REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-00720

IN THE MATTER OF AN APPLICATION FOR CONSTITUTIONAL REDRESS UNDER S.14 OF THE CONSTITUTION

BETWEEN

JASON JONES

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

AND

THE EQUAL OPPORTUNITY COMMISSION
THE TRINIDAD AND TOBAGO COUNCIL OF EVANGELICAL CHURCHES
THE SANATAN DHARMA MAHA SABHA OF TRINIDAD AND TOBAGO

Interested Parties

Appearances:

Claimant: Richard Drabble QC leading Rishi P.A. Dass instructed by Antonio Emmanuel

Defendant: Fyard Hosein SC leading Keisha Prosper instructed by Lesley Almarales

Interested Parties:

Lorelei Liselle Wong for the Equal Opportunity Commission
Dinesh Rambally for the Sanatan Dharma Maha Sabha
Elton Prescott SC instructed by Alicia G. George for the Trinidad and Tobago Council of Evangelical Churches

Before The Honourable Mr. Justice Devindra Rampersad

Dated the 20th day of September 2018

Contents

Introduction

1. By order dated 12 April 2018 the court directed that the parties provide further written submissions on the remedies available to the court in light of the court's finding that sections 13 and 16 of the Sexual Offences Act Chap. 11:28 (the Act) are unconstitutional to the extent that they criminalise consensual sexual conduct between adults. These submissions were ultimately filed by the claimant and the defendant on 18 June 2018.[1] There have been no submissions filed by the interested parties with The Trinidad and Tobago Evangelical Churches taking the position not to assist the court on any further aspect of the case in light of that party's respectful position that the court's finding was wrong.[2]

2. The court subsequently sought further submissions on the issue of whether the offence of buggery, as detailed in section 13 of the Act is covered by the provisions for rape under section 4 (1) of the Act and those further submissions were received from the claimant and the defendant on the 28 August and 5 September respectively.

Summary of the claimant's initial submissions

3. The claimant's ultimate position is that the court should read into section 13 (2) of the Act the words 'without consent' while simultaneously severing identified words from section 16 and reading in the words 'consenting persons' at section 16(2)(b) of the Act. The intended result being to ensure that the identified acts are only criminalised where there is an absence of consent. The suggested result would thus be:

> "13. (1) A person who commits the offence of buggery is liable on conviction to imprisonment for twenty-five years.
>
> (2) In this section "buggery" means sexual intercourse *without consent* per anum by a male person with a male person or by a male person with a female person.
>
> 16. (1) A person who commits an act of serious indecency on or towards another is liable on conviction to imprisonment for five years.
>
> (2) Subsection (1) does not apply to an act of serious indecency committed in

[1] Pursuant to order dated 7 June 2018

[2] As articulated by Alicia George, Attorney at Law for Reverend Desmond Austin, at the hearing on 9 July 2018

private between—

(a) a husband and his wife;

(b) ~~a male person and a female~~ *consenting* persons, each of whom is sixteen years of age or more, ~~both of whom consent to the commission of the act~~; or

(c) persons to whom section 20(1) and (2) and (3) of the Children Act apply.

(3) An act of "serious indecency" is an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organ for the purpose of arousing or gratifying sexual desire."

4. This position was taken in light the constitutional provision that a law is void to the extent of the inconsistency with the Constitution.[3] It was thus submitted that the court should only act insofar that it is necessary to avoid constitutional infringement and no more. Reference was made to the case of ***Schachter v Canada*** [1992] 2 RCS 679 which provided guidelines on the exercise of a court's flexible powers to strike down, entirely or partially, offending words, to read down or read in words on a finding of unconstitutionality. The important aspects of those guidelines may be summarised as follow:

4.1. As much of the legislative purpose as possible must be preserved to avoid undue intrusion into the legislative sphere;

4.2. The approach is dependent on the manner in which the extent of the inconsistency is defined;

4.3. The inconsistency can be defined as what is left out of the verbal formula as well as what is wrongly included;

4.4. In the usual case of severance the inconsistency is defined as something improperly included in the statute which can be severed and struck down. In the case of reading in the inconsistency is defined as what the statute wrongly excludes rather than what it wrongly includes. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme;

4.5. Severance or reading in will be warranted only in the clearest of cases where each of the following criteria is met 718e-j:

4.5.1. the legislative objective is obvious, or it is revealed through the

[3] See section 2 of the Constitution

evidence offered pursuant to the failed s. 1 argument, and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down;

4.5.2. the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain;

4.5.3. and severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.

5. In that regard the claimant's attorneys considered the following in coming to their recommendation:

5.1. The application of the offending sections to consenting adults is what is inconsistent with the Constitution, as set out in the Court's judgment and declaration;

5.2. Reading into the sections or severing therefrom the words necessary to exclude their application to consenting adults would remove any inconsistency with the Constitution;

5.3. Because the scope of constitutional invalidity can be delineated with relative precision, as identified in the Court's declaration, both severance and reading in can confidently be undertaken without trespassing upon the role of the legislature;

5.4. There is, in this regard, no wider policy position issue (such as budgetary concerns) which will be affected;

5.5. The Court can take notice that there are pending charges under these sections which should be permitted to continue insofar as they are consistent with the declaratory relief sought, i.e. they involve involuntary conduct. Reading in would therefore promote the continuation of the remaining lawful legislative objective underpinning the enactment of the two sections.

Summary of the defendant's initial submissions

6. The defendant acknowledged that the court's powers following a violation of sections 4 and 5 of the Constitution is flexible as reflected in sections 2 and 14 of the Constitution. Section 14(1) permits the court to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of which the person concerned is entitled. According to the defendant, that includes striking down legislation, the power to read down or sever offending parts of legislation and the power to read into legislation. The defendant then went on to define the remedies of severance, 'reading in' and striking out. It ultimately concluded that the court ought to strike out the offending sections so as not to invade the legislative domain.

7. It was submitted that severance is used in circumstances where the courts exercise a jurisdiction so as to interfere with the scheme of the legislation as minimally as possible. The defendant explained that the doctrine of severance requires the court to define carefully the extent of the inconsistency between the offending provision of the statute and the requirements of sections 4 and 5 and then declare inoperative the inconsistent portion and such other portions which it cannot be safely assumed that the legislature would have enacted without the inconsistent portion. Reference was made to the statement of Lord Diplock in the case of ***Hinds v R*** [1977] AC 195 when considering whether certain provisions were severable from the remaining provisions of legislation in Jamaica stated:

> "The test of severability has been laid down authoritatively by this Board in Attorney General for Alberta v Attorney General for Canada [1947] A.C. 503, 518:
>
> 'The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires and all.'"

8. The defendant then went on to suggest that sections 13 and 16 are complex provisions which have deep historical roots and it would be impossible to sever portions of it without affecting the other provisions of the sections. The defendant however failed to identify how the elements of these sections were 'inextricably and individually bound up with all the other provisions' of each such section of the Act.

9. Reading in was described as a process whereby words are added which would make the section constitutionally compliant and at the same time, express the will of the legislature. Reference was made to guidance from Lamer CJ in ***Schachter*** at page 698 whereby it was noted that reading in was closely akin to the practice of severance and as such, both required that the court carefully define the extent of the inconsistency. An example of reading in was provided as found in the case of ***Chuck Attin v The Attorney General of Trinidad and Tobago*** (unreported) HCA No 2175 of 2003.[4]

10. The defendant submitted that the remedies available to the court must be considered in the context of the role of the legislature and contended that:

    10.1. The court should not read in or sever any portion of these sections as it must ensure that the rights protected does not unnecessarily interfere and should be as faithful as possible to both the Constitution and to the scheme enacted by the legislature. Lamer CJ in ***Schachter*** at page 700 cited an extract from a text by Carol Rogerson entitled "The Judicial search for appropriate remedies under the Charter" as follows:

> "Court should certainly go as far as is required to protect rights, but no further. Interference with legitimate legislative purposes should be minimized and laws serving such purposes should be allowed to remain operative to the extent that rights are not violated. Legislation which serves desirable social purposes may give rise to entitlements which themselves deserve some protection."[5]

    10.2. It will be an overreach for the courts to sever or to read in either of those sections words which will legitimize by consent or otherwise, buggery and/or serious indecency. In this regard it was noted that the legislature by amendments made to the Sexual Offences Act as late as 2000 reaffirmed the legislative purpose of criminalizing buggery and serious indecency in the terms set out in sections 13 and 16 of the Act. It was submitted that this will be in breach of the separation of powers and would amount to entering into the arena of legislation rather than adjudication.

    10.3. The court must be careful that any order it makes does not make unintended consequences on other legislation as any severance or reading in might have an impact on other legislation such as the Immigration Act Chap 18:01 and the Children's Act Chap 46:01. It might also show up

[4] And at the trial on 9 July 2018, the Privy Council case of ***Seepersad***

[5] See also the statement at 714, "*It is important that the court not unjustifiably invade the domain which is properly that of the legislature.*"

deficiencies in the Equal Opportunities Act Chap 22:03, the Marriage Act Chap 45:01, the Matrimonial Proceedings and Property Act Chap 45:51, the Cohabitational Relationships Act Chap 45:55 and the Domestic Violence Act Chap 45:56.

11. The defendant then concluded that the only order which the court might be able to make in the circumstances is an order striking out both provisions. It was asserted that this order will allow the court to maintain its traditional role of adjudicating as to whether the challenged legislation comports with sections 4 and 5 of the Constitution and avoid an invasion of the legislative domain. It was also stated that the suggested remedy would not allow remaining portions of sections 13 and 16 to stand[6] which by themselves, absent the severed parts would have no significance and would amount to an absurdity.

12. At the hearing Senior Counsel Mr. Hosein for the defendant also went on to suggest, relying on the authorities of ***Roodal v State of Trinidad and Tobago*** [2003] UKPC 78 and ***Matthew (Charles) v The State*** (2004) 64 WIR 412, that the modification provisions of the Constitution is not applicable to this case as they authorise the legislature to make changes and do not authorise the general modification of legislation in law. It was noted that there was an explicit general power of the court in Belize to modify legislation as demonstrated in the cases of ***Vasquez v R*** [1994] 3 All ER 674 and ***San Jose Farmers Co-operative Society Ltd v The Attorney General*** (1991) 43 WIR 63. Reference was then made to sections 2 and 14 of the Constitution which permit the court to 'void' inconsistent legislation and 'give such directions as it sees fit' on the finding of unconstitutionality. Though recognising that there is a wide ambit to grant remedy, it was submitted that in Trinidad and Tobago, to the exception of the case of HCA No. 4789 of 1982 ***Rambachan v Trinidad and Tobago Television and the AG***, the courts have not given section 14 the breadth contemplated in that judgment. In support of that proposition it was suggested that the courts in Trinidad and Tobago have done nothing but strike down legislation.

13. At the hearing, reference was also made to the case of ***Yearwood v R*** (2001) 59 WIR 206 which suggests that the court should not use the remedies available to it to re-write statute. Overall, it was maintained that any modification ought to be done by the legislature and the court should refrain from making what amounts to amendments and what rightly ought to be an exercise of Parliament.

[6] Assuming there was a severance

14. When questioned about the impact of striking down the impugned sections and the fact that the court may thus be striking down provisions which legally criminalise sexual intercourse per annum without consent or sexual indecency without consent Mr. Hosein suggested that:

14.1. Rape on the face appears to be wide enough to include sexual intercourse per annum without consent;

14.2. Buggery is still a common law offence and there is nothing in this case suggesting that the common law position would be affected; and

14.3. The legislature can pass a law that creates the offence and apply it retroactively thereby curing any gaps if it chooses.

The further submissions

15. After the hearing on 9 July 2018 the parties were asked to specifically assist the court on the further issue of whether non-consensual sexual intercourse per anum is proscribed and criminalised by the provisions of section 4 of the Act.

16. The claimant filed submissions on 28 August 2018 and the defendant on 5 September 2018.

Claimant's position

17. The claimant's position is that section 4 of the Act is sufficiently broad to criminalise the same as:

17.1. There is no definition of sexual intercourse in the Act to so limit its application;

17.2. The dictionary meaning of sexual intercourse includes intercourse involving genital contact between individuals other than penetration of the vagina by the penis;[7]

17.3. The broad definition of intercourse is supported by the recognition of sexual intercourse per annum as a subset of sexual intercourse by section 13(2) of the Act; and

[7] See Marriam Webster's Medical Desk Dictionary

17.4. The intention of the Act to broadly define sexual intercourse is further supported by the amendments made by the Sexual Offences (Amendment)(No.2) Bill, 1999,[8] Hansard and national policy:

17.4.1. Section 4 of the Sexual Offence Act 1986 limited the offence of rape to a male person and a female person but the amendment leading to the current section 4 simply provides that the offence of rape is committed where a male person has sexual intercourse with another person without their consent. The inference then is that the victim can be either male or female;

17.4.2. The purpose for removing the reference to gender was explained at the 2nd reading of the Sexual Offences (Amendment)(No.2) Bill, 1999 when the then Attorney General, the Honourable Ramesh Lawrence Maharaj stated that the change attempted to make the offence gender neutral.

17.4.3. The responses of the Government of the Republic of Trinidad and Tobago to the recommendations made by the United Nations General Assembly Human Rights Council during the 2nd cycle Universal Periodic Review indicated that:

> "With particular reference to violence against the LGBTI community, the definition of rape in the Sexual Offences Act 1986 was amended by Act 31 of 2000 to reflect a gender neutral position with regard to the complainant and the victim. **This amendment serves to include protection for victims of violence in same sex relationships.**" [emphasis added]

Defendant's position

18. The defendant failed to take a position on the issue. Instead, the defendant:

18.1. Acknowledged that section 4 of the Act, as it is currently appear to be gender neutral and commented that:

> "the shift in language from section 4 of Act No 27 of 1986 to the amendment contained in Act No. 31 of 2000 clearly establishes a deliberate policy on the part of the legislature to include both non-consensual sexual intercourse between men and between women.";

18.2. Drew the court's attention to three commonwealth cases in relation to which the courts found that non-consensual anal intercourse did not

[8] Which was enacted as Act No. 31 of 2000 http://www.ttparliament.org/publications.php?mid=28&id=413

constitute rape but the applicable statutory provisions in those cases specifically dealt with rape of a woman; and

18.3. Cautioned that enactments imposing a penalty ought to be strictly construed and there can be no reading down to unnecessarily constrict or expand the meaning of the words. It was further suggested that the section ought to be construed against its predecessor section which it replaced and the Act construed as a whole taking into account the object of the statute.

Comment

19. Whereas there is no evidence of pending cases involving the prosecution of persons for consensual sexual intercourse per anum, there may be cases where persons are charged with the offence of buggery for non-consensual sexual intercourse per anum against (i) men and even (ii) women. In that instance, if section 13 was to be struck down entirely, the court must be certain that those charges as they stand are not affected or complicated by ensuing motions, interpretation applications and the like and there is no guarantee of that.

Analysis and conclusion

20. Having regard to the considerations set out above and their application to the facts of this case, the court is of the respectful view that the most non-intrusive manner in which to resolve the matter is to do as suggested by attorney at law for the claimant. This obviously means reading into the provisions of section 13 (2) the words "without consent". It also means the reading in and severance of the words suggested in relation to section 16.

21. To accede to the defendant's proposition that the provisions be struck down would be to go beyond what this court believes is sufficient to meet the justice of the case and to do no more than is necessary.

Section 13

22. The defendant has failed to establish any legitimate legislative purpose in conformity with the Constitution in forbidding sexual intercourse per anum between consenting adults. The genesis of the section was traced by this court in its earlier decision. Born out of the abhorrence shown towards homosexuals, the section asserted sexual intercourse per anum in a category of its own. The court has already found this to be unconstitutional in relation to consenting adults.

23. Having regard to the submissions of both parties, clearly the law as it stands at present allows non-consensual sexual intercourse per anum to be prosecuted under section 4 (1) of the Act. Therefore, striking down the entire section would not leave the offence of non-consensual sexual intercourse per anum unprotected.

24. However, in light of the paucity of evidence in relation to persons who would be affected by a striking down of the section and the other reasons given above, the court is reluctant to do so. Notwithstanding the concept of the non-retrospective effect of such an act by this court, this court prefers to err on the side of caution and narrow the scope of that which already applies.

25. As it stands, clearly, Parliament intended the greater to include the lesser so that the provision includes both scenarios i.e. the consensual and the non-consensual aspects of the act. All that is necessary is for this court to strike out one of the two applications of the offence i.e. the provision's applicability to consensual sexual intercourse between consenting adults. Mr. Hosein for the defendant has suggested that to do so would be to legitimize something which Parliament would not have intended but this court has already ruled that there has been no justification for such a suggestion or position. Accepting the fact that Parliament cannot legislate contrary to the provisions of the Constitution, then this court does not see it legitimizing the act but, instead, striking down a provision or, in this case a part of it, which is not in conformity with the Constitution. Parliament having failed to meet the requirements of section 13 of the Constitution, the court is satisfied that it cannot be accused of legitimizing the act but rather striking out that which Parliament could not lawfully do, having failed in establishing the legitimacy of the exclusion. The difference is subtle, but important. In this case, the Constitution guides the court as to the extent of Parliament's legislative content without the court having to sanction the legitimacy of the act.

Section 16

26. The legitimate purpose of section 16 is readily apparent but, as in section 13, it includes both consensual and non-consensual positions between consenting adults. In this case, applying similar reasoning as before, the court accepts the proposition put forward by the claimant that the section should be modified by the court. However, the court does not agree with the extent of the modification proposed by the claimant and, instead, it proposes to adopt a similar approach as was done in 2000 with respect to section 4 (1) to make the offence gender neutral.

27. Therefore, the proposed modification is as follows - strike out the words "a male person and a female" and add the letter "s" after the word person from section 16 (2) (b) so that it reads as follows:

> "16. (2) Subsection (1) does not apply to an act of serious indecency committed in private between—
>
> (a) a husband and his wife;
>
> (b) ~~a male person and a female~~ persons, each of whom is sixteen years of age or more, both of whom consent to the commission of the act; or
>
> (c) persons to whom section 20(1) and (2) and (3) of the Children Act apply."

28. The result is therefore that there is no differentiation or unequal treatment afforded to consenting male persons such as the claimant in relation to what could previously be regarded as serious indecency between males. Obviously, a corollary to this is that consenting females also qualify for the exemption under section 16 (2).

The Order

29. The court therefore orders that:

29.1. Section 13 of the Sexual Offences Act be modified in the following manner with the words shown in red read into section 13 (2):

> "13. (1) A person who commits the offence of buggery is liable on conviction to imprisonment for twenty-five years.
>
> (2) In this section "buggery" means sexual intercourse **without consent** per anum by a male person with a male person or by a male person with a female person."

29.2. Section 16 of the Sexual Offences Act be modified in the following manner deleting the words "*a male person and a female*" and reading in the letter "*s*" after the word person from section 16 (2) (b) so that the section reads as follows:

> "16. (1) A person who commits an act of serious indecency on or towards another is liable on conviction to imprisonment for five years.
>
> (2) Subsection (1) does not apply to an act of serious indecency committed in private between—
>
> (a) a husband and his wife;
>
> (b) ~~a male person and a female~~ person**s**, each of whom is sixteen years of age or more, both of whom consent to the commission of the act; or

(c) persons to whom section 20(1) and (2) and (3) of the Children Act apply.

(3) An act of "serious indecency" is an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organ for the purpose of arousing or gratifying sexual desire."

30. In the circumstances, costs would follow the event and the defendant shall pay to the claimant the costs of the claim to be quantified under Part 67.12 of the CPR. The quantification of the costs is transferred to an Assistant Registrar in chambers on a date to be fixed with liberty to the Assistant Registrar to fix such timeframes or schedules as he/she may deem necessary for the filing of statements of costs and or objections, etc.

/s/ Devindra Rampersad J

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Justice Devindra Rampersad

Assisted by Charlene Williams
Judicial Research Counsel
Attorney at Law