DCCC 196 of 2006

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CRIMINAL CASE NO. 196 OF 2006

HKSAR
against
CHAN Johnny Sek Ming

Coram : HH Judge Lok in Court
Date of trial : 12 and 13 September 2006
Date of verdict: 20 September 2006

VERDICT

1. The Defendant is charged with 2 counts of committing an act outraging public decency contrary to common law (Charges 1 and 3) and 2 alternative counts of obtaining access to a computer with intent to commit an offence contrary to section 161(1)(a) of the Crimes Ordinance, Cap. 200 (Charges 2 and 4).

2. As it would be quite difficult to have exact translations of the contents of the messages in the internet message board, which are the subject matters of the charges in issue, the Prosecution and the Defence agree that the evidence of the trial would be given in Cantonese. However,

as most of the legal authorities concerning the law in this area are English cases, it is also resolved that final submissions of the parties and verdict of the court would both be made and delivered in English.

The Admitted Facts

3. There is no grave dispute between the Prosecution and the Defence about the facts of the present case. In fact, all the prosecution evidence has been agreed by the Defence and this is one of the rare cases that no witness is required to be called for the prosecution case.

4. According to the admitted facts submitted to the court under s. 65C of the Criminal Procedure Ordinance, Cap. 221, at 10:48 a.m. on 13 August 2005, the Defendant calling himself "MasterMind", using a computer in his home, wrote a message in a message board called "GOSSIP" ("the Message Board") at an internet website known as "www.she.com" ("the Website"). Each of the topic created by a message would be assigned a thread number in the Message Board, and the contents of the Defendant's message were as follows:

> *"正經問：我想搞快閃強姦有冇兄弟想加入？快閃強姦（Jack Rolling）係由一組約五至六人既男仔組成，專阻截單身女子，每次其中一人從後將個女仔強姦，其它人就幫手同睇水，搞完將佢封口綁手然後一齊閃...正啊~這種手法源自南非，現傳到國，我好希望香港都可以搞下！"*
>
> *thread id: 1461287 posted by MasterMind on 2005-08-13 10:48:32"* ("the First Message")

5. The above message, which is the subject matter of Charges 1 and 3, can be translated to English as follows:

> *"(I am) serious in asking this: I want to organize 'flash mob' rape, would any brothers like to join? Flash Mob Rape [Jack Rolling] is a group formed by 5-6 boys, specifically intercepting single females. On each occasion, one of the guys will rape the female from behind and the others will render assistance and act as lookouts. After that, (we will have) her mouth gagged and hands tied before (we) flash (away) together …… (that'll be) great! This modus operandi has its origin in South Africa, now (it) has spread to (one character indecipherable), I really hope (it) can be organized in Hong Kong.*
>
> *thread id: 1461292 posted by MasterMind on 2005-08-13 10:48:32"* ("the First Message")

6. After that, the Defendant added a sentence to his message:

> *"Ha… 甘多人搞一個女仔重邊有得走！……有興趣 email 我：gigolo sar@yahoo.com"*

which can be translated to English as follows:

> *"Ha …… the girl is handled by so many people and there's no way (for her) to escape …… Those interested e-mail me at gigolo sar@yahoo.com ……"*

7. The e-mail address "gigolo sar@yahoo.com" belonged to the Defendant.

8. Many people saw the First Message at the Message Board, and there were about 19 messages in response. About half of such responses showed that the respondents were disgusted and were resented by the Defendant's act. Amongst those, one person with the code-name "vv" suggested to organize a "flash *Jur* (penis) cutting gang", and invited "men of justice" to join. After that, some viewers responded expressing their wishes to join this "flash *Jur* cutting gang". At 6:34 p.m. on 13 August 2005, the Defendant wrote at the Message Board

in reply to these messages:

> *"上面班人真搞笑*
> *扮晒正義之士*
> *話你地知我一定搞得成!"*

which can be translated to English as follows:

> *"The above persons are really funny, pretending to be men of justice, I tell you I will successfully organize it for sure."*

9. After that, a number of persons posted responses in the Message Board and some scolded the Defendant. Most were disgusted and were resented by the contents of the Defendant's First Message, and some of the respondents claimed that they had reported the matter to the police. The Defendant then wrote the following in English at 11:40 p.m. on 13 August 2005:

> "Hum …… reported to the police huh? CATCH ME …… IF YOU CAN!"

10. At 11:39 a.m. on 13 August 2005 and 4:42 p.m. on 14 August 2005, a person calling himself "William Wong" sent 2 e-mails to the Defendant's e-mail address. The first e-mail reads: "係咪真先玩老強" (translated as "really going to rape?"), and the second one reads: "有人嗎" (translated as "Anybody here?"). The Defendant did not respond to these e-mails.

11. There were a total of 76 responses to the First Message posted by the Defendant. Amongst those, two persons with the code-names

"Visa" and "bbc" expressed interest in joining the gang-rape. One person with the code-name "劉德華" (translated as "Lau Tak Wah") admired the idea. Another person with the code-name "中學生" (translated as "secondary school student") wrote that it was a horrible but exciting idea, he wanted to join the rape but did not dare to do so.

12. On 15 August 2005, the Defendant found out that the First Message had been deleted. While at home, the Defendant used his computer to post another message in the Message Board at 6:32 p.m. on the same day:

> "潮流興快閃強姦，快閃強姦（Jack Rolling）係由一組約五至六人既男仔組成，專阻截單身女子，每次其中一人從後將個女仔強姦，其它人就幫手同睇水，搞完將佢封口綁手然後一齊閃…正啊~這種手法源自南非，現傳到英國，希望香港都可以搞下！
>
> *posted by MasterMind*
>
> *thread id: 1463548* *on 2005-08-15 18:32:35"*
> ("the Second Message")

13. The English translation of this second message, which is the subject matter of Charges 2 and 4, is as follows:

> *"'Flash mob' rape is the trend. 'Flash mob' rape [Jack Rolling] is formed by 5 – 6 boys, specifically intercepting single females. Each time, one of the gangs will rape the female from behind and others will render assistance and act as lookouts. After that, (we will have) her mouth gagged and hands tied before (we) flash (away) together …… (that'll be) great. This modus operandi has its origin in South Africa, now (it has) spread to the United Kingdom, (I) really hope (it) can be organized in Hong Kong.*
>
> *posted by Mastermind*
>
> *thread id: 1463548* *on 2005-08-15 18:32:35"*
> ("the Second Message")

14. After that, the Defendant added the following sentence to his message:

"甘多人搞一個女仔重邊有得走！好 high 啊~"

which can be translated as follows:

"The girl is handled by so many people and there's no way (for her) to escape! (It feels) so high."

15. There were 26 responses to the Second Message, with some of the respondents having the same code-names as those who responded to the First Message. Amongst those responses, two respondents with the code-names "Ss" and "Whiteboy" expressed interest to join the gang rape, whilst other respondents with the code-names "旺角豪哥" (translated as "Mongkok Ho Koh"), "阿熙" (translated as "Ah Hey") and "EEG" admired the idea of the Defendant.

16. The police traced the IP address of the postings to the home address of the Defendant, and the latter was arrested on 24 August 2005. The Defendant's residence was occupied by the Defendant and his wife only. When the Defendant was arrested, he admitted that he was the one who posted the First and the Second Messages ("the Messages") and claimed that he was doing it as a joke. He made the same admission in the subsequent video-recorded interview.

17. Any members of the public could look at the messages in the said "GOSSIP" Message Board through the internet. However, if one

wished to write a message in the Message Board, he or she had to register, without any fee, as a member of the Website first.

The Defendant's case

18. The Defendant elects not to testify in the trial. I have reminded myself that it is the right of the Defendant to make such election, and no adverse inference should be made against the Defendant for his right to remain silent.

19. The Defendant is a man of good character, and in considering the verdict, the court needs to take into the two-limbs direction as laid down in the case of *R v Vye* [1993] 1 WLR 471.

20. The Defendant has called one witness, Madam Wong Wai Chong Joanna, to testify on his behalf. Madam Wong received education up to University level, and she has obtained a master degree in science of electronic commerce. She came to know the Defendant some time in 2003 and 2004 through chatting in the message board of the Website, as they shared a common interest of fetishism in women's pantyhose. According to Madam Wong, she was a regular visitor of the different message boards at the Website. Although there might be some serious discussions depending on the nature of the topics, some of the other participants of the message boards just posted various topics at the Website as some kind of joke. She mentions about a previous topic about an invitation to participate in a bank robbery, and most of the viewers of the Website did not pay serious attention to such invitation.

21. For this particular case, seeing the First and the Second Messages posted in the Message Board, without knowing the identity of the person who posted them by that time, Madam Wong also regarded the contents of the Messages as a bluff or some kind of joke. Madam Wong, however, admits that gang rape is a horrible crime, and it would be scary and disgusting for someone to invite others to participate in such crime. She also frankly admits that she is not certain whether the person who posted the Messages did have the real intention to commit the gang rape.

Whether the Defendant had the intention to commit the gang rape or to incite others to commit such crime?

22. It is the Defendant's case that he only posted the Messages as a joke. Internet is in fact a strange world, a lot of people would use the internet meaningfully to exchange their ideas, but on the other hand, a lot of other internet users just post different worthless creations in the internet forums with a view to arouse various fanciful discussions. Although the Prosecution asks me to infer intention on the part of the Defendant in committing the gang rape by looking at the explicit wordings used by the Defendant in the Messages, I cannot ignore the possibility that the Defendant is some of kind of facetious person, and the topic about the invitation to join in the gang rape was just one of his worthless fanciful creations. The Defendant might just want to provoke discussion and he would derive satisfaction from looking at the responses to his idea.

23. Further, the evidence of Madam Wong, the previous good character of the Defendant and the response made by him when he was arrested all support the fact that the Defendant had no real intention to commit

the gang rape or to incite others to do so. I therefore so find. As the alternative Charges 2 and 4 require the proof of a specific intent to commit an offence whilst the Defendant gained access to the computer, the Defendant cannot possibly be convicted for the offence under these charges.

The law relating to the offence of committing an act outraging public decency

24. Even if the Defendant posted the Messages with no such intention, he may still be guilty of the offence of committing an act outraging public decency. The object of the offence is to prevent the corruption of mind and the destruction or erosion of values of decency, and so such offence focuses on the nature of the Defendant's act and its effect on the general public.

25. As far as I understand, there have not been many prosecutions brought in Hong Kong for such offence, and this is indeed the first prosecution relating to the posting of a message on the internet. Hence, it is not surprising that we cannot find any local authorities on such area of the law. However, after reading paras. 21-298 to 21-304 of *Archbold Hong Kong 2005*, the relevant legal principles for such offence can perhaps be summarized as follows:

    (i) the offence of committing an act outraging public decency does exist in common law (see: *R v Gibson and Sylveire* [1990] QB 619, applying the dicta of Lord Simon in *Knuller (Publishing, Printing and Promotions) Ltd. v DPP* [1973] AC 435 at 493);

(ii) it must be proved that the act complained of was committed in public, which means that it must be committed in a place, public or private, where there exists a real possibility that members of the general public might witness it (see: *R v Walker (S)* [1996] 1 Cr App R 111);

(iii) the prosecution also has to prove that the act complained of was of such a lewd, obscene or disgusting character as constitutes an outrage on public decency, which is a question of fact to be decided by the trial judge, or in the case of a jury trial, by the jury;

(iv) it is not necessary for the prosecution further to prove that the act in fact disgusted or annoyed the persons within whose purview it was committed (see: *Knuller (Publishing, Printing and Promotions) Ltd v DPP, ibid.*). Although it is free for the prosecution to adduce evidence to that effect, ultimately it is a question for the trial judge or the jury to decide whether an act is one outraging public decency; and

(v) for the *mens rea*, it is not necessary for the prosecution to prove an intention to outrage or recklessness. The prosecution merely has to prove that the defendant had the intention to do the act which outrages public decency, whatever the defendant himself might think its likely effect might be (see: *R v Gibson and Sylveire*, ibid.).

26. Although the Defendant posted the Messages in his private home using his computer, other members of the public could view their contents through the internet. Hence, according to the proposition established in *R v Walker (S), ibid* (see paragraph 25(ii) above), the Defendant's act of posting the Messages should be regarded as an act committed in public. Further, the Defendant had the intention to publish the Messages, and so there is no dispute that the Defendant had the necessary *mens rea* for the offence. The remaining main issue is, therefore, whether the Defendant's act was of such a lewd, obscene or disgusting character as constitutes an outrage on public decency.

Whether the Defendant's act was one outraging public decency?

27. In this regard, guidance can be obtained from the judgment of the House of Lords in *Knuller (Publishing, Printing and Promotions) Ltd v DPP, ibid.* In that case, the appellants were directors of a company which published a fortnightly magazine. In an inside page under a column headed "Males", advertisements were inserted inviting readers to meet the advertisers for the purpose of homosexual practices. For such conduct, the appellants were charged with and convicted of the first count of conspiracy to corrupt public morals and the second count of conspiracy to outrage public decency. In the House of Lords, the Law Lords affirmed the conviction on the first count but quashed the conviction on the second count.

28. In respect of the charge of conspiracy to outrage public decency, the majority, including Lord Morris, Lord Simon and Lord Kilbrandon, held that such an offence did exist in common law, whilst Lord Reid

and Lord Diplock disagreed. But despite the existence of the offence, Lord Simon and Lord Kilbrandon quashed the conviction based on such charge, as there had been a misdirection in relation to the meaning of "decency" and "outrage" and the element of publicity required to constitute the offence. On the meaning of "decency" and "outrage", Lord Simon said the following in his judgment:

> *"It should be emphasized that 'outrage', like 'corrupt', is a very strong word. 'Outraging public decency' goes considerably beyond offending the susceptibilities of, or even shocking, reasonable people. Moreover the offence is, in my view, concerned with recognized minimum standards of decency, which are likely to vary from time to time. Finally, notwithstanding that 'public' in the offence is used in a locative sense, public decency must be viewed as a whole; and I think the jury should be invited, where appropriate, to remember that they live in a plural society, with a tradition of tolerance towards minorities, and that this atmosphere of toleration is itself part of public decency."* (at p. 495 C-D)

Although such observation was made in respect of the conspiracy charge, the same should be applicable in considering the overt act which is alleged to outrage public decency.

29. In another English Court of Appeal case, *R v Ching Choi* No. 9805975 Z4 (computer-aided transcript, decision of the English Court of Appeal on 7 May 1999), the defendant was charged with 6 counts of outraging public decency for filming a lady while she was relieving herself in the lavatory. In determining whether the defendant's acts could properly be described as lewd, obscene or disgusting, Roch LJ held that the defendant's acts had to be looked at objectively, applying the standard of "ordinary, right thinking members of the public". Further, according to the Particulars of Offence in the Charge Sheet, it is the Prosecution case that the Defendant's act of posting the Messages was one of a disgusting

nature. As to what amounts to "disgusting conduct", Roch LJ said the following in his judgment:

> *"Disgusting conduct is conduct which fills the onlooker with loathing or extreme distaste or causes the onlooker extreme annoyance."*

30. I have reminded myself of such high threshold for the offence. However, despite the aforesaid observations, I am satisfied that the act of inviting others to join him in committing a gang rape with the specific *modus operandi* was an act outraging public decency. Unlike homosexual activities, the display of a controversial artistic exhibit or the publication of obscene literature, which were usually the subject matters involved in similar charges in England, no person of a decent mind, whether in the past, at present or in the future, whether in Hong Kong or elsewhere in the world, would tolerate the commission of a crime such as rape, let alone a horrible gang rape in the manner suggested by the Defendant in the Messages. In my judgment, ordinary right thinking members of the public who read the Messages would not merely feel shocked or disgusted but would feel outraged by their contents.

31. No one would disagree that if the Defendant was serious in carrying out the plan if so perceived by the viewers of the Messages, then the Defendant's act of posting the Messages can be regarded as conduct outraging public decency. Even Madam Wong, the Defence witness, agrees that gang rape is a horrible crime, and it would be scary and disgusting for someone to send out an invitation to commit such a crime. However, Mr. Cheng, counsel for the Defendant, submits that the Defendant only posted the Messages as a joke. As it was the

"culture" of the Website for its members to post various fanciful creations in the message boards, the viewers of the Website and the Message Board would only regard the whole incident as a joke or a bluff. As such, the argument follows, the contents of the Messages lack the lewd, obscene or disgusting character as constitutes an outrage of public decency.

32. Whilst I agree that some viewers of the Message Board might so regard the contents of the Messages, that does not alter the nature of the Defendant's act itself. What is so outraging objectionable, disgusting and obscene is that the contents of the Messages went beyond the promotion of such horrible crime or a free expression of opinion, the Messages were in substance a public invitation to others to indulge in such sexual perversion with the Defendant. Specific mode to commit the crime was suggested in the Messages, and according to the wordings, the Defendant was serious about his plan. He also clearly indicated that he would be enjoying committing the crime and he was looking forward for the same. Further, what was alarming was that, as indicated by Madam Wong's evidence, internet would provide a good forum to group together people with common interest, and there might be a possibility that the invitation would group together such kind of people, with or without the Defendant himself, to plan for the gang rape, and what Defendant says to be a fanciful creation might materialize into a horrible crime. Although the title of the Message Board was "GOSSIP", it did not in any way lessen the impact of the Defendant's outraging and disgusting act.

33. Mr. Cheng further submits that in ascertaining the standard of public decency, the court should take into account the "culture" of the

Website and the possible responses of its viewers. However, the Defendant's Messages were no private communications. The Message Board was a public forum and any persons could gain access to its contents. There might be a lot of viewers who just participated in the discussion for the first time or who might not be familiar with the so-called "culture" of the Website. In such case, the court should base on the standard of ordinary right thinking members of the public, as suggested by Roch LJ in *R v Ching Choi, ibid.*, in deciding whether the Defendant's act was one which outrages public decency.

34. Even if the court were to adopt the standard of the "culture" of the Website, a lot of viewers of the Message Board were very much upset by the Defendant's conduct. They used strong words to express their outrage and disgust about the Defendant's invitation, and some claimed that they had reported the matter to the police. One viewer even attempted to contact the Defendant privately using the latter's e-mail address for further discussion on the topic, all these factors show that these viewers did not regard the Defendant's plan just as a joke. Even worse, after the Defendant knew about the outrage expressed by some viewers after the posting of the First Message, he posted the same message 2 days later. The only logical conclusion is that the Defendant wanted to cause further outrage to the viewers of the Message Board.

35. Mr. Cheng submits that the Prosecution has not called these persons to testify as to whether they were in fact disgusted or annoyed by the Defendant's conduct. However, as established by the *Knuller* case, it is not necessary for the prosecution to do so. In any event, the

contents of the responses speak for themselves, and if necessary, the court can take into account such responses and makes the same conclusion that the Defendant's act was one which outrages public decency.

Verdict

36. In reaching the verdict, I have reminded myself not to pass any personal moral judgment on the Defendant's conduct, nor to take into account any policy consideration as to whether the Defendant's conduct is desirable in modern world. I am not sitting as a judge of taste, and doing something disgraceful or immoral *per se* is not a criminal offence. It is also not the court's role to create new offences, as it is a matter for the legislature. On the other hand, committing an act outraging public decency is a long-established offence in common law. Although the values of society may change from time to time, the object of the offence in preventing the corruption of mind and the destruction or erosion of values of decency is still valid in modern world. Further, like other media such as newspapers and books, internet is a public forum and so there is no reason why the offence is not applicable to messages published on the internet.

37. Hence, in my judgment, the correct approach is for the court to apply faithfully the established legal principles to perhaps the novel facts of the present case, which is role of the court according to the well-quoted observations of Parke B. in *Mirehouse v Rennell* (1833) 1 Cl. & F 527 (cited with approval by Lord Simon in *Knuller (Publishing, Printing and Promotions) Ltd. v DPP, ibid.* at p. 492),

which reads:

> *"Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable or inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised." (at p.546)*

38. Based on the aforesaid analysis, it is certainly not unreasonable or inconvenient to apply the established legal principles to the facts of the present case. In doing so, I find that the Defendant's conduct was one which outrages public decency. I am therefore satisfied beyond all reasonable doubt that the Prosecution has proved all the elements of the offence under Charges 1 and 3, and I convict the Defendant accordingly.

(David Lok)
District Judge

Mr. Eddie Sean SGC of the Department of Justice, for the Prosecution

Mr. James C. C. Cheng, instructed by Messrs. Johnnie Yam, Jacky Lee & Co., for the Defendant