

**DALAM MAHKAMAH RAYUAN MALAYSIA  
(BIDANGKUASA RAYUAN)  
RAYUAN JENAYAH NO. B-09-62-07**

**ANTARA**

**ABD RAHIM BIN ABD RAHAMAN**

**...PERAYU**

**DAN**

**PENDAKWA RAYA**

**...RESPONDEN**

[Dalam Mahkamah Tinggi Malaya Di Shah Alam  
Dalam Negeri Selangor Darul Ehsan  
Rayuan Jenayah No.42-57 & 58-2007

**Antara**

**Abd Rahim Bin Abd Rahaman**

**Dan**

**Pendakwa Raya]**

**CORAM: SURIYADI HALIM OMAR, JCA  
HASAN LAH, JCA  
AHMAD HAJI MAAROP, JCA**

**JUDGMENT OF THE COURT**

The appellant was charged with 22 charges of sodomy under s.377B of the Penal Code against a 14 years and 7 months boy (the victim) from 18.4.2007 until 9.5.2007. Ten charges were tried and heard at *Sessions Court 5* and another twelve at *Sessions Court 6*.

The facts are as follows. The victim, one Mohd Farid Bin Iskandar had filed a police report, stating inter alia that the appellant, a friend of his, had sodomised him at his home. But before sodomising him the appellant had given him something that had caused him to hallucinate. In the report the victim clearly stated that the appellant had inserted his penis into his anus at that house from 18.4.2007 until 9.5.2007. These facts were admitted by the appellant in the course of the proceedings when the facts were read out. The medical report confirmed the penetration as it stated that an "anal fissure at 1 o'clock measuring 0.5 cm" and "an anal tear at 6 o'clock measuring 1 cm with signs of fibrosis" were detected at the victim's anus.

The appellant admitted to the facts and thereupon pleaded guilty to the 22 charges at the abovementioned Sessions Court at Shah Alam. For easy reference, the charges, case numbers and sentences have been summarized in the following manner:

Case Number	Charge	Sentence
62-52-2007 (Court 6)	3 charges under s.377B Penal Code.	8 years imprisonment and 1 stroke of whipping for each charge. Sentences to run concurrently.
62-54-2007 (Court 6)	3 charges under s.377B Penal Code.	8 years imprisonment and 1 stroke of whipping for each charge. Sentences to run concurrently but consecutively

		with any other sentences.
62-56-2007 (Court 6)	3 charges under s.377B Penal Code.	8 years imprisonment and 1 stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.
62-58-2007 (Court 6)	3 charges under s.377B Penal Code.	8 years imprisonment and 1 stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.
62-53-2007 (Court 5)	3 charges under s.377B Penal Code.	7 years imprisonment and 1 stroke of whipping for each charge. Sentences to run concurrently.
62-55-2007 (Court 5)	3 charges under s.377B Penal Code.	7 years imprisonment and 1 stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.
62-57-2007 (Court 5)	3 charges under s.377B Penal Code.	7 years imprisonment and 1 stroke of whipping for each charge. Sentences to run

		concurrently but consecutively with any other sentences.
62-59-2007 (Court 5)	1 charge under s.377B Penal Code.	7 years imprisonment and 1 stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.

The Sessions Court judges had considered the following factors when meting down the sentences, viz.:

- (a) the number of charges the appellant was charged with, namely 12 at *Sessions Court 6*, and 10 at *Sessions Court 5*;
- (b) the maximum sentence under the relevant provision being 20 years;
- (c) the victim was less than 15 years old and not mature enough to know the consequences of his act;
- (d) the acts were repeated almost daily from 18.4.2007 until 9.5.2007;
- (e) the issue of public interest, what with the rise of this type of cases in our society; and
- (f) the danger of allowing the appellant to move freely within the fabric of society whence he is a threat to young boys.

The appellant appealed to the High Court on the solitary ground of sentence in that he:

- (a) had repented and requested for another chance; and
- (b) would not repeat his mistake.

Come the hearing day at the High Court the appellant denied giving the pills to the victim though did not deny the commission of the offence. With no retraction of the plea of guilt the High Court affirmed the conviction. The sentences were upheld founded on the offences being serious ones, what with the victim being very young and the acts amounted to absolute sexual abuse.

When the matter came before us, the appellant for reasons known only to him and his counsel, filed several additional grounds of appeal, amongst them, that:

- i. s.377B of the Penal Code is contrary to article 8 (1) and (2) of the Federal Constitution;
- ii. the sentences meted out are contrary to Article 8 of the Federal Constitution when read with s.289 of the Criminal Procedure Code;
- iii. the judge made a wrong finding of fact that such offences had increased in Malaysia; and
- iv. that the overall sentences were too severe.

The appellant had ventilated that s. 377B of the Penal Code is unconstitutional as it infringed Article 8(1) and (2) of the Federal Constitution. The combined effect of the latter Article is that all persons are equal before the law and entitled to the equal



protection, and there shall be no discrimination against citizens on the ground only of gender. In the course of the proceedings counsel abhorred the promulgation of s.377B and questioned its legality. Under s.377A of the Penal Code, to bring an individual within the realm of carnal intercourse, there must be an introduction of the penis into the anus or mouth. Learned counsel even ventilated that homosexuality should not be illegal as lesbianism is not. Counsel further submitted that a man is discriminated against just because of his biological make-up whilst the female is saved because of hers.

Pertaining to s. 289 of the Criminal Procedure Code females are completely exempted from any whipping in all cases whilst males are exempted only in certain circumstances. We do not think that it was the appellant's view that for the legislation to be fair females should be whipped too. The appellant's counsel submitted that since s. 289 of the Criminal Procedure Code discriminated against males it thus must have violated Article 8(1) and (2) of the Federal Constitution.

Ironically, despite having submitted in the above vein, which effect would have been the quashing of the charges and resulting in the setting aside of the sentences in the event of success, counsel had instead prayed that the sentences against the appellant be revised and substituted with a proportionate sentence. Having heard the appeal we dismissed it. The broad reasons, inter alia, for its dismissal are as follows:

- a. the new grounds supplied do not fall under s.305 of the

Criminal Procedure Code. Under this provision it is provided that there shall be no appeal except as to the extent or legality of the sentence. Even the appellant acquiesced to this principle when he correctly cited the case of *R v Leo de Cruz* [1935] MLJ 1. Unless this appeal falls under these circumstances the court will not intervene. We, needless to say, found that the sentences are within the scope of the sentence permitted to be meted down by the court;

- b. the sentences are not excessive or have militated against any known legal principles;
- c. learned counsel for the appellant has also admitted that the appellant is an HIV (AIDS) patient. This information is certainly of no help to the appellant. With him riddled with HIV, what with a propensity and life style for certain sexual inclinations, to let him loose among young boys will do no good to society. We were satisfied that the learned Sessions Court judges had struck a balance between the interest of the public and the interest of the appellant;
- d. the constitutional argument ventilated has a backdrop of the victim giving his supposed consent to the sodomy charges. As mentioned above he totally denied drugging the victim. This is far removed from the truth after having scrutinized the facts. By so pleading guilty without reservation at the subordinate

courts, he unequivocally had admitted that when sodomising the victim, consent was never given. On the issue of consent it is trite that in Malaysia, whether consent is given or not, is irrelevant for a prosecution under s.377B of the Penal Code, as opposed to a charge under s.377C of the same Code. A person may be charged under the latter provision if no consent is forthcoming from the victim. Consent is the distinguishing element between the two provisions. But it must be understood that it is the right of the Public Prosecutor to select the provision for which an accused person is to be charged. In this case, even had there been a technical glitch, whereby the "wrong" provision was preferred in the charges, on the premise that consent was not given by the victim, the appellant was never prejudiced. With s. 377B discounting even a consensual relationship and there being no failure of justice the convictions here therefore were in order;

- e. with the victim aged only 14 years and 7 months when sodomised, any liberal country which has legalized homosexuality between consenting parties *so long as they are adults*, will surely not tolerate the appellant's abhorrent excesses; and
- f. without the suitable facts and antecedent supporting the constitutional questions, the issues were therefore argued in a vacuum. Without the necessary nexus and without proper mode of proceedings before us, this



was thus not the appropriate case or platform, for the constitutional arguments to be canvassed.

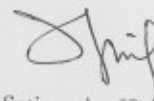
As we found no errors in the sentences meted down by the Sessions Court judges, which were also affirmed by the High Court we accordingly had dismissed the appeal.

Dated this 7<sup>th</sup> day of June 2010

T.T.

**SURIYADI HALIM OMAR**  
Judge  
Court of Appeal, Malaysia

Certified True Copy



Setiausaha Kepada  
Y.A. Datuk Suriyadi Bin Halim Omar  
Hakim Mahkamah Rayuan  
Putrajaya

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