IN THE HIGH COURT OF MALAYA AT IPOH

IN THE STATE OF PERAK DARUL RIDZUAN, MALAYSIA

[CRIMINAL APPEAL NO: AA-42LB-34-12/2017]

BETWEEN

PUBLIC PROSECUTOR

AND

MONG SOON TAT

Abstract: Coercion is an integral part of the definition of trafficking in persons for purpose of sexual exploitation as envisaged under s. 12 of Anti-Trafficking In Persons And Anti-Smuggling of Migrants Act 2007 ('ATIPSOM'). Coercion cannot be attached when the foreign nationals called as witnesses provided sexual services to the customers of their own free will. The mere act of the accused maintaining or acquiring the foreign nationals for sexual services without inflicting any form of coercion would not implicate the accused in an offence under s. 12 of ATIPSOM.

CRIMINAL LAW: *Anti-Trafficking In Persons And Anti-Smuggling of Migrants Act 2007 ('ATIPSOM') - Section 12 - Element of coercion - Accused acquired and maintained foreign nationals for sexual services - Passports were in possession of foreign nationals at all time – Foreign nationals were free to leave premises unaccompanied – Foreign nationals came to Malaysia voluntarily – Whether Foreign nationals were being held against their will and threatened with physical harm - Whether essential element of coercion had been proven - Whether coercion could be attached by mere act of maintaining and acquiring foreign nationals for sexual services*

[Appellant's appeal dismissed.]

Case(s) referred to:

Chang Kar Fei lwn. PP [2018] 1 LNS 1777 HC (***refd***)

Lim Kheak Teong v. PP [1984] 1 CLJ Rep 207 FC (***refd***)

Mohamad Abdullah v. PP [2017] 1 LNS 1978 HC (***refd***)

Periasamy Sinnappan & Anor v. PP [1996] 3 CLJ 187 CA (***refd***)

P'ng Hun Sun v. Dato' Yip Yee Foo [2013] 1 LNS 320 CA (***refd***)

PP v. Latif Sabang [2016] 1 LNS 1018 HC (***refd***)

PP v. Boon Fui Yan [2015] 7 CLJ 374 HC (***foll***)

Siow Hee Liong & Satu Lagi lwn. PP [2017] 1 LNS 348 HC (***refd***)

Legislation referred to:

Criminal Procedure Code, s. 316

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, ss. 2, 12, 16

JUDGMENT

Introduction

[1] This is an appeal by the appellant from the decision of the learned Sessions Court Judge (SCJ) in ordering that the respondent be acquitted and discharged at the end of prosecution case. The respondent was charges as follows charges:

> First Charge:
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> *"Bahawa kamu pada 1.8.2016 jam lebih kurang 8.40 malam, di dalam Premis Urut Thai Samoi Reflexology, No. 39, Jalan Medan Ipoh, Medan Ipoh Bistari, di dalam Daerah Kinta, di dalam Negeri Perak, telah memperdagangkan manusia nama : Miss Song Sang Palee, No. Passport : AA5531423 yang berumur 37 tahun, bagi maksud eksploitasi seksual dan dengan yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 12 Akta Anti Pemerdagangan dan Anti Penyeludupan Migran.*
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> Second Charge:
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> *"Bahawa kamu pada 1.8.2016 jam lebih kurang 8.40 malam, di dalam Premis Urut Thai Samoi Reflexology, No. 39, Jalan Medan Ipoh, Medan Ipoh Bistari, di dalam Daerah Kinta, di dalam Negeri Perak, telah memperdagangkan manusia nama : Miss Pennapa Aunjit, No. Passport : AA5418270 yang berumur 29 tahun, bagi maksud eksploitasi seksual dan dengan yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 12 Akta Anti Pemerdagangan dan Anti Penyeludupan Migran.*

Salient Facts

[2] The evidence shows that the respondent was arrested on 1.8.2016 at about 8.40 pm at premises known as "Urut Thai Samoi Refleksologi" . Also arrested together with him at the premises were Songsang Palee (SP1) who is mentioned as the person trafficked in the first charge and Pennapa Aunjit (SP2) who is mentioned as the person trafficked in the second charge. SP1 and SP2 are Thai nationals. Two other women were also arrested at the premises. They were Tran My Tho (SP3), a Vietnamese and Tan Ket Hong (SP4) a Malaysian.

[3] ASP Mohd. Sabri bin Ahmad (SP5) was the police officer who raided the premises on the night of 1.8.2016 after he received a pre planed WhatsApp message from Detektif Koporal Mohd. Firdaus (SP9). SP9 was in the premises at that time. Prior to the raid SP5 had sent Lans Koperal Hazizi (SP7) and SP9 ahead to the premises to find out whether there was any sexual exploitation being carried out at the premises.

[4] According to SP7 he had entered the premises with SP9. The respondent was at the counter and was the one who allowed them into the premises. SP7 said that the respondent offered to provide them body massage including sex for the price of RM198.00 each. The respondent then showed them several pictures of women in his handphone to choose from.

[5] They then made their pick and paid a sum totaling RM396.00 to the respondent and went to their respective rooms. SP7 said that after a short while SP2 turned up at the room. SP5 came in the room about 15 minutes later while SP7 was being massaged by SP2. At that time SP2 and SP7 had only a towel on. SP7 stated that he did not have sex with SP2 while in the room.

[6] SP9's evidence substantially corroborated the evidence of SP7. SP9 further stated that when he had entered into the room SP1 gave him a condom. SP9 then sent the WhatsApp message to SP5 informing SP5 that there was sexual exploitation taking place at the premises. SP5 together with other officers then raided the premises.

[7] SP1 gave her evidence by way of a deposition. SP1 deposed that she came to Malaysia voluntarily sometime in 2016. She was then met by an acquaintance called Sau who had previously worked at the premises. SP1 was then brought to the premises. There she met the respondent for the first time. She was informed by the respondent of the type of work she was supposed to do and the payment for the various services she was to provide to the customers. It was not denied by SP1 that apart from providing massages she also provided sexual services to the customers.

[8] SP1 earned about RM6,000.00 to RM7,000.00 in the 3 months she worked in Thai Samoi. During cross examination however she denied that the respondent paid her any money.

[9] A point to note was that SP1 stated that she was allowed to leave the premises at all times while she was working there. She only needed to inform the respondent that she intended to go out. The door would be opened by the respondent by remote. She had her telephone with her when she went out. If a customer came the respondent would telephone her. Her passport was kept by her all the time. Her employer provided rice and cooking oil. She bought the vegetables other dishes and cooked for herself. In her 3 months working at Thai Samoi she had returned to Thailand on three occasions. The purpose was to renew her passport. During cross examination she stressed the fact that the

respondent was not her employer and never forced her to hand over any money to him.

[10] SP2 also gave evidence by way of deposition. She stated that she first came to Malaysia around 2013 and worked at a shop as a manageress. Unfortunately, the shop closed down and a friend recommend her to Thai Samoi. She met the respondent for the first time there. She also provided sexual services to the customers of Thai Samoi. She would earn approximately RM7,000.00 to RM8,000.00 a month. Her passport was in her possession at all times. She resided at the premises itself where she was provided with oil, gas and cooking ingredients. She could eat out if she wanted to and was never tired working. She dealt with the respondent on anything concerning work. She never met the management of the business. She reiterated that the respondent never controlled her movements and she was free to go in and out of the premises. During cross examination she agreed to counsel's suggestion that she provided sexual services out of her own free will. No one forced her to provide these services or exploited her. Neither did the respondent force her to give him any money. She stated that the respondent did not know what she did with the customer.

[11] The prosecution also adduced evidence from 2 other witnesses namely SP3 and SP4 who were working at the premises and arrested together with the others on 1.8.2016.

[12] SP3 stated that had come to Malaysia on the recommendation of a friend on her own free will. No one forced her to do so. She had worked in other places in this country as a masseur before working in the premises. When she arrived at the premises for the first time, she was met by the respondent who was at that time seated at the reception. Of relevance in her evidence was

that she had possession of her passport at all times. She was at liberty to go out and would inform the respondent when doing so.

[13] During cross examination she agreed with counsel that the respondent was not her employer. She asserted that she was working at the premises on her own free will and the respondent did not force her to work there.

[14] SP4, Tan Ket Hong stated that she works as a masseuse at Thai Samoi. She is a Malaysian. Her income is about RM1,000.00 to RM2,000.00 per month. The respondent is the person who gives her the money. She resides at the premises of Thai Samoi. SD4 states that she came to work voluntarily. All the work done in Thai Samoi was done at her own free will. She said that whilst working in Thai Samoi she was free to go wherever she wished. She was free to take leave from work and it was up to her whether she wanted to work or otherwise. She further stressed that the respondent never asked any money from her. She further stated that the respondent did not treat her as a slave. She agreed with counsel for the respondent that she worked at the premises free from any orders from the respondent.

[15] SP8 was the investigating officer of the case. She had said in her evidence in chief that from her investigation the respondent was directly in charge of the management of the premises and no one else. In her evidence she said something which was puzzling in respect of the recording of the statements of SP1, SP2, SP3 and SP4. She gave evidence that she had earlier personally recorded the statements of SP1, SP2, SP3 and SP4. From her investigations she found that there was no evidence of sexual exploitation. Because there were contradictions, the nature of which was not explained in her evidence, the statements of these

witnesses were recorded again on the orders of the arresting offices SP5. This time their statements were recorded again by one Detektif Sarjan Mejar Kamal from Bukit Aman. SP8 gave evidence according to the statements recorded by Detektif Sarjan. Mejar Kamal. The rerecording of the statements throws a negative light on the investigations as it would seem that prior statements recorded by SP8 were less favourable to the prosecution.

Principles on Appellate Interference

[16] The powers granted to this Court in an appeal are provided for under section 316 of the Criminal Procedure Code [Act 593]. Basically, the court hearing the appeal will not interfere to alter the decision of the lower court on matters affecting the fact of a case as the Sessions Court Judge or Magistrate has had the benefit of hearing the evidence of the witnesses directly and evaluate the evidence to come to a finding of fact.

[17] In the case of *Periasamy a/l Sinnappan & Anor v. PP* [1996] 3 CLJ 187; [1996] 2 AMR 2511; [1996] 2 MLJ 557, Gopal Sri Ram JCA, *(as* his Lordship then was) stated the following:

> *In the state of the law, what was the duty and function of the learned judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.*
>
> *In Lim Kheak Teong v. PP [1985] 1 MLJ 38, the Sessions Court acquitted the accused on two charges under the Prevention of Corruption Act 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefor an order of conviction.*

The accused applied under the now repealed s. 66 of the Courts of Judicature Act 1964 to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court, whose judgment was delivered by Hashim Yeop Sani FJ (later CJ (Malaya)) said (at pp 39-40):

> *"... we gave leave because firstly we felt that there was no proper appraisal of Sheo Swarup v. King-Emperor AIR [1934] PC 227 and secondly purporting to follow Terrell Ag CJ in R v. Low Toh Cheng [1941] MLJ 1, the appellate judge went into conflict with the trend of authorities in similar jurisdictions."*

With respect, what Lord Russell of Killowen said in Sheo Swarup was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred 'the High Court should and will always give proper weight and consideration to such matters' as:

(1) the views of the trial judge on the credibility of the witnesses;

(2) the presumption of innocence in favour of the accused;

(3) the right of the accused to the benefit of any doubt; and

(4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

Lord Reid reiterated this same principle in Benmax v. Austin Motor Co Ltd [1955] AC 370 at 375 where he quoted from Lord Thankerton's judgment in Watt (or Thomas) v. Thomas [1947] 1 All ER 582 that:

> *"Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion."*

The learned appellate judge held that the learned President had "misdirected himself on the explanation of the accused". Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was "plainly unsound"? (Watt (or Thomas) v. Thomas). On the facts of this case we do not think so. (Emphasis added)

[18] There is however principles that operates to justify a court hearing an appeal to interfere with the decision of the trial court. These principles had been succinctly spelt out in the case of *P'ng Hun Sun v. Dato' Yip Yee Foo* [2013] 1 LNS 320; [2013] 2 AMCR 350; [2013] 6 MLJ 523, where the Court of Appeal held:

> *"When the finding of the trial judge is factual, however the fact finders decision cannot be disturbed on appeal unless the decision of the fact finder is plainly wrong (see China Airlines Ltd v. Maltran Air Corp Sdn Bhd (and Another Appeal) [1996] 3 CLJ 163; [1996] 2 AMR 2233; [1996] 2*

MLJ 517; Zahara Bt. A. Kadir v. China Airline Ltd v. Maltran AirCorp. Sdn Bhd & Anor Appeal [1996] 3 CLJ 163; [1996] 2 MLJ 517; Zaharah bt A Kadir v. Ramuna Bauxite Pte Ltd & Anor [2011] 1 LNS 1015; [2012] 1 AMR 209; Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2013] 3 CLJ 813; [2013] 1 LNS 1; [2013] 4 AMR 55; [2013] 2 MLJ 650;.

The findings of fact of the trial judge can only be reversed when it is positively demonstrated to the appellate court that;

a) By reason of some non-direction or misdirection or otherwise the judge erred in accepting the evidence which he or she did accept; or

b) In assessing and evaluating the evidence the judge has taken into account some matter which he or she ought not to have taken into account; or

c) It unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he or she cannot have taken proper advantage of his or her having seen and heard the witnesses; or

d) In so far aside the Judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witness which he or she accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."

[19] Guided on the above principles I proceeded to analyse the evidence presented in the Appeal Records in relation to Section 12 of the (Act 670) (ATIPSOM).

Analysis and Findings of this Court

[20] The Respondent was charged under section 12 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670) (ATIPSOM).

[21] The section reads as follows:

> Offence of trafficking in persons
>
> *Any person, who traffics in persons not being a child, for the purpose of exploitation, commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding fifteen years, and shall also be liable to fine.*

[22] The elements of the offence can be broken down to the following:

i) the accused trafficked the person named in the charge,

ii) the person trafficked is not a child, and

iii) the accused trafficked the named person in the charge for the purpose of exploiting him/her in accordance to the provision of Section 2 of ATIPSOM.

[23] Section 2 of ATIPSOM defines a “child” to means a person who is under the age of eighteen years. From the evidence presented in court both SP1 and SP2 were aged above 18 years at the time

of their arrest. That being the case section 12 applied to the facts of this case.

[24] The phase "*traffics in persons"* has been given a specific meaning in ATIPSOM. According to section 2 of ATIPSOM, "trafficking in persons" means all actions involved in:

> *"the acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person".*

[25] In the context of this case the acquiring or maintaining of the labour or services of SP1 and SP2 must be obtained through coercion. Accordingly, in my view the element of "coercion" is an integral part in the definition of "trafficking in persons".

[26] As to what constitute "coercion" under ATIPSOM section 2 states:

> *"coercion" means -*
>
> *(a) threat of serious harm to or physical restraint against any person;*
>
> *(b) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or*
>
> *(c) the abuse or threatened abuse of the legal process*

[27] The definition of "coercion" is indeed wide. Paragraph (a) of the definition does not require actual serious harm or actual physical restraint to take place. The threat of such harm or physical restraint to the trafficked person or any other person

would suffice to constitute coercion. As to paragraph (b) it is the belief or the person trafficked that matters. There is therefore a subjective element to this part. If there is a "*scheme, plan, or pattern*" perpetrated or caused by the trafficker that results in the person trafficked to believe that failure to perform any act would result in serious harm to the person trafficked or to any person for that matter, that by itself would constitute coercion. In my view paragraph (a) is a more direct form of coercion than that in paragraph (b). As for paragraph (c) it is self-evident that the mere threat of abuse of the legal process would suffice. The abuse of the legal process could, for example, take the form of an arrest, detention or deportation or a treat thereof against the trafficked person or any other person.

[28] Section 12 makes it an offence to traffic persons for the purpose of exploitation. The term "exploitation" is defined in section 2 as follows:

> *"exploitation" means all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs*

[29] From the plain reading of the meaning of "exploitation" I am of the opinion that, from the evidence adduced, there are elements of sexual exploitation in this case.

[30] There was evidence that SP1 and SP2 provided sexual services. The evidence of SP1 and SP2 shows that the respondent was the one who dealt with the customers before SP1 or SP2 entered the room. The respondent would be the one to tell the customer the type of services available. This would include sexual services. The respondent would then convey to SP1 and SP2 of the services required by the customer. As evinced from the

testimony of SP 7 and SP9 the respondent was the one who collected the money for the services to be provided by SP1 and SP2 before SP7 and SP9 went to their respective rooms. This was after the respondent had offered SP7 and SP9 the "full service" which included sex. Further the pictures of the women were shown to SP7 and SP9 from the hand phone of the respondent. It would be reasonable to conclude here that the pictures of SP1 and SP2 would have been in the pictures shown. From the evidence it is clear that sex was part of the services offered by SP1 and SP2 and payment was made for that service. The payment was made to the respondent.

[31] Exploitation is however only one of the elements of the the offence of trafficking in persons. As stated earlier the element of coercion is essential in the definition of trafficking in persons. The burden is on the prosecution to prove coercion. See *Siow Hee Liong & Satu Lagi lwn. PP* [2017] 1 LNS 348.

[32] Whether coercion exists is a question of fact. In *Mohamad Abdullah v. PP* [2017] 1 LNS 1978 the fact that the person trafficked was accompanied by the trafficker whenever she went out was regarded as indicative of coercion. In those circumstances it did not matter that the person trafficked had her passport and telephone with her. In that case it was held that there was coercion where the persons trafficked were locked in a room from outside and only the trafficker held the keys. Escaping from the clutches of the trafficker or contemplating to do so was also held to be indicative of coercion. In *Chang Kar Fei lwn. PP* [2018] 1 LNS 1777 the person trafficked owed a debt for the expenses incurred in bringing her to Malaysia and was compelled to repay the debt by providing sexual services. This was found to be a form of coercion. Control over the trafficked person by the trafficker is also a consideration in

determining whether there was coercion. In *PP v. Latif Sabang* [2016] 1 LNS 1018 one of the reasons the accused was acquitted was because there was no credible evidence he "had control over the movements of the 4 Indonesian women."

[33] The issue is whether on the facts of this case, there is evidence of coercion. I am of the view that on the basis of the evidence of SP1 and SP2 it can be deduced that they both came to Malaysia voluntarily. They worked at Thai Somai on their own accord. They were free to leave the premises unaccompanied and had their hand phones with them when they went out. Their passports were with them all the time. I would also say the same for SP3 and SP4. Neither SP1, SP2, SP3 nor SP4 had complained that they were being held against their will or they were threatened with physical harm. There was no evidence to that effect. There was no evidence of "any scheme, plan, or pattern intended to cause" either of them to believe that failure to provide sexual services during their work would result in serious harm to or physical restraint against them. Neither was there any attempt by any one of them to escape from the premises. I am therefore of the opinion that the essential element of coercion had not been proven by the prosecution.

[34] On the contrary SP1 and SP2 provided sexual services to the customers of Thai Samoi at their own free will and not because they were coerced to do so. Thus although, on the facts, there was evidence the respondent had acquired or maintained the services of SP1 and SP2, there was no coercion as envisaged under section 2 of ATIPSOM attached in the maintaining or acquiring.

[35] For the sake of completeness had also considered whether section 16 of ATIPSOM would alleviate the prosecution from proving coercion. Section 16 reads:

> *In a prosecution for an offence under section 12, 13 or 14, it shall not be a defence that the trafficked person consented to the act of trafficking in persons.*

[36] I am of the view that this section does not relieve the prosecution from having to prove coercion at the prima facie stage of the trial. The section is only relevant at the defense stage. I find guidance for this proposition in the case of *PP v. Boon Fui Yan* [2015] 7 CLJ 374 where it was held that "in order to give purpose to the amended interpretation of 'trafficking in person' to include the means used in trafficking namely, through coercion, s. 12 of the Act, read together with s. 16, means that only when it is proven that the accused had trafficked the victims through or by means of coercion, that the consent of the person trafficked is irrelevant". See also *Siow Hee Liong & satu lagi lwn. PP* [2017] 1 LNS 348.

Conclusion

[37] I find that the learned SCJ had based her decision on the facts of the case. There was nothing perverse in her decision. At this juncture I remind myself that this Court must be slow in disturbing a finding of fact arrived at by a judge who had the audio-visual advantage of seeing the witnesses. See *Lim Kheak Teong v. PP* [1984] 1 CLJ Rep 207; [1985] 1 MLJ 38.

[38] In the upshot, I dismiss the prosecution's appeal against the learned SCJ' decision in acquitting and discharging the accused.

Dated: 10 JUNE 2019

(ANSELM CHARLES FERNANDIS)
Judicial Commissioner
High Court of Malaya
Ipoh

Date of decision: 17 DECEMBER 2018

COUNSEL:

For the appellant - Fadhli Ab Wahab; Deputy Public Prosecution Negeri Perak

For the respondent - Matthews Jude; M/s Naran Singh & Co