

Orden David et al v. The Attorney General of Antigua & Barbuda

*Case digest of Orden David et al
v The Attorney General of
Antigua & Barbuda*

Human
Dignity
Trust

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CASE DIGEST

Orden David, Women Against Rape Inc. v The Attorney General of Antigua and Barbuda

The High Court of Justice of the Eastern Caribbean Supreme Court Antigua and Barbuda

Claim No. ANUHCV2021/0042, 5 July 2022

First claimant: Orden David

Second claimant: Women Against Rape Inc.

Defendant: Attorney General of Antigua and Barbuda

Judge: Justice Marissa Robertson

Summary

The first claimant, Orden David, an openly homosexual man, and the second claimant, Women Against Rape Inc., an incorporated company that provides support to the LGBT community of Antigua and Barbuda, challenged the constitutionality of section 12 (offences of buggery) and section 15 (serious indecency) of the Sexual Offences Act No. 9 of 1995 (hereinafter Sexual Offences Act), which criminalized sexual activities between consenting same-sex adults. These offences were inherited through colonial-era legislation.

The court held that sections 12 and 15 of the Sexual Offences Act are void as they contravene with constitutional provisions relating to the right to liberty, protection of the law, freedom of expression, protection of personal privacy and protection from discrimination on the basis of sex.

Challenged Provisions

Section 12 of the Sexual Offences Act - Buggery

(1) A person who commits buggery is guilty of an offence and is liable on conviction to imprisonment -

- a. for life, if committed by an adult on a minor;
- b. for fifteen years, if committed by an adult on another adult;
- c. for five years, if committed by a minor.

(2) In this section “buggery” means sexual intercourse per anum by a male person with a male person or by a male person with a female person.

Section 15 of the Sexual Offences Act – Serious indecency

(1) A person who commits an act of serious indecency on or towards another is guilty of an offence and is liable on conviction to imprisonment

- a. for ten years, if committed on or towards a minor under sixteen years of age;
- b. for five years, if committed an or towards a person sixteen years of age or more.

(2) subsection (1) does not apply to an act of serious indecency committed in private between

- a. a husband and his wife; or
- b. a male person and a female person each of whom is sixteen years of age or more:

both of whom consent to the commission of the act.

(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.

Grounds of claim

- Constitutional rights: right to liberty - Article 3 (a) and Article 15 constitution.
- Constitutional rights: freedom of expression - including free expression of sexuality and/or sexual identity - Article 3 (b) and Article 12 of the constitution.
- Constitutional rights: right to privacy - Article 3 (c) of the constitution.
- Constitutional rights: protection from discrimination - discrimination on the basis of sex, including sexual orientation - Article 14 of the constitution.

Issues

Whether provisions of section 12 and section 15 of the Sexual Offences Act infringe the fundamental rights and freedoms as stated under sections 3, 5, 12, and 14 of the constitution.

Remedies sought

- Declaration that section 12 of the Sexual Offences Act contravenes the constitution in so far as the section applies to consensual and private sexual acts between adults each of whom has attained the age of 16 years, and is accordingly null, void and of no force and effect.
- Additionally, that section 15 is null, void and of no effect to the extent that section 15 applies to acts in private between consenting persons each of whom is 16 years of age or more. Further, that section 15 contravenes the constitution owing to its vagueness and uncertain application.
- Orders in the alternative: that section 12(2) of the Sexual Offences Act be read as if the words “except where the sexual intercourse is in private and between consenting persons each of whom is 16 years of age or more” were added at the end of the provision. Additionally, section 15(2)(b) of the Sexual Offences Act be read as if the words “a male person and a female person” were deleted and replaced with the word “persons”.

Orders granted

- Section 12 of the Sexual Offences Act 1995 contravenes sections 3, 12 and 14 of the constitution of Antigua and Barbuda, in so far as section 12 of the Sexual Offences Act is inconsistent with the rights of 16 years and older to engage in consensual sexual intercourse per anum in private, and to the extent of that inconsistency section 12 of the Sexual Offences Act is void.
- Section 15 of the Sexual Offences Act 1995 contravenes sections 3, 12, and 14 of the Constitution of Antigua and Barbuda, in so far as section 15 of the Sexual Offences Act is inconsistent with the rights of persons 16 years and older to engage consensually and in private in the sexual acts described in section 15(3), and to the extent of that inconsistency section 15 of the Sexual Offences Act is void.
- Subsection 15(2)(b) of the Act be read as if the words “a male person and a female person” were deleted and replaced with the word “persons.” It is also ordered that the defendant pay the costs of the Claimants in an amount to be assessed if not agreed within 21 days.

Written decision

Right to Privacy

On the right to privacy, the court held that this right includes elements such as gender identification, sexual orientation, and sexual life (paragraph 70). It further held that the “criminalization of same-sex sexual expression between consenting adults is intrusive by its very nature” as the offences of sections 12 and 15 of the Sexual Offences Act occur between consenting adults in private spaces.

Freedom from discrimination

On Freedom from discrimination, the court held that a liberal and purposive approach should be adopted in the interpretation of section 14(3) where reference to “sex” as a prohibited ground of discrimination should not merely refer to physical gender as “such an approach would be too linear and restrictive,” but should encompass concepts such as gender identity, sexual character and sexual orientation (paragraph 75).

The court was of the view that the identification of self and how a person identifies is “intrinsic to self-discovery” (paragraph 76). To deprive a person of their opportunity to self-discovery is likely to “impact negatively at their sense of self and, consequently, their identity” (paragraph 76). The court held that the constitution “protects against persons having to be ‘less of themselves’ or to suffer the indignity of the loss of personal authenticity” (paragraph 76).

The courts further relied on interpretations of international treaty bodies which interpreted “sex” to include “sexual orientation” (paragraph 77).

The court affirmed the claimants position that sections 12 and 15 of the Sexual Offences Act prima facie discriminate the claimants (paragraph 83). Particularly, as section 15 excludes the application of the offence to consenting heterosexual adult couples. It also accepted the claimants positions that in relation to section 12, which is expressed in neutral terms, it would have a discriminatory and disproportionate effect where the prohibited acts are closely associated with one class of persons, and “specifically targets same-sex adults” (paragraph 83).

The court held that the effect of provisions such as sections 12 and 15 of the Sexual Offences Act is to stigmatize same-sex couples and makes a particular group subject to arrest, prosecution and conviction of an offence which is a part of that group’s human experience (paragraph 84).

Freedom of expression

The court was of the view that a generous and purposive approach should be adopted when interpreting fundamental rights and that the “concept of ‘expression’ is not necessarily limited to expressions of a particular kind or nature (paragraph 79)”.

The court held that the “choice of a consenting adult with whom that adult person is or can be intimately or romantically connected is integral to self-expression.” It went on to state that “this choice is, by its very nature, a personal decision and a private

and personal form of expression.” (paragraph 80).

It held that the infringement not only relates to the free expression of sexual orientation but also includes the right “to hold and express opinions on their sexual orientation without interference” (paragraph 82).

Right to Liberty

The court held that the criminalization of same sex sexual relations between consenting adults are “intrusive by its very nature and thereby offends the right to liberty and personal privacy which the constitution affords” (paragraph 81).

Constitutional interpretation and limitations on Fundamental Rights

The court was of the view that a generous and purposive interpretation should be adopted when interpreting the constitution to conform to prevailing social realities (paragraph 48). The court acknowledged that the test of proportionality should be adopted when addressing the matter of constitutionality of impugned provisions of a statute (paragraph 42).

The court held that the underlying spirit of the constitution is derived from the preamble which affirms democratic principles such as human dignity, inclusiveness, and equality for all as sacrosanct (paragraph 47). Reference in the preamble which states that the “[...] sovereign nation is founded upon principles that acknowledge the supremacy of god [...]” was found to refer to the principles in natural law which places the protection for fundamental rights within “an important foundational framework” (paragraph 47).