Case Summary

Applicants McEwan, Clarke, Fraser, Persaud and Society Against Sexual Orientation Discrimination (SASOD) v Attorney General of Guyana

Application No: 21-M, 2010

1. Reference Details

Jurisdiction: In the High Court of the Supreme Court Judicature: Civil Jurisdiction

Date of Decision: 6 September 2013

Case Status: Judgment of High Court received. Appeal pending.

Link to the full case:

http://www.equalrightstrust.org/ertdocumentbank/McEwan,%20Fraser,%20Clarke,%20Persaud%20and%20SASOD%20vs.%20AG%20of%20Guyana_6September2013.pdf

2. Facts of the Case

Applicants A, B, C and D (the Applicants) are transgendered persons who possess male primary sexual characteristics but identify themselves with the female gender.

On 6 February 2009, Applicants A and B were arrested and taken to the Brickdam Police Station. On the same night, Applicants C, D and another individual were also arrested and brought to the same police station. None of the Applicants were informed of the reason for their arrest and Police declined their requests to seek legal representation.

The Applicants were detained until 9 February 2009, when they were taken to Georgetown's Magistrate Court and charged with the offence of Loitering and Wearing Female Attire (and in one case certain other charges). The offence of Wearing Female Attire is prohibited under Section 153(1)(XLV11) of the Summary Jurisdiction (Offences) Act, chapter 8:02, which states that:

"Every person who does any of the following acts shall, in each case, be liable to a fine of not less than seven thousand dollars nor more than ten thousand dollars, that is to say, every person who – (XLV11) being a man, in any public way or public place, for any improper purpose, appears in female attire; or being a woman, in any public way or public place, for any improper purpose, appears in male attire."

The charge of Loitering was scheduled to be dealt with at a later date. It was alleged that, at the hearing on 9 February 2009, the Chief Magistrate made comments about the Applicants being confused about their sexuality and told them they were men not women and needed to give their lives to Jesus Christ. The Applicants, who were all unrepresented at the time, pleaded guilty to the charge of Wearing Female Attire. Applicants A, B and D were fined $7,500, and Applicant C was fined $19,500 (Guyanese dollars). The charges of Loitering were eventually dismissed.

On 13 February 2010, the applicants spoke to the Society Against Sexual Orientation Discrimination (SASOD) – The Equal Rights Trust's Guyanese partner – about the case and SASOD provided representation to the Applicants.

SASOD, on behalf of the Applicants and naming itself as a fifth applicant, filed a Notice of Motion challenging the decision of the Magistrate's Court and seeking redress.

3. The Law

National Laws:

- Section 153 (1) (XLV11) of the Summary Jurisdiction (Offences) Act 1893 (the Act), Chapter 8:02 of the Laws of Guyana
- Articles 1, 40, 139, 145, 146, 149 and 149D of the Constitution of the Co-operative Republic of Guyana Act No. 2 of 1980 (the Constitution)

4. Legal Arguments

Applicant's Arguments

The Applicants and SASOD alleged that there had been a series of violations of the Applicants' legal rights in the case. Specifically, they alleged that:

- The refusal by the police to inform the Applicants of the reason for their arrest and detention was contrary to their constitutional rights to be informed of the reasons for their arrest (Article 139(3)) and charge (Article 144(2)(b)) as soon as reasonably practicable and was accordingly unlawful.
- The refusal by the police to permit the Applicants to retain and instruct a legal adviser of their choice upon arrest and before they were taken to court violated their right to such permission under Article 139(3) of the Constitution.
- Section 153 (1) (XLV11) of the Summary Jurisdiction (Offences) Act 1893 was vague and of uncertain scope as well as irrational and discriminatory on the ground of sex. The Applicants and SASOD argued that the vagueness and uncertainty lies in the words "improper purpose", "female attire" and "male attire". They argued that the section violated Articles 1, 40, 149 and 149D of the Constitution and was, therefore, null, void and of no effect. Article 1 states that "Guyana is an indivisible, secular, democratic sovereign state in the course of transition from capitalism to socialism." Article 40 provides that every person in Guyana is entitled to basic fundamental rights and freedoms. Article 149 provides a right to protection from discrimination on a number of grounds including that of gender and states that "no law shall make any provision that is discriminatory of itself or in its effect". Article 149D prohibits the state from denying any person "equality before the law or equal protection and benefit of the law".
- The provisions of Section 153 (1) (XLV11) of the Summary Jurisdiction (Offences) Act 1893 posed a continuing threat to the Applicants' rights to be protected from discrimination on the ground of sex and gender under Article 149(1) of the Constitution, the right to equality and to equal protection and benefit of the law under Article 149D, and the right to freedom of expression under Article 146 of the Constitution.

- By instructing the Applicants to attend Church and give their lives to Jesus Christ, the Chief Magistrate discriminated against the Applicants on the basis of religion and violated a fundamental norm of the Co-operative of the Republic of Guyana as a secular state in contravention to Articles 1, 40, 145 and 149(1) of the Constitution. Article 145 provides the fundamental right to freedom of conscience.

Respondent's Arguments

The Respondent disputed the facts as presented by the Applicants. It argued that the arrests had taken place in accordance with standard operating protocols for persons arrested pursuant to being charged with a criminal offence; that the Applicant's were informed of the reason for their arrest and detention by the Police Constable; that the Police Constable gave the Applicants an opportunity to contact family or friends by telephone; and that the Applicants did receive visitors while in custody. The Respondent argued that it was self-serving, malicious and vexatious for the Applicants to claim over a year after the event that they did not fully understand the situation at that time.

With regard to the substantive claims in relation to Section 153(1) (XLV11), the Respondent argued that the law was in force before the Constitution and had remained in force since the Constitution was enacted and accordingly Section 7(1) of the Constitution applied. Section 7(1) states that:

"[S]ubject to the provisions of this Act, the existing laws shall continue in force on and after the appointed day as if they had been made in pursuance of the Constitution but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act."

The Respondent argued that the effect of this section 7(1) was to preserve the Act including its Section 153.

The Respondent also argued that Section 153 did not infringe the Applicants' rights under the Constitution and submitted that the applications were "entirely misconceived, speculative, vexatious and an abuse of the process of the court" and that they "ought to be dismissed with substantive costs".

With regard to the application of SASOD, the Respondent argued that SASOD was "gratuitously officious, meddlesome and without authority to represent the Applicants and was pursuing an agenda not contemplated by the Constitution". It also submitted that SASOD lacked the *locus standi* to bring these proceedings, noting that the Applicants that SASOD was representing, were acting in their own names.

5. Decision

The Court upheld the Applicants' claims in relation to their fundamental right to protection of personal liberty under Article 139 of the Constitution but rejected all their other claims. It also struck out SASOD's application in full, finding that SASOD did not have *locus standi* to be an applicant in this case.

Arrest and Detention Procedures - Article 139 of the Constitution – Right to Personal Liberty

The Court addressed several aspects of the state's obligations under Article 139.

First, it stated that the police were under a constitutional duty, under Article 139(3), to inform the applicants of the reason for their arrest. The Court found that the constitutional right of the Applicants to each be informed of the reason for their arrest as soon as reasonably practicable under Article 139(3) was denied. As such, the Court made the declaration sought for in Paragraph 1, as there was a deliberate denial of the Applicants rights under Article 139(3).

Second, the Court held that the words "shall be permitted" in Article 139(3) of the Constitution did not impose upon the police an obligation to positively act to enable a person arrested or in custody to retain and instruct counsel. Rather, the court held, it imposed the negative obligation to not prevent the arrested or detained person from exercising his right to retain and instruct counsel of his own. The court, in making this statement, referred to the cases of *Robinson v R* (1985) 3 2 W.I.R 330 (P.C) and *Abdool Salim Yasseem and Thomas v The State* (No. 2) (1994) 5 6 W.I. R 274. The Court found no evidence to show that the police had acted to prevent any of the applicants from retaining and instructing counsel and so rejected this claim.

Section 153(1) (XLV11) of the Act

Responding to the allegations that section 153(1) was in breach of fundamental constitutional rights, the Court held that section 153(1) could not be challenged by the court on the ground of constitutional inconsistency but could rather only be invalidated by the legislative process. In making this decision, it cited sections 2, 7(1) and Article 152 of the Constitution. These provisions, it stated, had the effect that no law in existence and having effect both immediately before the commencement of the Constitution and continuing to have effect afterwards, shall be held to be inconsistent with Articles 138 to 149 of the Constitution (the fundamental rights provisions).

Responding to the claim that Section 153(1) (XLV11) was too vague and uncertain to be enforceable, the Court stated that "social values, mores, customs and attitude" change over time and the legislature had intentionally used free-standing terms in the provision so leaving it to the court to determine "as a question of fact in the prevailing social conditions and circumstances whether a particular purpose is improper and whether a particular piece of attire is 'male' or 'female'." The fact that statutory terms are free-standing does not render them incapable of factual determination. In this case, the Court did not consider Section 153(1) "vague and uncertain".

The court noted that section 153(1) did not make it an offence for males to wear female attire and vice versa in a public place unless there was some "improper purpose". According to the Court:

> "[I]t is not criminally offensive for a person to wear the attire of the opposite sex as a matter of preference or to give expression or to reflect his or her sexual orientation".

The Court rejected the Applicants' claims that section 153(1) breached the Applicants' right to freedom from discrimination under Article 149. In response to the argument that section 153(1) discriminates against persons on the basis of their gender in contravention of Article 149(2) of the constitution, the Court held that section 153 is "directed against the conduct of

both male and female persons" and so could not be considered sex discriminatory. It went on to state that Section 153(1) (XLV11):

"[S]imply recognises a difference between male and female persons in relation to the wearing of attire (clothes) and proscribes against cross-dressing of attire in any public way or place for an improper purpose. If there is any discrimination on the basis of gender, it relates to attire in contradistinction to any other kind of open wear rather than to male or female persons who are both treated equally or in the same manner."

The Court went on to note that the section only focussed on attire and not on any other forms of wear "which also attract a gender description". It stated that it is not an offence for a male person to wear a female head wig or earrings in a public way or place, even for an improper purpose. Nor, as the court held, is it an offence for a female person to wear a pair of male shoes or finger rings in a public way or place even for an improper purpose. The Court then repeated its position that:

"If a person is wearing an 'attire' for the purpose of expressing or accentuating his or her personal sexual orientation in public, section 153(1)(XLV11) is not offended since such a purpose is not improper or even capable of being viewed as improper."

The Court also rejected the argument that the Applicants' rights to equality before the law and equal protection of the law under Article 149D of the Constitution had been violated. In this respect, the Court stated that:

"The evidence does not at all show that other persons similarly circumstanced in the way that they were attired were not arrested and charged for the offences for which any of the applicants were arrested and charged. Nor does the evidence show any persons similarly circumstanced were given any treatment more favourable than that received by the applicants by the Police or the Magistrate."

Comments of the Chief Magistrate – Articles 145 and 149 of the Constitution – right to equality and freedom of conscience

The Court held that statement by the Court Magistrate telling the Applicants that they must attend church and give their lives to Christ, which was argued to be discrimination on the basis of religion and violated Articles 1, 40, 145 and 149(1) of the Constitution, was not a hindrance to the Applicants freedom of thought or religion. "At the highest", the Court said, "the Chief Magistrate can be accused of proselytising. But, proselytising does not constitute a hindrance to freedom of thought and of religion." The Court therefore refused to declare that there had been a violation of the Applicants' fundamental rights in this respect.

SASOD Application

The Court held that SASOD had no *locus standi* as an applicant, as there was no room for a representative applicant when the Applicants themselves instituted proceeding on their own behalf. The Court stated that SASOD was improperly joined and must be struck out.

6. Remedy

The Court awarded each applicant the sum of $40,000 for breach of their right to be informed as reasonably practicable of the reason(s) for his arrest under Article 139(3). It awarded the state $5000 costs to be payable by SASOD.