Reclaiming Solid Earth from the Legal Sea - Poh Boon Kiat v Public Prosecutor: A Case Commentary on Human Trafficking in Singapore

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ASSIGNMENT*

RECLAIMING SOLID EARTH FROM THE LEGAL SEA –
POH BOON KIAT v PP: A CASE COMMENTARY

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"We must approach the future with a deft balance, aspiring towards playing a responsible regional or international role, while continuing our quest for excellence in our domestic legal framework. Pursuing both ends simultaneously will be challenging. If we are to advance, we will have to break new ground, or, in the best Singapore tradition, reclaim solid earth from the legal sea."

- The Honorable Chief Justice Sudaresh Menon S.C.

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I. INTRODUCTION

The Magistrate’s Appeal case of Poh Boon Kiat v PP signaled a promising step forward for Singapore’s crackdown on trafficking in persons. CJ Menon’s High Court pronouncement that prostitution-related offences under s 140 and s 146 of the Women’s Charter now attract a benchmark custodial sentence (rather than a mere fine) for first-time offenders was a fitting foreshadow of what would unfold 15 days later, just across the road from the Supreme Court. On 5 October 2015, in harmony with the still resonating judicial warning against organized PROs, the

Part II highlights the opportunity missed in Poh to propose a clear, local judicial definition of TIP independent of PROs in the context of the pre-PHTA legal framework. Part III weighs the merits of the decision and lauds how CJ Menon’s “reclaimed solid earth from the legal sea” by recognizing the multifariousness of PROs, and utilized the law to its fullest in proposing a fresh sentencing framework leading to enhanced

6 No 45 of 2014, Singapore (“PHTA”)
7 “LEF”
8 The issues of concurrent sentences and prospective overruling will not be discussed.
10 Bruch on TIP, pg 45

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1 [2014] SGHC 186 (“Poh”)
2 “TIP”
3 “SGHC”
4 “PROs”
5 (Cap. 353, 2009 Rev. Ed. Sing.) (“WC”)
benchmark sentences for PROs. Closing observations in light of Poh will be made in Part IV about the complementariness of the PHTA and the WC provisions on PROs.

**A. Background**

The material facts of the case are these: with help from Thai contacts, Poh set up a prostitution ring after 2 months of planning. They procured 5 prostitutes for him, who were apparently willing participants seeking financial gain through Poh’s one-man operation.\(^{11}\) Poh provided for all the logistical needs of the women. However, the ring was busted only after 10 days of operating. Poh pleaded guilty to 8 charges under the WC (two under s 140(1)(b); four under s 140(1)(d); one under s 146, and; one under s 148) and consented to 12 similar charges taken into consideration.

At first instance, an aggregate sentence of a 9-month custodial term was meted out with 3 sentences running consecutively. Poh’s appeal that the sentence was manifestly excessive succeeded in the SGHC, which also highlighted that the sentence was incorrect in principle.\(^{12}\) Apart from a revised sentencing benchmark for PROs, the sentence was adjusted also because CJ Menon preferred two (rather than three) of the sentences to run consecutively.

**II. THE ‘LURE’ OF PROSTITUTION: MARRYING PRO WITH TIP?**

**A. A Definitional Impediment**

CJ Menon reviewed Poh’s sentence by first situating the problem of prostitution in Singapore within its historical context, noting that one of the reasons prostitution was “suppressed” but not “outlawed” by the colonial government was its worry about “trafficking of women and girls into Singapore for the sex trade”\(^{13}\).

The problem from that juncture though is that TIP and PROs received no clear distinction and are mentioned in the same vein. This mirrors a mistake characteristic of international efforts against TIP, which pigeonhole TIP under the rubric of violence against women even though PROs and TIP are arguably different.\(^{14}\) Even “the transnational element of the operation” (at [95]) was deemed an aggravating factor instead of a compelling reason to attract a more unique categorization such as TIP.\(^{15}\)

On this note, one may offer the charitable argument there was then no ‘official’ local definition of TIP, which we now have in the PHTA. However, that is beside the point. A plethora of international instruments was available

\(^{11}\) *Public Prosecutor v Poh Boon Kiat* [2014] SGDC 109 (“Trial Decision”): the names of the women are: Buasing Orasa, Srithun Promporn, Krasaesom Sirapatsorn, Woraruthai Phonpun (for reasons unknown, the last name was omitted).

\(^{12}\) *Poh Boon Kiat*, headnote (7)

\(^{13}\) At [16]

\(^{14}\) *Bruch*, pg 28

\(^{15}\) Notably, the authorities CJ Menon cited all involved foreign nationals brought into Singapore for the purpose of prostitution: *PP v Chan Soh* [2008] SGDC 277 (“Chan Soh”) (two Chinese nationals); *Lee Swee Yang v PP* [1991] SGHC 117 (“Lee Swee Yang”) (a Thai national); *PP v Tang Huisheng* [2013] SGDC 432 (a Chinese national); *PP v Seng Swee Meng* (DAC 34801/2011 and others) (14 Vietnamese nationals).
to guide the formulation of a judicial definition for TIP. Furthermore, locally, the Singapore Taskforce on TIP had in 2012 adopted The Palermo Protocol definition in its National Plan of Action Against TIP. It was certainly open to the SGHC to adopt, if not to adapt, a definition of TIP, which would also signal to Parliament the urgency to legislatively remedy this legal lacuna.

In Poh, CJ Menon also cited an example of how a “woman may be the victim of sex trafficking, made to work in Singapore as a prostitute against her will.” This precisely reflects the overlapping, confusing relationship between TIP and PROs. He also added later, “the procurement of sex workers from abroad, even if they are willing parties, encourages the international trafficking of women.” The second quote evinces evidently the practical implications stemming from a failure to distinguish PROs from TIP: how will the court differentiate between different situations of prostitution? What about consent of the woman – what is the court to make of voluntary prostitution?

The above echoes two unhealthy habits of the international law enforcement effort against TIP. First, it reveals a “focus on trafficking in women for purposes of prostitution or sexual exploitation”, which accordingly overlooks “other situations of exploitation” outside the traditional genus of the sex trade. Essentially, this first problem revolves around the issue of consent, which, when deemed irrelevant, “assume[s] that women [in PROs/TIP scenarios] are either weak, wholly compromised figures who can be treated paternalistically, or inadequately assertive individuals who should be compelled by the use of legal incentives to defend their own rights.” This necessary elucidation of consent that the SGHC overlooked is simply the “struggle to reconcile two apparently conflicting views of prostitutes and prostitution.”

Secondly and as a consequence of the above, at a deeper and more fundamental level the ‘irrelevance of consent’ advocates a “discriminatory, paternalistic view of women”. It depicts them as “innocent victims” based on the erroneous assumption “that no one would choose to be trafficked” and “no one would

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17 At [73]
18 At [84]
19 Bruch at 15
22 Bruch at 19:
“One that seeks to protect individuals from being trafficked into prostitution and another that seeks to exclude from protection those who willingly engage in the criminal conduct of prostitution, even if they have been trafficked to another country.”
voluntarily choose prostitution.”23 Yet, the instant facts of Poh unambiguously prove otherwise.

**B. A Definitional Impossibility**

Notwithstanding the above, that the existing legal framework restricted CJ Menon’s analysis should compel some forgiveness as we critique his decision. CJ Menon’s comprehensive journey through the legislative history of the offences in Pt. XI of the WC suggests so: the genesis of the PROs was a 1955 ordinance specifically intended to protect women and girls; the 1961 and subsequent editions of the WC retained the same goal via the “punishment of offences against women and girls.” As was rightly lamented, the pre-PHTA legal framework lacked any comprehensive definition of TIP24 and centered on sexual wrongs committed against females. In fact, it was only after the PHTA’s enactment that other forms of TIP received recognition independent of PROs.25

Moreover, in the second quote above, CJ Menon merely stated that the procurement of sex workers abroad even if they are willing parties encourages but does not equate per se international TIP.26 In any case, CJ Menon had rightly stressed earlier that the heading “Offences relating to prostitution” under s 140 WC is, to some extent, a misnomer because not all the s 140 offences actually relate to prostitution although they operate for “the prevention of the exploitation of women and girls.”27

Indeed, this intention of CJ Menon to distinguish between different types of prostitution arising in varying circumstances becomes crystal-clear toward the end of the judgment, and it is to this that we now turn.

**III. PROSTITUTION – MORE THAN MEETS THE EYE: ANALYSING THE RATIONALE FOR AN INCREASED BENCHMARK**

*A. Drawing from the Legal Sea: Unearthing the Potential of the LEF*

CJ Menon’s examination of the legislative history led him to conclude that the intention was for the relevant WC PROs to be punished with mandatory custodial terms rather than to grant judicial discretion to impose fines.

Most significantly, CJ Menon masterfully unearthed the previously untapped potential the law wielded to send a strong deterrent message against PROs. He stressed the importance, in sentencing, for judicial cognizance of the “statutory maximum sentence [as a signal] of the gravity with which Parliament views any individual offence.” 28 He correctly noted that jurisprudence PROs had been found wanting in this aspect.29

In this regard, CJ Menon’s reasoning is commendable. From a TIP perspective,

\[\text{footnotes}^23 \text{ Ibid} \]

\[\text{footnotes}^24 \text{ Parliamentary Debates Singapore: Official Report, vol 92 (3 November 2014) (Mr Christopher De Souza); Parliamentary Debates Singapore: Official Report, vol 92 (3 November 2014) (Mr Christopher De Souza)}\]

\[\text{footnotes}^25 \text{ Parliamentary Debates Singapore: Official Report, vol 93 (23 February 2015) when Mr Teo Chee Hean addressed separately sex trafficking and labour trafficking cases when discussing suspected TIP cases in Singapore.} \]

\[\text{footnotes}^26 \text{ Supra note 18} \]

\[\text{footnotes}^27 \text{ At [21]} \]

\[\text{footnotes}^28 \text{ At [60]} \]

\[\text{footnotes}^29 \text{ At [61]} \]
the LEF typically embodies the international “fight against organized crime”\textsuperscript{30} and its “greatest advantage […] is that it offers potential for prosecuting traffickers directly” as exemplified in \textit{Poh}.\textsuperscript{31} The prevention of TIP is thus heavily reliant on the judicious and effective judicial administration of the law. Accordingly, meticulous consideration of statutorily defined maximum sentences, as CJ Menon demonstrated, is integral in ensuring this so that justice is seen to be done. In this light, it is understandable why CJ Menon opined that fraudulent traffickers who have nefariously scammed foreign women into local prostitution should not escape with mere fines.\textsuperscript{32}

\textbf{B. A Calibrated Approach to Elucidating Prostitution-Related Offences}

Next, CJ Menon’s adaptation of the UK Sentencing Council’s three-tiered “culpability” and two-tiered “harm” sentencing framework is also praiseworthy, as it aids the court in ascertaining the severity of PROs, which depend on a “wide variety of circumstances” and differs from case to case.\textsuperscript{33} This is preferred to a simplistic, dichotomized model of the traditional LEF which typically yo-yos between one unhealthy extreme that predominantly criminalizes traffickers in order to deter crime (thereby sidelining the interests of victims) or a purely “victim-centered victim-welfare” approach (with a weaker emphasis on prosecuting traffickers).\textsuperscript{34}

Rather, CJ Menon’s approach accounts for both the trafficker as offender (“Culpability” Classification) and the prostitute as victim (“Harm” Categorization). This also addresses the abovementioned difficulty of punishing different categories of prostitutes and proscribing diverse types of prostitution, as CJ Menon himself highlighted.\textsuperscript{35} While this technically does not categorically distinguish between forced and consensual prostitution, at the very least, it underscores varying degrees of culpability.

Finally, CJ Menon also percutively stressed that PROs typically involve myriad forms of violations, especially in situations of involuntary prostitution e.g. “the withholding of basic necessities” and “excessive wage reduction or debt bondage.”\textsuperscript{36} He hence rightly acknowledged two harrowing yet commonly overlooked aspects of PROs. First, from a rights perspective, PROs are similar to TIP “as a phenomenon that violates human rights”; in other words, violations of various fundamental human rights are inherent in both TIP and PROs, yet usually glossed over.\textsuperscript{37} Secondly, from a labor perspective, \textit{Poh} recognizes “the variety of abusive [labor] circumstances prostitutes face”\textsuperscript{38} such that “sexual exploitation should [also] be seen as a form of labour exploitation.”\textsuperscript{39}

\textsuperscript{30} Bruch, at 16
\textsuperscript{31} Bruch, at 17
\textsuperscript{32} Chan Soh; Lee Swee Yang
\textsuperscript{33} At [68]
\textsuperscript{34} Ronald Wong, “A Critique of International and Singapore Legal Treatments of Trafficking in Persons” [2014] SJLS 179 [Wong], pg 187-190
\textsuperscript{35} At [73]: “victim”, “actively groomed and enticed” or “attracted by the prospect of the quick financial gain.”
\textsuperscript{36} At [83]
\textsuperscript{37} Bruch, at 28
\textsuperscript{38} Bruch, at 26
\textsuperscript{39} Wong, at 192
IV. CONCLUSION

Under the PHTA, Poh is unlikely to be penalized for his conduct. Although the ‘act’ (Poh recruited, transported, harbored and received the women) and ‘purpose’ (prostitution falls within the PHTA definition of “sexual exploitation”) elements are satisfied, the ‘means’ element is not. The consent of the 5 Thai women was not secured through any of the vitiating means under s 3 PHTA since they willingly participated in Poh’s enterprise. Thankfully however, as Poh demonstrated, offenders like Poh must still face the wrath of the law.

The separate regimes of the PHTA and the WC provisions on PROs need not operate to the exclusion of one another. Poh suggests the WC provisions on PROs are likely operative primarily in situations of voluntary prostitution. Conversely, CJ Menon appears to hint that PROs only attract a ‘trafficking’ classification under circumstances of coercion and exploitation. 40 Accordingly, since the ‘means’ element under s 3 PHTA is not met in cases of voluntary prostitution, the WC provisions ensure that traffickers in such situations will not escape unpunished for their offences. The PHTA is therefore intended to be operative and to punish offenders more severely where involuntary prostitution is concerned.

In light of the above, Poh appositely epitomizes Singapore’s commendable efforts to be recognized for international responsibility and excellence in her domestic legal framework. Not only did the SGHC “reclaim solid earth from the legal sea” by emphasizing and exercising conscientious awareness of legislative

40 At [73]