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Citation

CHAN, Wing Cheong. Singapore's approach to sex by deception. (2022). *Proceedings of the 2nd Law Chiangmai University International Conference: Dynamic of Laws Amidst Crisis and Its Aftermath, Chiangmai, Thailand, 2022 February 11..* 104-114.

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SINGAPORE'S APPROACH TO SEX BY DECEPTION

Wing-Cheong CHAN

ABSTRACT

A vigorous debate about whether sex by deception ought to be considered rape appears to have caught the imagination of criminal law theorists and commentators in recent years. This debate is by no means devoid of practical implications as shown by case law from various jurisdictions which have had to grapple with the issue. This article sets out the approach taken in Singapore and suggests that it may offer a practical solution in this contentious area of criminal law and the understanding of consent.

Keywords: *rape, consent, deception, criminal law*

INTRODUCTION

Every so often, a vigorous debate breaks out on an area of the criminal law which does not appear close to resolution. This seems to have happened with regards to “sex by deception”.¹ The debate is by no means purely theoretical in nature, as can be seen by the number of cases that have emerged on this issue around the world.²

The term “sex by deception” is used to describe cases where the defendant obtains sex by inducing a false belief in the victim on a material matter affecting the decision to have sex. In such cases, there is no question about the victim’s mental competency to give consent or being in a condition of vulnerability such as being underage, under the influence of drugs or alcohol, or subjected to any form of threats. To any external observer, the victim has given consent to the sexual intercourse with the defendant, but it is later claimed that there was no true consent because of the deception used by the defendant. The question in such cases is whether the defendant had committed rape since the sexual intercourse had arguably been committed without consent.

Examples of “sex by deception” encountered in the case law of various countries include matters relating to:

- payment for the sexual service;³
- HIV status;⁴
- wearing a condom during sexual intercourse;⁵
- withdrawal before ejaculation;⁶
- birth gender;⁷
- having had a vasectomy;⁸
- religion and ethnicity;⁹

¹ See for example, Herring J, “Mistaken Sex” (2005) *Criminal Law Review* 511; Bohlander M, “Mistaken Consent to Sex, Political Correctness and Correct Policy” (2007) 412 *Journal of Criminal Law* 416; Gross H, “Rape, Moralism, and Human Rights” (2007) *Criminal Law Review* 220; Rubinfeld J, “The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy” (2013) 122 *Yale Law Journal* 1372.

² For a survey of the law in Hong Kong, Taiwan, Thailand and Singapore, see Chen J, “Lying About God (and Love?) to Get Laid: The Case Study of Criminalising Sex under Religious False Pretense in Hong Kong” (2018) 51 *Cornell International Law Journal* 553; Chen J, “Joyous Buddha, Holy Father, and Dragon God Desiring Sex: A Case Study of Rape by Religious Fraud in Taiwan” (2018) 13(2) *National Taiwan University Law Review* 183; Chen J and Triratpan P, “Black Magic, Sex Rituals and the Law: A Case Study of Sexual Assault by Religious Fraud in Thailand” (2020) 37(1) *UCLA Pacific Basin Law Journal* 25; Chen J, “Fraudulent Sex Criminalisation in Singapore: Haphazard Evolution and Accidental Success” [2020] *Singapore Journal of Legal Studies* 479.

³ *R v Linekar* [1995] QB 250.

⁴ *R v B* [2007] 1 WLR 1567.

⁵ *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin).

⁶ *R(F) v DPP* [2014] QB 581.

⁷ *R v McNally* [2014] QB 593.

⁸ *R v Lawrance* [2020] 1 WLR 5025.

⁹ Reuters, “Israel jails Arab in ‘sex through fraud’ case” (July 21, 2010). Available online at <https://www.reuters.com/article/us-israel-sex-idUSTRE66K2EG20100721>.

- intention to marry.¹⁰

In Thailand, a situation of “sex by deception” was encountered in the Supreme Court case no. 10007/2557 (2014) where the defendant had sex with a 16 year-old girl on the pretense that he would use his supernatural power to get her father to remit money to the family. The victim eventually went back to carry out the same ritual four more times. The Supreme Court found the girl naive and stupid, and said her agreement to have sex did not stem from her will but from a condition of inability to resist him. It was therefore held to be a case of rape.

The Supreme Court’s decision can be queried whether the victim truly “cannot resist” the defendant,¹¹ especially when the victim went back to the defendant repeatedly. There is no doubt that the innocent victim was badly taken advantage of, but should it be rape?

One commentator has pointed out that:

... the questions of whether and how deceptive sex ... ought to be criminalised have arisen across a number of jurisdictions, where they have elicited a variety of different responses. Courts and commentators disagree not only about which deceptions ought potentially to lead to criminal liability but also about which category of offence best fits the defendant’s conduct.¹²

In this article, I will explain the law of consent and rape in Singapore, how it had been changed by the amendments made in 2019 in terms of the situations that would vitiate consent to sexual intercourse, and the new offences created by the 2019 amendments to the Penal Code.¹³

1. LAW OF CONSENT AND RAPE IN SINGAPORE BEFORE THE 2019 AMENDMENTS TO THE PENAL CODE

Under section 375 of the Penal Code, the offence of rape is defined as simply sexual penetration without the victim’s consent.¹⁴ But will “consent” which was given under a mistake

¹⁰ *State of UP v Naushad* AIR 2014 SC 384; *Santosh Sinha v State of Tripura* 2007 Cri LJ 7; *Swapan Chatterjee v State of West Bengal* 2009 Cri LJ 16; *Deepak Gulati v State of Haryana* AIR 2013 SC 2071.

¹¹ The offence of rape is defined in section 276(1) of the Thai Penal Code as follows:

Whoever has sexual intercourse with a person without their consent by coercion, an act of violence, or in the condition that such person cannot resist, or by causing such person to mistake the perpetrator for another person, the perpetrator shall be punished with imprisonment from 4 to 20 years and fined from 80,000 to 400,000 THB.

On the facts of the case, there was no coercion or violence, or mistake about the identity of the perpetrator. The court therefore had to consider if the victim “cannot resist” the defendant in order to convict him of rape.

¹² Kennedy C, “Criminalising Deceptive Sex: Sex, Identity and Recognition” (2021) 41 *Legal Studies* 91 at 91.

¹³ The 2019 amendments were made by the Criminal Law Reform Act 2019 (Act 15 of 2019), most of which came into operation on 1 January 2020.

¹⁴ Prior to amendments made by the Penal Code (Amendment) Act 2007 (Act 51 of 2007), lack of consent was only one of the situations where sexual intercourse with a woman would amount to rape. The other situations include sexual intercourse “against her will” and “when her consent has been obtained by putting her in fear of death or hurt”. The offence of rape became gender neutral after the 2019 amendments when the offence was extended to penetration of the anus or mouth of another person using the defendant’s penis.

be valid? A straight-forward reading of section 90 of the Penal Code would suggest that this is the case. This provides that:

A consent is not such a consent as is intended by any section of this Code –

(a) if the consent is given by a person – ...

(ii) under a misconception of fact,

and the person doing the act knows, or has reason to believe, that the consent was given in consequence of such ... misconception.

Under this approach, there cannot be a principled distinction between deceptions which can or cannot vitiate consent. For example, a victim who is deceived about the defendant’s wealth or love for her, can allege that she had been raped if he knew or had reason to believe that the consent to sex was on this basis.

However, in *Siew Yit Beng v PP*,¹⁵ which was decided in 2000, the Singapore High Court sought to limit the types of deception that would vitiate sexual consent by following the English common law that only a mistake as to the nature of the act or identity of the defendant would do so.¹⁶ In this case, the defendant was convicted by the trial court of giving false information to the police that she had been raped by her physician. She claimed that her physician had refused to treat her unless she agreed to have sexual intercourse with him. She argued that her consent was vitiated by a misconception of fact that he would cure her thereafter. However, since she had no misconception regarding the nature of the act of sexual intercourse, the High Court upheld her conviction because her consent had not been vitiated and her allegation of rape was therefore false.

If the High Court applied section 90 of the Penal Code, it might have found that she was indeed under a misconception of fact (that her physician would cure her) when she agreed to have sex. If the physician knew or had reason to believe that her consent was given on this basis, there could not be true consent to the sexual intercourse. It was therefore a case of rape and she consequently did not falsely accuse the physician of rape. Regretfully, the High Court did not engage in an analysis of section 90 in the case.¹⁷

There have also been some Singapore cases that cast doubt on *Siew Yit Beng*. In the earlier decision of *PP v Kwan Kwong Weng*,¹⁸ the defendant tricked a “naive and gullible” young woman into having sexual intercourse by being told that she needed to cleanse her vagina of poison. She also performed fellatio on the defendant because she was told that he needed to replenish his energy after the sexual intercourse. The Singapore Court of Appeal was “utterly amazed” that the Prosecution conceded that the victim’s consent to fellatio was not vitiated.¹⁹ Instead of proceeding

¹⁵ [2000] 2 SLR(R) 785.

¹⁶ The English case of *R v Flattery* (1876-77) 2 QBD 410 was cited by the court.

¹⁷ The prospect of using English common law to restrict the scope of the Penal Code runs counter to the aims of codification itself, see Yeo S, Morgan N and Chan WC, *Criminal Law in Singapore* (LexisNexis, 2022) at para. [1.55].

¹⁸ [1997] 1 SLR(R) 316.

¹⁹ *Ibid*, see [12], [33] and [34].

with rape charges, the Prosecution proceeded with charges of “unnatural offence” under section 377 of the Penal Code which did not require proof of lack of consent.²⁰

The decision by the Prosecution not to file rape charges appears to be correct if the English common law approach is adopted. The victim was not mistaken about what she was doing or the identity of the defendant. She was only mistaken about the *purpose* of the sexual intercourse (as a form of medical treatment) and fellatio (to revitalise energy) which would not have vitiated consent. The comment from the Singapore Court of Appeal therefore suggests a wider approach to consent than the English common law.

Siew Yit Beng had also not been cited in later cases to limit the types of misconception of fact that can vitiate consent. In *PP v Lim Cher Foong*,²¹ the defendant had anal sex with the victim on the pretext that it was to pass his energy or “chi” to him. Since the victim was aware that it was anal intercourse but was only deceived as to the need for such conduct, application of *Siew Yit Beng* would not negate consent since the misconception would be on the purpose of the act rather than the nature of the act. But the Singapore District Court applied section 90 and convicted the defendant of sexual penetration without consent under section 376A of the Penal Code.²² In *Wong Tian Jun De Beers v PP*,²³ the defendant came up with an elaborate scam to trick various women into having sex with him on the pretext that he was an agent for “sugar daddies” who would pay well for their services but he had to first test the adequacy of their skills. The High Court commented *obiter* that the victims did not consent to the sexual acts with the defendant by applying section 90’s misconception of fact without even mentioning *Siew Yit Beng*.

2. CLARITY AT LAST

Uncertainty in the applicability of *Siew Yit Beng* came to an end when amendments were made to the Penal Code in 2019. A new section 377CB was added to limit the types of misconception of fact that would vitiate consent in sexual offences. This new provision reads:

(1) Despite section 90(a)(ii), a consent for the purposes of an act which is the physical element of a sexual offence is not a consent given by a person under a misconception of fact only if it is directly related to –

- (a) the nature of the act, namely that it is not of a sexual nature;
- (b) the purpose of the act, namely that it is not for a sexual purpose; or
- (c) the identity of the person doing the act,

and the person doing the act knows, or has reason to believe, that the consent was given in consequence of such misconception.

²⁰ This offence no longer exists in the Penal Code.

²¹ [2016] SGDC 6.

²² The offence of rape was not gender neutral at the time when the act was committed.

²³ [2021] SGHC 273.

Under this provision, only three types of misconception will vitiate consent – misconceptions relating to nature or purpose of the act, and the identity of the person doing the act.²⁴ In all other situations, consent to sexual acts even if given under a mistake will be valid. Four illustrations are given in s 377CB to illustrate its operation:

(a) *A* deceives *B* into allowing him to penetrate her vagina by inducing the misconception that he is extracting an evil spirit from *B*'s body. *B* believes *A* and thinks that what she has consented to is a procedure to extract an evil spirit, not sexual intercourse. *B* has given her consent under a misconception as to the sexual nature of the act. *B*'s apparent consent is therefore not a valid consent.

(b) *A* deceives *B* into believing that he can heal *B*'s chronic disease by treatment involving sexual penetration. *B* gives her consent under the misconception that the act is treatment for a health purpose and not for a sexual purpose. *B*'s apparent consent is therefore not a valid consent.

(c) *A* deceives *B* into believing that *A* is her husband. *A* is an imposter. *B* consents to sexual intercourse with *A* because she believes *A* is her husband. *B*'s consent is given under a misconception of the identity of *A* and is therefore not a valid consent.

(d) *A* deceives *B* into believing that *A* is an influential movie director. *A* is in fact only an administrative assistant to that movie director. *B* consents to sexual intercourse with *A* because she believes *A* is that movie director. *B*'s misconception is as to *A*'s attributes and not of *A*'s identity. *B*'s consent is therefore a valid consent.

The Singapore approach is essentially binary in nature. There is either consent or no consent to sex. This is unlike the current English law where there exists general definition of consent along with conclusive presumptions that there is no consent if the victim was deceived as to the nature or purpose of the act, or the person doing the act. The English courts have held that even though the conclusive presumptions did not apply, the victim's consent could still be vitiated using the general definition of consent.²⁵

However, there could still be criminal liability for some types of deception which lead the victim to agree to sexual intercourse in Singapore. The 2019 amendments introduced two new offences to the Penal Code. The first is section 376H, called “Procurement of sexual activity by deception or false representation”, which reads:

²⁴ It can be noted that the scope of section 377CB is wider than the English common law by allowing mistakes as to the purpose of the act to vitiate consent. Section 377CB also applies to a “sexual offence” and so it is not limited to the offence of rape only.

²⁵ See for example, *R v Jheeta* [2008] 1 WLR 2582; *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin); *R(F) v DPP* [2014] QB 581.

- (1) Any person (*A*) shall be guilty of an offence if –
- (a) *A* intentionally touches another person (*B*) or intentionally incites *B* to touch *A* or *B* or another person;
 - (b) the touching is sexual and *B* consents to the touching;
 - (c) *A* fraudulently obtains *B*'s consent by means of deception or false representation practised or made by *A* for that purpose;
 - (d) the deception or false representation mentioned in paragraph (c) relates to –
 - (i) the use or manner of use of any sexually protective measure; or
 - (ii) whether *A* or another person whom *B* is incited to touch is suffering from or is a carrier of a sexually transmitted disease; and
 - (e) *A* knows or has reason to believe that the consent was given in consequence of such deception or false representation.
- (2) A person who is guilty of an offence under subsection (1) shall –
- (a) in the case where the sexual touching mentioned in that subsection involved –
 - (i) penetration of the vagina or anus (as the case may be) with a part of the body or anything else; or
 - (ii) penetration of the mouth with the penis,be punished on conviction with imprisonment for a term which may extend to 10 years, or with fine, or with caning, or with any combination of such punishments; and
 - (b) in any other case, be punished on conviction with imprisonment for a term which may extend to 2 years, or with fine, or with both.
- (3) For the purposes of subsection (1) –
- (a) a person makes a false representation if it is untrue or misleading, and that person knows that it is, or might be, untrue or misleading;
 - (b) a representation may be express or implied; and
 - (c) a “sexually protective measure” means –
 - (i) where *B* is female, a device, drug or medical procedure to prevent pregnancy or sexually transmitted diseases as a result of sexual intercourse; or

- (ii) where *B* is male, a device, drug or medical procedure to prevent sexually transmitted diseases as a result of sexual intercourse.

Under this new provision, it is a criminal offence to deceive a victim into having sex by misrepresenting that the defendant will use a “sexually protective measure” or that the defendant does not have a sexually transmitted disease. The difference is that this offence is not stigmatised as rape, and the maximum punishment for such sexual conduct is imprisonment of up to 10 years, fine or caning, or any combination of such punishments. In contrast, the punishment for non-aggravated rape is mandatory imprisonment of up to 20 years, and a fine or caning may also be imposed.

The second offence is section 420A, called “Obtaining services dishonestly or fraudulently”, which reads:

- (1) A person shall be guilty of an offence if he obtains services for himself or another person dishonestly or fraudulently and –
 - (a) the services are made available on the basis that payment has been, is being or will be made for or in respect of them;
 - (b) the person obtains the services without any payment having been made for or in respect of them or without payment having been made in full; and
 - (c) when the person obtains the services –
 - (i) the person knows that they are being made available on the basis mentioned in paragraph (a) or that they might be; and
 - (ii) the person intends that payment will not be made or will not be made in full.

- (2) A person who is guilty of an offence under subsection (1) shall on conviction be liable to imprisonment for a term not exceeding 10 years, or to fine, or to both.

This offence will cater to the scenario of a sex worker who is tricked into performing sexual services by a defendant who does not make payment. Like the offence in section 376H, imprisonment is not mandatory for this offence and the maximum term of imprisonment is only half of that for non-aggravated rape (10 years). Caning also cannot be imposed for this offence.

For situations which do not fall within rape or either of the two new offences, the offence of “cheating” may also be used. Cheating is defined in section 415 of the Penal Code as follows:

Whoever, by deceiving any person, whether or not such deception was the sole or main inducement ... intentionally induces the person so deceived to do or omit to do

anything which he would not do or omit to do if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation or property, is said to “cheat”.

As can be seen from the definition, the offence of cheating extends beyond situations involving sale of goods. A person who is tricked into doing something such as having sexual intercourse by the promise of marriage can complain of being “cheated” so long as all the other requirements for the offence can be proven as well.²⁶ Offences of cheating which do not involve the delivery of property are punished with a maximum term of imprisonment of 3 years, or fine, or both.²⁷

3. CONCLUSION

The Singapore approach seeks to draw a clear limit to the types of deception that will vitiate consent in rape. It is only if there is a mistake as to the nature or purpose of the sexual act, or the identity of the person doing the act that will constitute rape.

Having clear limits on when consent is vitiated for a serious offence such as rape with harsh penalties is important not only in terms of fairness but also in order not to undermine the law by having cases of “deceptive sex” being placed in the category of rape.

However, this does not mean that other forms of deplorable conduct will not be punished. Other types of deception leading the victim to have sexual intercourse with the defendant will not amount to rape, but they can be punished as lesser offences. If the deception involves the risk of a sexually transmitted disease or conception, or that the sexual services will be paid for, such conduct may be punished under the new offences found in sections 376H and 420A of the Penal Code. All other forms of deception may be punished as cheating.²⁸ The “Singapore approach” may be something worth consideration by Thailand and other jurisdictions that are facing the issue of “sex by deception”.

²⁶ See for example, *Bipul Medhi v State of Assam* 2008 Cri LJ 1099. The wording of the offence in the Indian Penal Code is almost the same as the Singapore Penal Code. See also *Wong Tian Jun De Beers v PP* [2021] SGHC 273 where the deception involved a pretense that the defendant was an agent for “sugar daddies”.

²⁷ Section 417 of the Penal Code.

²⁸ But Prosecutorial discretion will need to be exercised in order not to proceed in cases of doubtful merit.

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