

Abdool Ridwan Firaas Ah Seek v. State Of Mauritius

*Case digest of Abdool Ridwan
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Mauritius*

Human
Dignity
Trust

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CASE DIGEST

Abdool Ridwan Firaas Ah Seek v State Of Mauritius

The Supreme Court of Mauritius

Record No. 119259, 04 October 2023

Claimant: Abdool Ridwan Firaas Ah Seek

Defendant: The State of Mauritius

Interested Parties: Collectif-Arc-en-Ciel
Director of Public Prosecutions

Judges: Judge D. Chan Kan Cheong
Judge K. D. Gunesh-Balaghee

Summary

In 2019, Abdool Ridwan (Ryan) Firaas Ah Seek filed a legal challenge to the Supreme Court of Mauritius challenging the constitutionality of Section 250 of the Criminal Code. Section 250 of the Mauritian Criminal Code criminalises 'sodomy', and anyone convicted could face a maximum penalty of five years' imprisonment. The Claimant was joined by the Collectif-Arc-en-Ciel, the largest organisation in Mauritius championing LGBT rights, as an interested party. The Human Dignity Trust, Tim Otty KC (founder of the Human Dignity Trust), Isabel Buchanan and international law firm Herbert Smith Freehills provided legal support to the Claimant. The Human Dignity Trust also supported the Collectif Arc-en-Ciel. The Defendant was the State of Mauritius. The Director of Public Prosecutions joined the case as an interested party. The case was heard in November 2021, and judgment was released on 04 October 2023. The Supreme Court declared Section 250 unconstitutional and discriminatory to the extent it criminalises consensual sexual acts between adult males in private.

Challenged Provisions

The Claimant challenged the constitutionality of Section 250 of the Mauritian Criminal Code, which criminalises 'sodomy'. Whilst 'sodomy' is not defined in the Criminal Code, the Supreme Court interpreted Section 250 as encompassing intercourse per anum between men, or a man and a woman (referencing *Goomany v The State* [1998 SCJ 152]). Section 250 enabled the police to enter suspected offenders' premises on the mere suspicion they may be engaged in consensual male same-sex activity in private, and to conduct intrusive searches (page 3).

Grounds of Claim

Mr Ah Seek argued that the offence of sodomy under Section 250 of the Criminal Code violated the following constitutional rights contained in the Constitution of Mauritius:

- Section 7 (right to protection against inhuman and degrading treatment)
- Section 5 (right to liberty)
- Section 9 (right to privacy)
- Section 12 (freedom of expression)
- Section 13 (freedom of assembly and association)
- Section 16 (right to protection against discrimination)

Remedies sought

The Claimant sought:

- A declaration that Section 250 of the Criminal Code is unconstitutional and in violation of various provisions of the Constitution and is struck down to the extent of that inconsistency.
- Alternatively, that Section 250 be declared unconstitutional and in violation of various provisions of the Constitution to the extent it prohibits consensual and private sexual acts between male adults, and for Section 250 to be read as excluding such acts from its scope.

Orders granted

On 04 October 2023, the Supreme Court declared Section 250 of the Criminal Code to be in breach of Section 16 of the Constitution and thus unconstitutional, to the extent it criminalises consensual sexual acts between adult males in private. It declared that Section 250 should be read so as to exclude such acts from being encompassed by the section.

Written Decision

As noted, the Supreme Court declared Section 250 of the Criminal Code unconstitutional to the extent it criminalises consensual sexual acts between adult males in private and declared that Section 250 should be read to exclude such acts from being encompassed by the section. The Court reached this conclusion on the basis that Section 250 of the Criminal Code violates Section 16 of the Constitution, which provides for protection from discrimination on the ground of sex.

Protection from Discrimination: Section 16 of the Constitution

Whilst Section 16 does not explicitly include a right to protection from discrimination on the ground of sexual orientation, the Supreme Court interpreted the word “sex” in Section 16 of the Constitution to include “sexual orientation”, as the Claimant had argued for. It did so drawing on international and comparative human rights jurisprudence, such as the UNHRC’s decision in *Toonen v Australia* No. 488/1999, which had interpreted the word “sex” in the International Covenant on Civil and Political Rights (ICCPR) as including sexual orientation. The Supreme Court further cited *Vriend v Alberta* [1998] 1 R.C.S. 493, *Orozco v The Attorney General of Belize* claim No 668 of 2010, *Navtej Singh Johar & Ors v Union of India* thr. Secretary Ministry of Law and Justice AIR 2018 SC 4321, and *Letsweletse Motshidiemang v Attorney General* [2019] MAHGB-000591-16 as comparative authorities in support of this approach. On the basis of these authorities, the Court concluded that, whilst these authorities are not binding on Mauritian Courts, they provide “relevant, useful and persuasive guidance” in determining “the meaning to be ascribed to the word ‘sex’” (pages 13f).

Further, whilst it found that the decisions and interpretation of the UNHRC do not have direct effect and applicability in Mauritius, it held that due consideration should be given to the decision in *Toonen* as domestic legislation should, if possible, be construed in conformity with international instruments Mauritius is a signatory to. Citing *Matadeen v Pointu*, it noted that:

“[S]ince Mauritius has acceded to the ICCPR, it has accepted to adhere to international norms and standards regarding the fundamental rights and freedoms the ICCPR provides for and that interpreting ‘sex’ as including ‘sexual orientation’ in section 16 of our Constitution would be in conformity with the standard canon of constitutional interpretation which requires, where possible, that our constitutional provisions be interpreted in line with our international obligations.”

The Court dismissed the State’s contention that such an interpretation would amount to an amendment of the Constitution by the Judiciary in breach of the separation of powers enshrined in Section 47 of the Constitution: such an interpretation was in line with the Court’s constitutional mandate and duty to apply the Constitution and to adopt a generous and purposive interpretation (pages 15f, relying on *Madhewoo v The State of Mauritius* [2016] UKPC 30; *Matadeen v Pointu* [1997] PRV 14; page 19). The Court noted that whilst it would have been open to the legislature to amend Section 250, it failed to do so “in spite of its avowed intention and its undertaking before international fora to this effect” (page 18). Additionally, the Court emphasised that no better proof for the need for protection from discrimination on the ground of sexual orientation was provided than by the State itself, given Mauritius co-sponsored a UN General Assembly Statement with 66 other countries in 2008 on human rights, sexual orientation and gender identity, and supported the Resolution on “Human rights, sexual orientation and gender identity” adopted in 2011 by the 17th Session of the Human Rights Council, which expressed concern about acts of violence and discrimination based on sexual orientation and gender identity. The State had also enacted laws to prohibit discrimination on the ground of sexual orientation in various areas, such as employment, education, and services.

Having held that Section 16 of the Constitution included “sexual orientation”, the Court found Section 250 to be discriminatory. Whilst the Court contended Section 250 to be ostensibly neutral as it applies to all men who engage in sodomy, it found the Section to be discriminatory against homosexual men as it “proscribes the only mode of sexual expression available to homosexual men which is anal intercourse” (page 23). Further, the Court agreed with the Claimant’s contention that the existence of the offence has a crippling effect on the claimant’s sexual life and that of homosexual men, as every time a homosexual man engages in sexual intercourse, expressing love for his partner, he commits a criminal offence, thus living in constant fear of arrest, prosecution and conviction. This impact does not apply equally to heterosexual men as they “are free to express their love through vaginal intercourse with women” (page 21f). The Court also found that Section 250 subjected homosexual men to psychological and moral harm, and that sexual orientation is an innate attribute of one’s identity and cannot be altered (page 22f, citing Johar in support).

Justification Stage

Having established an interference with the Claimant’s right under Section 16 of the Constitution, the Court found no legitimate State interest such as national security or other public interests which could justify this differential treatment of same-sex activity. The Court dismissed the State’s contention that same-sex relations remain “a highly sensitive issue in view of the delicate socio-cultural and religious fabric of the Mauritian society”, on which basis the State had argued that the time was not ripe for amending Section 250 through Parliament (page 24). The Court emphasised, in response, that Mauritius is a secular State, with Section 11 of the Constitution providing for the freedom of conscience, thought and religion, and that the State had failed to assert any legitimate purpose or particularly serious reasons for interfering in the most private and intimate aspects of the identity of homosexual men (page 24). The Court also highlighted that Section 250 is an imposed colonial import which had remained part of Mauritian law post-independence but was not reflective of Mauritian values (page 20).

Thus, in the absence of any justification for interfering with the Claimant's rights under Section 16 of the Constitution, the Supreme Court declared Section 250 unconstitutional in so far as it criminalised consensual sexual activity between male adults. Having made this finding, the Court did not view it necessary to examine the alleged breaches of the other rights asserted by the Claimant.