consensual, private acts of sexual intimacy with whomsoever they desired. It was also stated that even though Article 14 was not an absolute right [since the right could be restricted based on the grounds mentioned under Article 14(2)], Section 377A failed to impose a reasonable restriction. Accordingly, they prayed for the right of Singaporeans to engage in private, consensual acts of sexual intimacy with whomsoever they desire, to be declared as fundamental under Article 14(1)(a).

Finally, on the issue of the right to life and personal liberty, the plaintiffs adduced expert evidence on the immutability of one’s sexual orientation, scientific opinion on the nature of sexual orientation and on the effects that criminalization of same-sex sexual conduct and societal disapproval have on a homosexual person’s mental health. By way of evidence, the plaintiffs intended to argue that Section 377A attached criminal liability to male homosexuals on account of their ingrained identity or sexual orientation which was immutable.

* **Decision Overview**:

The court started with the interpretation of the true object of Section 377A. While relying on the judgment in Tan Cheng Bock v. Attorney-General [2017] 2 SLR 850 [“Tan Cheng”], the court highlighted the three-step framework towards statutory interpretation [which was to first ascertain the possible interpretations of the provision based on its text and context, followed by an assessment of the legislative purpose or object of the statute, followed finally by a comparison of the possible interpretations of the text against the purposes of the statute].

Accordingly, the court referred to extraneous material including, *inter alia*, the Explanatory Note to the 1938 Penal Code (Amendment) Bill as well as the speech of the then Legislative Council in order to determine the “Objects and Reasons” behind enacting the provision. The court reasoned that the usage of the terms “gross indecency with another male person” placed no limit on the activity to be strictly non-penetrative, or one which had to be performed in public, thereby rejecting the argument of the plaintiffs at the outset. Therefore, the court stated that neither of the aforementioned materials had any specific intent of targeting male prostitution alone, and that Section 377A could be used for penetrative sexual conduct performed in private. As far as the specific argument of an overlap between Section 377 and Section 377A was concerned, the court stated that the Penal Code in Singapore was replete with multiple instances of two provisions which provided for overlapping offences [Sections 323 and 325, Sections 354 and 354A, for instance].

While addressing the right to equality argument, the court first cited the test of reasonable classification as used in Taw Cheng, which demands that there must be an intelligible differentia between the classes created, and that there should be a rational nexus between the object sought by the legislation and the classification so made. The court then laid down the threshold standard stating that for a provision to lack a reasonable nexus, it must be so unreasonable so as to be illogical. The court referred to various cases such as Yong Vui Kong, where the court had concluded that a provision which prohibits infliction of the punishment of caning on women was not discriminatory against men, since there were obvious physiological differences between men and women. In the case of Ong Ming, while referring to this precedent, the court concluded that Section 377A was not an outlier, since the scheme of Singaporean laws was replete with provisions where men and women were treated differently. The court also stated that as far as the reasonable classification argument, it was bound by the earlier decision in Lim Meng, which had elaborately discussed and finally concluded that Section 377A had an intelligible differentia. Therefore, no violation to the right to equality was made out.

While interpreting the true scope of “freedom of speech and expression”, the court stated that it had the duty to interpret the provision in a manner which gave effect to the intent and will of Parliament [relying on Tan Cheng]. The court first referred to the plain and ordinary meaning of the word “expression” to fathom the object and the purpose intended by the legislature. It stated that even though the dictionary meanings (the plain meaning) of the term ‘expression’ did not rule out the possibility of sexual intercourse being a form of expression (since language is not the only medium to express), however the court should have regard to the context of a term as well.

For this, while referring to the case of Tee Soon Kay v. Attorney General [2007] 3 SLR(R) 133 [“Tee Soon Kay”], the court stated that since the marginal note of Article 14(1)(a) mentioned “Freedom of speech, assembly and association”, the right to freedom of expression was contemplated to fall within the right to freedom of speech itself and hence the right to freedom of expression could not be divorced from the right to speech. In other words, the court argued that if the legislature wanted to refer to “expression” independent of “speech, it would have made a mention of it in the marginal note (which in the case of Article 14 only stated “Freedom of speech, assembly and association”).

The court also relied on the statutory principle of Ejusdem generis by referring to the case law of Public Prosecutor v. Lam Leng Hung and others [2018] 1 SLR 659 [“Lam Leng Hung”], a principle of statutory interpretation, where the meaning of a general word that follows a list of specific words is interpreted in light of the specific word. Even though the court acknowledged that Article 14(1)(a), [that is, the phrase, “Freedom of speech and expression”] was not an ideal provision where the principle of Ejusdem generis could be applied since it mentioned only two terms (“speech” and “expression”), the court stated that the same was not a bar on its application. Based on this, along with the fact that the marginal note of Article 14 mentioned only “Freedom of Speech”, the court held that “expression” in the form of male homosexual acts would not qualify for protection under Art 14(1)(a) and would be understood only in context of the term “speech”.

Accordingly, the term expression was held to be limited to “verbal communication” of ideas, beliefs or opinions, and homosexual conduct or an expression of one’s identity was held to be not protected by the right to freedom of speech and expression. The court, based on its reasoning, rejected the observations made by the Supreme Court of India in Navtej as well as other international jurisprudence on the subject of freedom of expression and refused to recognize the freedom of expression as a free-standing, independent right.

Finally, the court discussed the challenge based on the right to life and personal liberty. The court relied on the case of Lim Meng, which had earlier held that the arguments surrounding immutability of one’s sexual orientation were extra-legal arguments and were therefore not relevant for the determination of the constitutionality of Section 377A of the Penal Code. The court in Ong Ming also stated that since there was scientific evidence both for and against the immutability of sexual orientation, no conclusive determination could be made based on that aspect. In any case, the court held that Section 377A was not premised on the identity of a person, since it was equally applicable to a heterosexual person who engaged in public or private homosexual conduct. Based on this, the court concluded that an absolute protection could not be given to one’s “personal liberty”, especially since the right claimed by the plaintiffs was an unenumerated one.

***Direction:***

* **Outcome**: Contracts Expression
* **Information**: The court contracts the right to freedom of expression by holding that “expression” in the form of male homosexual acts would not qualify for protection under Art 14(1)(a).

***Perspective***:

* **Outcome**: Law Deemed Constitutional
* **Related International and/or regional laws**:
* Yogyakarta Principles, Principle 19.
* **National law or jurisprudence**:
* Singapore, Const. (1965) art. 9.
* Singapore, Const. (1965) art. 12.
* Singapore, Const. (1965) art. 14.
* Public Prosecutor v. Lam Leng Hung and others [2018] 1 SLR 659.
* Tan Cheng Bock v. Attorney-General [2017] 2 SLR 850.
* Tee Soon Kay v Attorney-General [2007] 3 SLR(R) 133.
* Yong Vui Kong v. Public Prosecutor [2015] 2 SLR 1129.
* Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.
* **Other national law or jurisprudence**: N/A

***Significance***:

**Binding or persuasive precedent within jurisdiction:** The decision establishes a binding or persuasive precedent within its jurisdiction.

Judgments of the High Court of Republic of Singapore are binding within the jurisdiction of Singapore.

* **Related Cases**: Self-generated
* **Date updated**: N/A

***Docs***:

* **Official Case Documents**:
* Ong Ming Johnson v. Attorney General and other matters, [2020] SGHC 63. (Attached in the email)
* **Reports, Analysis, and News Articles**:
* Fait Accompli: Singapore Again Upholds Section 377A Criminalising Homosexuality, at: https://blogs.cuit.columbia.edu/rightsviews/2020/04/28/fait-accompli-singapore-again-upholds-section-377a-criminalising-homosexuality/
* Round Two – Strike Two: Singapore and LGBT Rights (Ong Ming Johnson v Attorney General), at: https://blog-iacl-aidc.org/2020-posts/2020/4/30/round-two-strike-two-singapore-and-lgbt-rights-ong-ming-johnson-v-attorney-general
* Singapore High Court rejects the challenge to Section 377A, at: https://www.theleaflet.in/singapore-high-court-rejects-the-challenge-to-section-377a/#