

Mc-Lean-Ramirez and Ors v. The Attorney General Of Barbados

*Case digest of Mc-Lean-Ramirez
and Ors v The Attorney General
Of Barbados*

Human
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CASE DIGEST

Mc-Lean-Ramirez and Ors v The Attorney General Of Barbados

High Court, Civil Division of the Republic of Barbados

No. CV 0044 of 2020, 25 May 2023

Claimants: René Golder McClean-Ramirez, Raven Davina Gill, Equals Inc.

Defendants: The Attorney General of Barbados

Judge: Justice Michelle I. L. Weekes

Summary

On 15 January 2020, René Golder McClean-Ramirez, Raven Davina Gill, and Equals Inc. filed a claim in the High Court of Barbados challenging the constitutionality of sections 9 and 12 of the Sexual Offences Act, CAP 154 (“SOA”), which criminalised same-sex sexual acts.

Following hearings that concluded on 8 November 2022, the High Court issued an oral judgment and Orders on 12 December 2022, striking down both section 9 and 12 SOA as unconstitutional. On 23 May 2023, the Court issued a written judgment setting out its reasons for the Declarations granted.

Challenged Provisions

The Claimants challenged the constitutionality of the following offences:

- Section 9 SOA, which provided that any person who commits “buggery” is guilty of an offence and, where convicted, liable to imprisonment for life.
- Section 12 SOA, which criminalised acts of “serious indecency”, defined as

“an act, whether natural or unnatural by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire”. The sentence for serious indecency under section 12 ranged from imprisonment for 10 years where committed with or against a person above 16 years (section 12(1) SOA), or imprisonment for 15 years where committed with or towards a child below the age of 16 (section 12(2) SOA).

Grounds of Claim

The Claimants argued that the criminalisation of private, consensual sexual activity between same-sex adults under sections 9 and 12(1) of the SOA violated their following constitutional rights:

- Section 11(a) of the Constitution (right to liberty)
- Section 11(b) of the Constitution (right to privacy)
- Section 11(c) of the Constitution (right to equal protection of the law and freedom from discrimination)
- Section 11(d) of the Constitution (right to freedom of expression)
- Section 13 of the Constitution (right to personal liberty)
- Section 15 of the Constitution (right not to be subjected to from inhuman or degrading treatment)
- Section 20 of the Constitution (the right not to be hindered in the enjoyment of freedom of expression)
- Sections 11 and 23 of the Constitution (right not to be discriminated against on the ground of sex, which includes sexual orientation).

It was further argued that section 12 of the SOA did not meet the constitutional or common law requirements for legal certainty, and was therefore unconstitutional, null, void and of no effect on account of its vagueness and uncertain application.

Remedies sought

The Appellants sought:

- Declarations that sections 9 and 12(1) SOA were unconstitutional and void to the extent that they criminalised private, consensual sexual activity between adults;
- Should the Court not be willing to find section 9 SOA unconstitutional in its entirety, an Order that section 9 SOA be read as if the words “except where it occurs in private and between consenting persons each of whom is sixteen years of age or more” were added at the end of the section;
- A Declaration that section 12 was void due to its vagueness and consequent uncertainty in its application, in breach of the common law and the constitution.

Orders granted

On 12 December 2022, the Court made the following Declarations, striking down sections 9 and 12 SOA:

- Section 9 of the SOA contravenes the constitutional rights of the Claimants enshrined in sections 11 and 20 of the Constitution, and is accordingly unconstitutional, null and void and of no effect to the extent that it applies to consensual sexual intercourse between persons of sixteen years of age or more in private;
- Section 12 of the SOA contravenes the constitutional rights of the Claimants enshrined in sections 11 and 20 of the Constitution, and is accordingly unconstitutional, null and void and of no effect to the extent that sub-section (1) applies to serious indecency committed in private between consenting persons of sixteen years of age or more;
- The offence of serious indecency under section 12 of the SOA is unconstitutional, null and void and of no effect on account of its vagueness and uncertain application.

Written decision

Savings clause

Prior to considering the alleged substantive rights violations, the Court determined, as a preliminary issue, whether the ‘savings clause’ at section 26 of the Constitution, protected sections 9 and 12 of the SOA from a constitutional challenge. Section 26 of the Constitution purports to prevent laws enacted or made before 30 November 1966 (the date of Barbados’ Independence from the UK), from being subject to such a legal challenge for alleged breach of constitutional rights.

Section 12 SOA was enacted in 1992, and all Parties agreed that it was not an ‘existing law’. However, the Defendant asserted that section 9 of the SOA was an existing law, since it derived from section 62 of the Offences against the Person Act 1868. Although the offence had been amended, repealed and replaced since Independence, the Defendant argued that it had not changed in substance and therefore remained protected by the savings clause in section 26 of the Constitution.

The Court adopted the CCJ’s approach in the McEwan and Nervais judgments¹, in which the CCJ’s held that savings law clauses are to be interpreted narrowly to pave the way for existing laws to be stripped of savings clause protection if challenged on a constitutional basis (paragraph 64). This is to ensure individuals “enjoy the fruits of the Constitution’s fundamental rights and freedoms” (paragraphs 70-71). The Court held that section 9 was no longer an existing law, noting in particular the changes made to the sentence for the offence (paragraphs 70-7)]. Consequently, the savings clause does not apply to section 9 SOA.

Fundamental rights and freedoms

Having found that section 9 and section 12 SOA were not protected by the savings clause, the Court proceeded to consider whether these offences violated the Claimants’ constitutional rights and freedoms. As to further preliminary issues, the Court held that:

- Section 11 of the Constitution is not simply a preambular statement, but contains enforceable constitutional rights, for which the Claimants could seek constitutional redress (paragraphs 80-86).

1 McEwan and Others v. Attorney General of Guyana [2018] CCJ 30 (AJ); Nervais v The Queen [2018] CCJ 19 (AJ).

- In interpreting the constitution, it was relevant for the Court to consider international law and the human rights treaties Barbados has ratified, such as the ICCPR, CRC and CEDAW. The Court described international law as “a body of laws” to be given consideration and respect so as to ensure compliance with the rule of law (paragraph 79).

On the right to privacy enshrined in section 11(b) of the Constitution, the Court found, by reference to comparative case law such as the ECtHR case of *Dudgeon v UK*, that the right to privacy was not limited to unlawful searches, but guaranteed a broader and more general right to privacy, including sexual activities. Sections 9 and 12 SOA therefore breached this right as they intruded on the private, sexual affairs of adults (paragraphs 90-102).

On the right to liberty contained in section 11(a) of the Constitution, the Court found that sections 9 and 12 SOA infringed on this right as the offences limited individuals’ freedom to choose their partner and make choices of personal intimacy (paragraph 103-111). The Court considered an interpretation of section 11(a) which only encompassed arbitrary arrests and detentions to be misguided, as it would “ignore ever-changing social realities” (paragraph 112). The right to liberty under section 11(a) was therefore not constrained by section 13 of the Constitution which articulates more detailed and specific protections for individuals from unlawful deprivation of liberty by the state.

On the right to equal protection of the law enshrined in section 11(c) of the Constitution, the Court found sections 9 and 12 SOA to violate this right by failing to meet Barbados’ international obligations under the ICCPR that prohibit the criminalisation of consensual same-sex relations (paragraph 114-120).

The Court also found a violation of the right to freedom of expression contained in section 20 of the Constitution. Citing the CCJ’s rulings in *McEwan*, the Court agreed that expressions of sexual intimacy and gender identity are protected under the right to freedom of expression, and that criminalisation of same-sex relations violates this freedom (paragraph 131).

On the right to freedom from discrimination, the Court found sections 9 and 12 SOA also violated this right. Firstly, drawing on CCJ and Privy Council case law, the Court found sections 9 and 12 SOA unconstitutional for infringing the right to equality before the law and equal treatment enshrined in section 11(c) of the Constitution (paragraph 153). Secondly, in relation to the general principle of non-discrimination in the enjoyment of constitutional rights contained in section 11 of the Constitution, the Court accepted that the reference to “sex” as a protected characteristic in section 11 encompasses sexual orientation (paragraphs 154-159), and, furthermore, that sexual orientation constituted a standalone category of discrimination (paragraphs 160-165).

Justification

Having determined that sections 9 and 12 SOA impugn the above fundamental rights under the Constitution, and more specifically the rights of the Claimants, the burden shifted to the Defendant to prove that the provisions were ‘reasonably required’ in the interests of defence, public safety, public order, public morality, public health, or other purposes set out in section 20 of the Constitution.

The Court held that the State had provided no evidence that sections 9 and 12 SOA were reasonably required in the circumstances. Consequently, it concluded that both sections violated sections 11 and 20 of the Constitution and were unconstitutional and void to the extent they criminalise consensual, private sexual intercourse between persons of sixteen years or more.

Legal uncertainty

Lastly, the Court considered whether the offence of serious indecency under section 12 SOA met the constitutional and common law requirements of legal certainty. Taking into account the particular standard of clarity and certainty required in respect of criminal laws, i.e. that an individual can know in advance of acting whether that conduct is forbidden, the Court concluded that the whole of section 12, including the definition of ‘serious indecency’, was too vague and uncertain, and was therefore null and void in its entirety (paragraph 19).