

Jamal Jeffers et al v. The Attorney General Of St. Christopher And Nevis

*Case digest of Jamal Jeffers et al
v The Attorney General Of
St. Christopher And Nevis*

Human
Dignity
Trust

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CASE DIGEST

Jamal Jeffers, St. Kitts and Nevis Alliance for Equality Inc v. Attorney General of St. Christopher and Nevis

The High Court of Justice of the Eastern Caribbean Supreme Court Federation of Saint Christopher and Nevis

SKBHCV2021/0013, 29 August 2022

First claimant: Jamal Jeffers

Second claimant: St. Kitts and Nevis Alliance for Equality (SKNAFE)

Defendant: Attorney General of St. Christopher and Nevis

Judge: Justice Trevor M. Ward QC

Summary

The first claimant, Jamal Jeffers, a self-described gay man and the second claimant, the St. Kitts and Nevis Alliance for Equality (SKNAFE), a non-profit organisation that advocates for the rights of members of the LGBT community in St Kitts and Nevis, sought a declaration that sections 56 (sodomy and bestiality) and 57 (attempt to commit an infamous crime) of the Offences Against the Person Act No. 7 of 1873 (hereinafter Offences Against the Person Act), to be unconstitutional. These offences were inherited through colonial-era legislation.

The court held that both sections 56 and 57 of the Offences Against the Person Act are inconsistent with the constitution as they contravened the constitutional rights to protection of personal privacy and freedom of expression, to the extent that it criminalised acts constituting consensual sexual conduct in private between adults. The court however, rejected the claimant's argument that

reference to “sex” as a ground of discrimination includes sexual orientation and did not find a violation on this ground. The court also did not find that the impugned provisions contravened the right to liberty.

Challenged Provisions

Section 56 of the Offences Against the Person Act - Sodomy and bestiality.

Any person who is convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned for a term not exceeding ten years, with or without hard labour.

Section 57 of the Offences Against the Person Act - Attempt to commit an infamous crime.

Any person who attempts to commit the said abominable crime or is guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, commits a misdemeanour, and, on conviction, shall be liable to be imprisoned for a term not exceeding ten years, with or without hard labour.”

Background to the impugned provisions

The Offences Against the Person Act is a colonial-era law that was introduced as part of the laws of Saint Christopher and Nevis by Offences Against the Person Act. Section 56 has retained its original form while section 57 was amended in 2012 to increase the maximum penalty for indecent assault from four years to ten years.

The offence of ‘buggery’ was not defined in the Offences Against the Person Act. The court stated that the “reference to ‘the abominable crime’ in both sections are a reference to the crime of buggery” (paragraph 12). The court was of the view that “while not defined in the Act, it was not controversial that buggery consists of sexual intercourse per anum by a man with a man or a woman, or per anum or per vaginam by a man or a woman with an animal” (paragraph 10).

Grounds of claim

- Constitutional rights: right to life, liberty security of the person, equality before the law and the protection of the law – section 3 (a).
- Constitutional rights: freedom of expression – section 3 (b) and section 12 (1).
- Constitutional rights: right to privacy - section 3 (c).
- Constitutional rights: right not to be discriminated based on sex – section 15.

Issues

Whether sections 56 and 57 of the Offences Against the Person Act contravene:

(a) the right to protection of personal privacy contained in section 3 (c) of the constitution; and/or

(b) the right to protection of freedom of expression, contained in section 12 of the constitution; and/or

(c) the right to protection from discrimination on the grounds of sex, contained in section 15 of the constitution.

Remedies sought

The claimants sought the following:

- Declarations that sections 56 and 57 of the Offences Against the Person Act contravenes the constitutional rights enshrined in sections 3, 7, 12, and 15 of the constitution, as such are null and void and no force and effect to the extent that it applies to consensual sexual intercourse in private between persons 16 years of age or more.
- Order that section 56 the Act be read as if the words “except where committed in private between consenting persons each of whom is 16 years of age or more” were added at the end of the provision.
- Order that section 57 the Act be read as if the words “save and except where the acts which would otherwise constitute an indecent assault, are done in private by and/or between persons, each of whom consents and each of whom is 16 or more years old” were added at the end of the provision.

Orders granted

- Section 56 of the Offences Against the Person Act, contravenes sections 3 and 12 of the constitution of the Federation of Saint Christopher and Nevis, as such, is null and void and of no force and effect to the extent that it criminalises any acts constituting consensual sexual conduct in private between adults;
- Section 57 of the Offences Against the Person Act, contravenes sections 3 and 12 of the constitution of the Federation of Saint Christopher and Nevi, as such, is null and void and of no force and effect to the extent that it criminalises any acts constituting consensual sexual conduct in private between adults;
- For the purpose of giving effect to the declaration in 1 above, section 56 of the Offences Against the Person Act shall be read as if the words “this section shall not apply to consensual sexual acts between adults in private” were added at the end of the section.
- For the purpose of giving effect to the declaration in 2 above, section 57 of the Offences Against the Person Act shall be read as if the words “save and except where the acts which would otherwise constitute an offence are done in private between consenting adults.”

Written decision

Right to Liberty

The court held that sections 56 and 57 of the Offences Against the Person Act did not infringe on the right to liberty as enshrined in section 3 (a) of the constitution. The court held that the right to liberty declared in section 3(a) of the constitution is not confined to formal arrest and detention “but it does not encompass or support the expansive definition of the right to include the right to sexual autonomy to choose a sexual or intimate partner and to engage in consensual sexual intercourse” of one’s choice (paragraph 55). The court was of the view that there was “no need to attempt to force-fit sexual autonomy within the boundaries of the right to liberty where it may be commodiously accommodated within the ambit of other constitutional provisions” (paragraph 55).

Right to privacy

The court held that sections 56 and 57 of the Offences Against the Person Act intrude on the personal and private sphere of consenting adults who engage in intimate sexual activity of their choice.

The court analysed jurisprudence from several domestic jurisdictions that provided a broad interpretation for the right to privacy to include characteristics associated with gender identification, sexual orientation and sexual life.

The court recognized that the right to privacy guaranteed under section 3(c) of the constitution, impinge of the claimants right to “express their sexuality in private with another consenting adult” (paragraph 66). Therefore, the court held that sections 56 and 57 are null and void and unconstitutional as they intrude on the personal and private sphere of consenting adults by criminalizing intimate sexual acts expressed in private.

Freedom of expression

The court was of the view that freedom of expression includes expression of “one’s identity such as dress, action or behaviour” and that the guarantees of freedom of expression under sections 3(b) and 12 of the constitution recognize “sexual acts between consenting adults are cognisable as a form of expression” (paragraph 74). It held that sections 56 and 57 of the Offences Against the Person Act are incompatible with the right to freedom of expression guaranteed by sections 3 and 12 of the constitution.

The court rejected the defendant’s argument that reference to “Almighty God and inherent dignity in each individual” in the preamble and any interpretation of the constitution, consideration should be given to the “moral and religious fibre of the country.” On the contrary, the court affirmed that the preamble upheld “the essential human dignity to be accorded to all persons under the Constitution” (paragraph 79).

Right to protection from discrimination on grounds of sex

The court rejected the claimant's argument that reference to "sex" as a ground of discrimination includes sexual orientation. Accordingly, the court held that sections 56 and 57 do not infringe of the claimants right to protection from discrimination on the ground of sex under section 15 of the constitution.

With respect to the opinion in *Toonen v Australia* of the Human Rights Committee, the court held that as Sanit Christopher and Nevis has not acceded nor ratified the International Covenant on Civil and Political rights, it was not bound by it. Therefore, the opinion of the Human Rights Committee cannot influence the interpretation of sections 3 and 15 of the constitution (paragraph 91).

The court held that sex in its "natural and ordinary meaning" refers to gender which "is not the same as sexual orientation" (paragraph 101). The offence of buggery is gender and sexual orientation neutral as it does not discriminate between a heterosexual male and female or two gay males (paragraph 103).

The court was of that section 56 cannot be considered to be a 'gender' discriminatory provision even though it may have a discriminatory effect by being applicable to the gay community who more commonly express their sexual desires by sex per anum (paragraph 103). Similarly, section 57 is gender neutral as it prohibits sodomy between gay males or between a heterosexual male and a female (paragraph 104). It also prohibits acts of indecency upon a male as they "may be performed by a gay male with a male person or by a heterosexual female with a male person" (paragraph 104). The court found that sexual orientation is not proscribed by section 3 and 15 of the constitution as a "sub-set of discrimination on grounds of sex" (paragraph 105).

Limitations on fundamental rights

The state must discharge that there is a "sufficiently important objective" for limiting a fundamental right and the measures adopted for its impairment are "rationally connected to it" and are "proportionate in a manner that is necessary to the objective that it seeks to achieve" (paragraph 108). The sole objective

relied upon the state to justify limitations of fundamental rights is that of public morality (paragraph 109). The court was of the view that the “absolute nature of the prohibition” of sections 56 and 57 are not reasonably justified as they proscribe sexual acts between consenting adults in private and do not contain any element of “public conduct” or “harm to, or sexual acts, with minors” (paragraph 119).

The court held that sections 56 and 57 are excessive and arbitrary as they fail to be reasonably justified in the “interest of public morality and cannot stand in its present form” (paragraph 119).

Modification clause

Section 2 of the constitution enables the court to modify language of any law prior to the existence of independence to bring it in conformity with the constitution. The court affirmed that there is no savings clause in the constitution that preserves the validity of existing laws but contains a modification clause which enables the court to modify existing laws in order for them to conform with the constitution.

The claimants submitted that section 57 ceased to be an existing law when the penal code was amended in 2012 which substituted a new penalty of 10 years from the original penalty of 4 years. Due to this amendment, the court held that section 57 is not an existing law “as it is not identical with its pre-independence form” (paragraph 126). The court held that it would be excessive to strike down sections 56 and 57 in its entirety, as there is a legitimate objective in proscribing acts of “bestiality, non-consensual sexual acts between adults, male or female, and sexual acts involving minors” (paragraph 132).

Therefore, the court held that sections 56 and 57 can be modified to bring them in conformity with the constitution. In finding that sections 56 and 57 are null and void and of no force and effect as they contravene the right to privacy and freedom of expression, the court declared that sections 56 and 57 should both be read as if the words “this section shall not apply to consensual sexual acts between adults in private” were added to the end of the section.