

**Record No. 119259**

**THE SUPREME COURT OF MAURITIUS**

**In the matter of:-**

**Abdool Ridwan Firaas Ah Seek**

**Plaintiff**

**v.**

**State of Mauritius**

**Defendant**

**In the presence of:-**

**Collectif-Arc-en-Ciel**

**Interested Party**

**JUDGMENT**

The plaintiff is a gay man. The interested party, Collectif-Arc-en-Ciel ("CAEC"), is a non-governmental association based in Mauritius. It campaigns against, *inter alia*, homophobia and various forms of discrimination related to sexual orientation. The plaintiff, who is actively involved in the day to day activities of the CAEC and has served on its board in various capacities, is currently a member of the board of CAEC.

By way of a plaint with summons ("the plaint"), the plaintiff is seeking constitutional redress under section 17 of the Constitution. It is his contention that section 250 of the Criminal Code which provides for the offence of sodomy and criminalises anal sex between consenting male adults in private is unconstitutional inasmuch as it breaches sections 3 and 5 of the Constitution which protect the right to liberty, section 7 which enunciates the principle of proportionality and protects against inhuman and degrading treatment, sections 3 and 9 which secure the right to privacy of the individual and of his home, sections 3 and 12 which guarantee freedom of expression, sections 3 and 13 which guarantee freedom of assembly and association and sections 3 and 16 which protect from discrimination.

In the plaint, the plaintiff is praying:-

- (a) that the offence of sodomy under section 250 of the Criminal Code be declared unconstitutional and violative of various provisions of the Constitution, as set out above, and that section 250 of the Criminal Code be struck down as being null and void to the extent of that inconsistency;
- (b) in the alternative, that section 250 of the Criminal Code be declared unconstitutional and in infringement of various provisions of the Constitution, as set out above, to the extent that it prohibits consensual sexual acts between adults in private and should accordingly be read so as to exclude same from the ambit of section 250 of the Criminal Code.

In its plea, the State (the defendant) denies that section 250(1) is in breach of the constitutional rights of the plaintiff and avers, *inter alia*, that:-

- (a) it is not insensitive to the concerns of and representations made by the members of the Lesbian Gay Bisexual and Transgender ("LGBT") community with respect to section 250(1) of the Criminal Code;
- (b) in recognition of the general concerns of the LGBT community, it has enacted laws to prohibit discrimination on the ground of sexual orientation in a number of spheres of activities, such as employment, education, provision of goods, services and facilities amongst others;
- (c) the amendment of section 250 to allow for consensual sexual activities between members of the same sex is on its agenda, but this remains a highly sensitive issue in Mauritius in view of the delicate socio-cultural and religious fabric of the Mauritian society and can only be introduced in Parliament when the necessary conditions favourable to its adoption in Parliament are present.

The Director of Public Prosecutions ("the DPP") was granted leave to address us *amicus curiae*.

The plaintiff gave sworn evidence on his own behalf. In a gist, his case is as follows: He brought the present action because he is a homosexual and forms part of

the LGBT community. He is directly impacted by section 250(1) which criminalises an act committed in private between two consenting male adults. He stated that, while being homosexual is not in itself illegal in Mauritius, yet the act of sodomy which is an expression of love between two men is an offence.

The plaintiff started to realise that he is a homosexual since the age of 13. Although he tried to behave like a heterosexual, he quickly realised that being a homosexual person was his true nature. He has been living in a homosexual relationship with his partner for the past 10 years. Although the acts of sexual intimacy between him and his partner are consensual and conducted in private, he lives in constant fear of being arrested as section 250(1) of the Criminal Code criminalises acts of sexual intimacy between men in Mauritius. When indulging in sexual intimacy with his partner, he is simply expressing his love for somebody. However, section 250(1) is like the sword of Damocles dangling over his head because it criminalises sex between men.

The plaintiff asserted that the Constitution guarantees protection against inhuman and degrading treatment, but he is not free to be himself. It is very hard for a homosexual to live in a country where one is supposed to have the freedom to do what he pleases, provided he respects the law, but where sodomy is criminalised. In the mind of Mauritians, there is a correlation between homosexuality and section 250(1). Homosexuals are automatically classified as criminals because for many persons being homosexual is equivalent to committing the offence of sodomy. Homosexuals are not considered as normal persons: they are called names which are very demeaning and which belittle them. He is a law-abiding citizen but his liberty is jeopardised because although, under the Constitution, he is guaranteed the right to be who he is and has the liberty to express himself while respecting the rights of others, yet, under section 250(1), he is considered as a criminal.

The plaintiff pointed out that section 250(1) enables the police to enter his house on the mere suspicion that two adult homosexual men may be engaged thereat in consensual sexual intercourse in private. If the police were to investigate him for an alleged act of sodomy, the police would be empowered, by virtue of section 250(1), to investigate intimate aspects of his private life and an intrusive, undignified and humiliating search could be carried out on his person.

The plaintiff explained that section 250(1) discourages male homosexuals and the wider LGBT community from freely exercising their rights to assemble and express their sexual orientation, as evidenced by the cancellation of the LGBT pride march in March 2018 which, however, was successfully organised in 2019 with the help of the police.

Mr Nicolas Ritter gave evidence in support of the plaintiff's case. He is the founder of the Prevention Information Lutte contre le SIDA ("PILS") and one of the founders of the CAEC. He explained the negative and traumatic consequences of section 250(1) on the LGBT community, namely the jeopardy of mental and physical health.

The defendant did not adduce any evidence.

The crux of the present case is whether section 250(1) of the Criminal Code is unconstitutional.

**Does section 250(1) of the Criminal Code violate section 16 of the Constitution?**

For reasons which will become apparent later in our judgment, we shall first consider the constitutionality of section 250(1) having regard to section 16 of the Constitution which provides for protection from discrimination.

Section 16 so far as relevant reads as follows:-

**"16. Protection from discrimination**

(1) *Subject to subsections (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect.*

(2) ... ..

(3) *In this section -*

*"discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description*

*are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description.*

.....”

Section 16(1) confers protection against any law which is discriminatory either of itself or in its effect. In the present case, we are concerned with section 250 of the Criminal Code which proscribes sodomy. The case for the plaintiff is that section 250(1), which criminalises anal intercourse between gay men, violates section 16 of the Constitution as it discriminates on the ground of sexual orientation. In this respect, it is the plaintiff's contention that the word "sex" in section 16 should be read as including "*sexual orientation*". Thus, the questions which we have to determine are:-

- (i) firstly, whether we should interpret the word "sex" in section 16 as including "*sexual orientation*", and
  - (ii) secondly, if the answer to the first question is in the affirmative, whether section 250(1) of the Criminal Code subjects the plaintiff to discrimination on the ground of sexual orientation under section 16.
- (i) **Should we interpret the word "sex" in section 16 of the Constitution as including "*sexual orientation*"?**

The word "sex" is not defined in the Constitution. Generally, so far, the word "sex" in the Constitution, in keeping with its primary dictionary meaning, has been accepted as referring to "*gender*".

In support of his contention that the word "sex" in section 16 should be read as including "*sexual orientation*", learned Counsel for the plaintiff referred to international and foreign case law where the word "sex" was construed accordingly. We propose to consider below the cases referred to by learned Counsel for the plaintiff, most of which were also referred to by learned Counsel for the other parties.

- (a) **Toonen v Australia No. 488/1992 ("Toonen")**

Mr Toonen was an activist for the promotion of the rights of homosexuals in

Tasmania. He challenged two provisions of the Tasmanian Criminal Code, namely sections 122(a) and (c) and 123, which criminalised various forms of sexual contacts between men, including all forms of sexual contacts between consenting adult homosexual men in private, before the United Nations Human Rights Committee ("the UNHRC").

The UNHRC was called upon to determine whether Mr Toonen had been the victim of an unlawful or arbitrary interference with his privacy, contrary to article 17 of the International Covenant on Civil and Political Rights ("the ICCPR"), and whether he had been discriminated against in his right to equal protection of the law, contrary to article 26 of the ICCPR. The State party sought the UNHRC's guidance as to whether sexual orientation may be considered an "*other status*" for the purposes of article 26 or, in other words, whether discrimination on the ground of "*other status*" under article 26 could be construed as discrimination on the ground of "*sexual orientation*".

For ease of reference, article 26 of the ICCPR is reproduced below:-

*"Article 26*

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

The UNHRC stated that, inasmuch as article 17 was concerned, it was undisputed that adult consensual sexual activity in private was covered by the concept of "*privacy*" and that sections 122(a) and (c) and 123 of the Tasmanian Criminal Code interfered with Mr Toonen's privacy. The UNHRC further stated that since it had found a violation of Mr Toonen's rights under articles 17(1) and 2(1) of the ICCPR requiring the repeal of the offending law, it did not consider it necessary to consider whether there had also been a violation of article 26 of the ICCPR which provides, *inter alia*, for protection against discrimination.

But what is relevant for our purposes is that the UNHRC went on to state that it "*confines itself to noting, however, that in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation*" [emphasis added].

Article 2(1) of the ICCPR is reproduced below:-

*\*Article 2*

1. *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

We must observe that although the UNHRC noted that in its view "sex" in articles 2(1) and 26 should be interpreted as including "sexual orientation", it provided no indication or reasoning as to why and how it arrived at such a conclusion. It would seem that the UNHRC considered this as being an obvious and a logical conclusion.

**(b) Vriend v Alberta [1998] 1 R.C.S. 493**

The employment of Mr Vriend, a homosexual, was terminated by the college where he was employed as laboratory coordinator. The sole reason given was his non-compliance with the college's policy on homosexual practice. He appealed the termination and applied for reinstatement but both were refused. He attempted to file a complaint with the Alberta Human Rights Commission on the ground that his employer had discriminated against him because of his sexual orientation, but the Commission advised Mr Vriend that he could not make a complaint under the Individual's Rights Protection Act ("the IRPA") because it did not include sexual orientation as a protected ground. Mr Vriend sought a declaration before the Court of Queen's Bench that the IRPA violated his equality rights as guaranteed under section 15 of the Canadian Charter of Rights and Freedoms.

Section 15, which is reproduced below, does not provide for prohibition against discrimination on the ground of sexual orientation:-

*"15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."*

The trial judge, however, found that the omission of protection against discrimination on the basis of sexual orientation in the IRPA was an unjustified violation of section 15. She ordered that the words "*sexual orientation*" be read into sections 2(1), 3, 4, 7(1), 8(1) and 10 of the IRPA as a prohibited ground of discrimination. The decision was reversed by the Court of Appeal for Alberta. However, on further appeal, the Supreme Court of Canada held that sexual orientation is a personal characteristic which has been found to be analogous to the grounds enumerated in section 15 and went on to read into section 15 "*sexual orientation*" as a ground on which discrimination was not permissible.

It is of interest to refer to the following excerpt:-

*"In summary, this Court has no choice but to conclude that the IRPA, by reason of the omission of sexual orientation as a protected ground, clearly violates s.15 of the Charter. The IRPA in its underinclusive state creates a distinction which results in the denial of the equal benefit and protection of the law on the basis of sexual orientation, a personal characteristic which has been found to be analogous to the grounds enumerated in s.15. This, in itself, would be sufficient to conclude that discrimination is present and therefore there is a violation of s.15. The serious discriminatory effects of the exclusion of sexual orientation from the Act reinforce this conclusion. As a result, it is clear that the IRPA, as it stands, violates the equality rights of the appellant Vriend and of other gays and lesbians."*

(c) **The National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6**

The Constitutional Court of South Africa had to consider whether provisions which prohibited sodomy were unconstitutional on the ground, *inter alia*, that the provisions unfairly discriminated against gay men on the basis of their sexual orientation. The Court was concerned with section 8 of the interim Constitution and section 9 of the 1996 Constitution of South Africa. It is interesting to note that both sections 8 and 9 provide for protection against unfair discrimination not only on the ground of sex but also specifically on the ground of sexual orientation. "*Sex*" and "*sexual orientation*" are therefore 2 separate distinct grounds in the South African Constitution and this begs the question as to whether it was because its framers were of the view that "*sex*" did not include "*sexual orientation*" or because they wanted to avoid any doubt in the minds of readers of the Constitution.



(d) Orozco v The Attorney General of Belize, claim No 668 of 2010  
("Orozco")

Mr Orozco challenged the constitutionality of section 53 of the Belize Criminal Code which provided that *"every person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years"*. He alleged that there had been a breach of his constitutional rights enshrined in sections 3, 6 and 16 of the Constitution.

Before proceeding further, it is relevant to refer to the definition of the term *"carnal intercourse against the order of nature"*. According to the Concise Oxford English Dictionary (Eleventh Edition, Revised), the term *"carnal"* means *"relating to physical, especially sexual, needs and activities"*. *"Carnal intercourse against the order of nature"* refers to intercourse where there is no possibility of human conception since the natural object of carnal intercourse is that there should be the possibility of conception of human beings (vide: *Naz Foundation v Government of NCT Delhi and Others [WP(C)7455/2001]*). Section 53 thus makes it an offence for a person to have sexual intercourse with another person where there is no possibility of human conception and therefore includes sexual intercourse between homosexual men.

We note that the wording of the relevant extract of section 16 of the Constitution of Belize, which is reproduced below, is the same as section 16 of the Constitution of Mauritius:-

**"16. Protection from discrimination .....**

(1) *Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.*

(2) ....."

(3) *In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.*

....."

The Court observed that, in *Toonen* (supra), the UNHRC had held that the word "sex" in articles 2 and 26 of the ICCPR was to be interpreted as including "sexual orientation" and that this interpretation had been adopted by other United Nations Agencies and bodies. At paragraph 94, the Court stated:-

*"[94] Belize has acceded to the ICCPR in 1996 two years subsequent to Toonen. As such, it can be argued that in doing so, it tacitly embraced the interpretation rendered by the UNHCR. It has been further urged by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties that by virtue of section 65 of the Interpretation Act, Chapter 1 given that more than one interpretation is reasonably possible 'a construction which is consistent with the international obligations of the Government of Belize is to be preferred to construction which is not'. I accept these contentions to the effect that the word 'sex' in section 16(3) of the Constitution is to be interpreted to extend to 'sexual orientation'."*

The Court held that the plaintiff had been discriminated against on the basis of his sexual orientation by virtue of section 16(1) and (3) of the Constitution of Belize.

For the purposes of the present complaint, what is interesting and relevant is that the Supreme Court of Belize, basing itself on the interpretation given by the UNHRC to the word "sex" in *Toonen* (supra), held that the word "sex" in section 16 of the Constitution of Belize, worded in the same terms as section 16 of our Constitution, should be interpreted to extend to "sexual orientation".

(e) **Navtej Singh Johar & Ors v Union of India thr. Secretary Ministry of Law and Justice AIR 2018 SC 4321 ("Johar")**

The Supreme Court of India had to determine whether section 377 of the Indian Penal Code which criminalised "carnal intercourse against the order of nature" breached articles 14, 15, 19 and 21 of the Indian Constitution.

Section 377 is reproduced below:-

*"377. Unnatural offences — Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

Article 15 of the Indian Constitution, which prohibits discrimination on the ground of, *inter alia*, sex, provides as follows:-

**"15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth**

(1) *The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.*

(2) *No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -*

(a) *access to shops, public restaurants, hotels and places of public entertainment; or*

(b) *the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.*

(3) *Nothing in this article shall prevent the State from making any special provision for women and children.*

(4) *Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."*

As can be seen, Article 15 does not specifically prohibit discrimination on the ground of "sexual orientation". But the Supreme Court of India held that "sexual orientation" was encompassed within the meaning of "sex" in Article 15. Chandrachud J., noted as follows:-

**"46. ... one cannot simply separate discrimination based on sexual orientation and discrimination based on sex because discrimination based on sexual orientation inherently promulgates ideas about stereotypical notions of sex and gender roles."**

Malhotra J., for her part, stated as follows:-

**"15.1. The term 'sex', as it occurs in Article 15 has been given an expansive interpretation by this Court in *National Legal Services Authority v Union of India*... to include sexual identity...**

**Sex as it occurs in Article 15, is not merely restricted to the biological attributes of an individual, but also includes their 'sexual identity and character'.**

*The J.S. Verma Committee had recommended that 'sex' under Article 15 must include 'sexual orientation':*

*'65. We must also recognize that our society has the need to recognize different sexual orientations a human reality. In addition to homosexuality, bisexuality, and lesbianism, there also exists the transgender community. In view of the lack of scientific understanding of the different variations of orientation, even advanced societies have had to first declassify 'homosexuality' from being a mental disorder and now it is understood as a triangular development occasioned by evolution, partial conditioning and neurological underpinnings owing to genetic reasons. Further, we are clear that Article 15 of the constitution of India uses the word 'sex' as including sexual orientation.'*

*The prohibition against discrimination under Article 15 on the ground of 'sex' should therefore encompass instances where such discrimination takes place on the basis of one's sexual orientation."*

**(f) Letsweletse Motshidiemang v Attorney General [2019] MAHGB-000591-161 ("Motshidiemang")**

Mr Motshidiemang, a gay man, challenged sections 164, 165 and 167 of the Penal Code of Botswana before the High Court of Botswana. Section 164 is reproduced below:-

**\*164. Unnatural offences**

*Any person who –*

- (a) has carnal knowledge of any person against the order of nature;*
- (b) ... .. or*
- (c) permits any other person to have carnal knowledge of him or her against the order of nature,*

*is guilty of an offence and is liable to imprisonment for a term not exceeding seven years."*

It was Mr Motshidiemang's case that the challenged penal provisions were discriminatory in effect, contrary to sections 3 and 15(1) of the Constitution of Botswana (section 15(1) is the equivalent of section 16(1) of the Mauritian Constitution). The respondent, on the other hand, submitted that the said penal provisions were gender neutral and were not discriminatory.

It was submitted that the word "sex" in section 3 should be generously and purposively interpreted to include "sexual orientation". The High Court of Botswana held as follows:-

*"157. On the basis of the formulated rules of constitutional construction or interpretation, I have no qualms whatsoever in determining that the word 'sex' in Section 3 thereof is generously wide enough to include and capture 'sexual orientation', as I hereby determine.*

*158. The Court of Appeal in the DOW (supra) case has stated that the enumerated grounds of discrimination in Section 3 of the Constitution were not hermetically sealed, nor cast in stone. Amissah P, at page 146(H) neatly buttressed the point as follows:*

*"I do not think that the framers of the Constitution intended to declare in 1966, that all potentially vulnerable groups and classes, who would be affected for all time by discriminatory treatment, have been identified and mentioned in the definition in section 15(3). I do not think that they intended to declare that the categories mentioned in that definition were forever closed. In the nature of things, as farsighted people trying to look into the future, they would have contemplated that, with the passage of time, not only groups or classes which had caused concern at the time of writing the Constitution but other groups or classes needing protection would arise. The categories might grow or change. In that sense, the classes or groups itemised in the definition would be, and in my opinion, are by way of example of what the framers of the Constitution thought worth mentioning as potentially some of the most likely areas of possible discrimination."*

*159. It is henceforth determined that 'sex', as used in Section 3 of the Constitution includes 'sexual orientation'..."*

### **Discussions and Conclusions**

The first issue to be determined is whether the word "sex" in section 16 of our Constitution is to be interpreted as including "sexual orientation". In this respect, we have referred extensively above to international and foreign case law. We do bear in mind that these cases are not binding upon Mauritian Courts and that, in some of the cases, the wording of the provisions in issue is not the same as that of section 16. However, we consider that we can obtain relevant, useful and persuasive guidance from

the said cases in determining the meaning to be ascribed to the word "sex" in section 16.

It was submitted by learned Counsel for the plaintiff that there are 5 reasons as to why the word "sex" should be read as including "*sexual orientation*":

1. The UNHRC has held in *Toonen* (supra) that the word "sex" includes "*sexual orientation*" and since 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. Interpreting "sex" as including "*sexual orientation*" would be in conformity with the standard canon of constitutional interpretation which requires that our constitutional provisions be interpreted in line with our international obligations.
2. Sexual orientation is as innate an aspect of a person's identity as his gender and in the 21<sup>st</sup> century both gender and sexual orientation fall within the term "sex".
3. Even a narrow dictionary-based definition of the word "sex" embraces sexual act and sexual intercourse and so is inextricably linked to sexual orientation as the way in which sexual orientation is expressed and defined.
4. Including "*sexual orientation*" in the definition of "sex" in our Constitution would be affording a purposive, contemporary and generous meaning for the protection of human rights consonant with a modern Constitution.
5. Where legislation has a differential impact on homosexual persons as compared with heterosexual persons, this necessarily entails a differential based upon sex even in a narrow sense of gender because it is a differential treatment referable to traits or actions which would not have been questioned in a person of a different gender.

Learned Counsel for the State, for her part, submitted that section 250 of the Criminal Code does not violate section 16 of the Constitution. It was her contention that interpreting the word "sex" so as to include "*sexual orientation*" will result in the

amendment of the Constitution by the Judiciary in breach of section 47 of the Constitution and that unless a legislative amendment is brought by Parliament, in interpreting the word "sex" as including "sexual orientation" in section 16, the Judiciary would be breaching the doctrine of separation of powers.

Learned Counsel further submitted that it would not be in order to assume that the interpretations of the UNHRC have direct effect or are directly applicable in Mauritius, as Mauritius needs to enact laws for those interpretations to have effect locally. She admitted that Mauritius has acceded to the Optional Protocol to the ICCPR in respect of individual communications which, in effect, enables the UNHRC to entertain direct communications from Mauritian citizens alleging potential breaches of rights provided for under the ICCPR, in respect of which the State has committed itself. However, she relied on *Matadeen v Pointu* [1997] PRV 14 to argue that, in Mauritius, our legislative framework caters for the right not to be discriminated against on the basis of sexual orientation, not by affording constitutional status to the said right, but by the legislator choosing to give effect to equal protection of the law through statutes which have been enacted and which provide for the recognition of one's sexual orientation, namely the Equal Opportunities Act, the Workers' Rights Act and the Employment Relations Act.

Learned Counsel for the DPP submitted that section 16 of the Constitution protects from discrimination based on specific categories which are listed therein and that sexual orientation is not specifically mentioned therein. He submitted that section 16 does not confer an absolute right but is embedded with a number of derogations spelt out under subsections (4) to (8). In addition, he argued that it is generally accepted that a generous and purposive interpretation must be given to the Constitution. The ICCPR may assist in interpreting the Constitution and, if reliance is placed on the ICCPR, then it follows that the word "sex" should include "sexual orientation" and that, even if "sex" is interpreted as meaning gender, i.e., male and female, the plaintiff would still have a case, as section 250 of the Criminal Code only punishes men as opposed to women for the act of sodomy.

At this juncture, it is apposite to set out below some of the guiding principles which can be gathered from the Constitution itself and the case law when dealing with a claim for constitutional redress.

The Constitution is the supreme law of Mauritius and any other law has to be consistent with the Constitution. The principle of separation of powers is entrenched in the Constitution and one branch of government may not trespass on the province of another. While Parliament is sovereign in the sphere of the enactment of laws, its sovereignty is not absolute inasmuch as any law enacted by it which is inconsistent with the Constitution may be declared void by the Supreme Court.

Under sections 17 and 83 of the Constitution, any citizen may apply to the Supreme Court for enforcement of any of his constitutional rights. In exercising its role as the guardian of the Constitution, the Supreme Court is vested with the power of declaring a law unconstitutional. Every law is presumed to be constitutional and it is up to a party who alleges any breach of his constitutional right to establish same. In determining whether a law passes the test of constitutionality, the role of the Supreme Court is to interpret and apply the provisions of the Constitution.

The Constitution is a living document and must be given a generous and purposive interpretation. In *Madhewoo v The State of Mauritius* [2016] UKPC 30, the Judicial Committee of the Privy Council stated as follows:-

*"13. It is not in dispute that the Constitution is given a generous and purposive interpretation and in particular the provisions that enshrine fundamental rights should receive a generous and not literalist interpretation..."*

But the Judicial Committee also reminded itself that the rejection of a narrow or legalistic interpretation cannot mean that sections of the Constitution "*can be construed as creating rights which they do not contain*".

In the present case, the plaintiff is alleging that section 250(1) of the Criminal Code is discriminatory against him on the ground of his sexual orientation under section 16 of the Constitution. But "*sexual orientation*" is not one of the grounds of discrimination listed in section 16. It is, however, the plaintiff's contention that "*sex*", which is one of those listed grounds, should be interpreted as including "*sexual orientation*".

In this respect, we find that the above submission of learned Counsel for the plaintiff, which is supported to a certain extent by learned Counsel for the DPP and is based on the accession of Mauritius to the ICCPR and on the interpretation of the



UNHRC in *Toonen* (supra) that "sex" includes "sexual orientation", to be powerful and persuasive. We are fully alive to the fact that the interpretations of the UNHRC do not have direct effect and are not directly applicable in Mauritius. But we believe due consideration must also be given to the following dictum of the Judicial Committee in *Matadeen v Pointu* (supra):-

*"Since 1973 Mauritius has been a signatory to the International Covenant on Civil and Political Rights. It is a well recognised canon of construction that domestic legislation, including the Constitution, should if possible be construed so as to conform to such international instruments."*

We, therefore, find considerable force in the plaintiff's above submission that since 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. This would also be in line with the fact that, in interpreting the Constitution, reference may be made to international instruments and international jurisprudence. We also endorse the remaining cogent and persuasive submissions of learned Counsel for the plaintiff, as set out above, in favour of interpreting "sex" in section 16 of the Constitution as including "sexual orientation".

Furthermore, due consideration should be given to the well settled principle that, as already stated above, the Constitution is a living document and must be given a generous and purposive interpretation, especially when it comes to the interpretation of provisions which enshrine fundamental rights, albeit not to the extent of creating non-existing rights. As was held in *Motshldiemang* (supra), enumerated grounds of discrimination in the Constitution are neither hermetically sealed, nor cast in stone and other groups or classes needing protection may arise.

It is noteworthy that if proof is needed that, in this day and age, protection from discrimination on the ground of sexual orientation is recognised as being a necessity, no better one is provided than by the defendant itself. In its plea, it has averred that in December 2008, it co-sponsored along with 66 other countries a Statement delivered in the United Nations General Assembly on human rights, sexual orientation and gender identity. It supported the Resolution on "Human rights, sexual orientation and gender identity" which was adopted on 17 June 2011 by the 17<sup>th</sup> Session of the Human Rights

Council which affirms the universality of human rights and expresses concern about acts of violence and discrimination based on sexual orientation and gender identity. It has also enacted laws to prohibit discrimination on the ground of sexual orientation in a number of spheres of activities, such as employment, education, and provision of goods, services and facilities, e.g. the Equal Opportunities Act, the Workers' Rights Act and the Employment Relations Act.

Moreover, we take into account the abundant foreign case law, as set out above, albeit not binding on this Court but of persuasive value, which shows that the word "sex", in provisions of different Constitutions equivalent to our own, has been interpreted as including "*sexual orientation*".

We shall now turn to the defendant's contention that if this Court were to interpret the word "sex" in section 16 of the Constitution as including "*sexual orientation*", this would result in the Judiciary legislating and amending the Constitution, thereby acting in breach of the principle of separation of powers.

Under the framework of our Constitution, the legislature has been conferred the power to enact laws for the peace, order and good government of Mauritius. As already stated above, the principle of separation of powers is entrenched in the Constitution and one branch of government may not trespass on the province of another. It is of course open to the legislature to pass a law to amend section 250(1) of the Criminal Code and the defendant has given notice of its intention to do so in order to address the concerns of the LGBT community. But it has so far failed to do so in spite of its avowed intention and its undertaking before international fora to this effect.

In view of such failure, the plaintiff has applied to this Court under section 17 of the Constitution to enforce his fundamental rights enshrined in the Constitution, which he alleges are being breached by section 250(1) of the Criminal Code. As guardian of the Constitution, the Supreme Court has the duty to ensure that any other law is consistent with the Constitution, which is the supreme law of this country, and is accordingly vested with the power of declaring a law unconstitutional. It goes without saying that, in so doing, the role of the Supreme Court is not to legislate but to interpret and apply provisions of the Constitution. This is precisely the exercise being carried out by us and it is our responsibility under the Constitution to do so. Nor is it a responsibility

which this Court may abdicate. As was aptly stated by Lord Bingham in *Roodal v The State of Trinidad and Tobago* [2003] UKPC 78, at paragraph 34:-

*"The Constitution itself has placed on an independent, neutral and impartial judiciary the duty to construe and apply the Constitution and statutes and to protect guaranteed fundamental rights, where necessary. It is not a responsibility which the courts may shirk or attempt to shift to Parliament."*

We, therefore, disagree with the defendant's above contention of an alleged breach of the principle of separation of powers by the Judiciary and, in this respect, we find it apposite to also refer to the following extract in *Tan Seng Kee v Attorney-General* [2022] SGCA 16 where the Court of Appeal of Singapore had to consider the constitutionality of section 377A of the Penal Code which provides for the offence of gross indecency by 2 male persons:-

*"12. ...The doctrine of the separation of powers is premised on the notion that the Judiciary, the Executive and the Legislature are co-equal branches. It follows that the court will not defer to the other branches where the constitutionality or legality of a measure or statutory provision is challenged in legal proceedings. Indeed, any such deference would be contrary to the doctrine of the separation of powers and would portend the institutional irrelevance of the court."*

In the light of all the above, including the need to adopt a generous and purposive interpretation, especially as we are being called upon to interpret a section of the Constitution which enshrines fundamental rights, we hold that the word "sex" in section 16 of the Constitution should be interpreted as including "*sexual orientation*".

**(ii) Is section 250(1) of the Criminal Code discriminatory on the ground of sexual orientation in breach of section 16 of the Constitution?**

Having held that the word "sex" in section 16 of the Constitution should be read as including "*sexual orientation*", the next issue to be determined is whether or not section 250(1) of the Criminal Code is a law which is discriminatory, either of itself or in its effect, against the plaintiff, on the ground of his sexual orientation.

Section 250 of the Criminal Code reads as follows:-

**"250. Sodomy and bestiality**

**(1) Any person who is guilty of the crime of sodomy or**

*bestiality shall be liable to penal servitude for a term not exceeding 5 years.*

*(2) (a) Notwithstanding sections 151 and 152 of the Criminal Procedure Act, where it is averred that the sodomy is committed on a minor or a physically or mentally handicapped person, the person charged shall, on conviction, be liable to imprisonment for a term of not less than 2 years.*

*(b) Part X of the Criminal Procedure Act and the Probation of Offenders Act shall not apply to a person liable to be sentenced under paragraph (a)."*

"Sodomy" is not defined in the Criminal Code. However, the Supreme Court in the case of *Goomany v The State [1998 SCJ 152]* referred to the dictionary and textbook definitions of the word "sodomy" and held as follows:-

*"It is clear from the above that the consistent approach of either the courts or those responsible for defining words in dictionaries has been to look upon the word sodomy as intercourse per anum between men or a man and a woman. This is the unassailable ordinary meaning of the word and we see no reason to depart from it."*

As pointed out by learned Counsel for the plaintiff, section 250 was not introduced in Mauritius to reflect any indigenous Mauritian values but was inherited as part of our colonial history from Britain. Its enactment was not the expression of domestic democratic will but was a course imposed on Mauritius and other colonies by British rule. Mauritius became a British colony in 1810 and section 250, in its present version, was promulgated in 1898. But while homosexual consensual acts in private were decriminalised in England in 1967, section 250 remained on the statute book of Mauritius when it became independent in 1968. As noted by Malhotra J. in *Johar (supra)*, a number of other countries have decriminalised sodomy, either through legislation or court judgments:-

*"9. In 1957, the United Kingdom published the Wolfenden Committee Report... which recognised how the anti-sodomy laws had created an atmosphere for blackmail, harassment and violence against homosexuals...."*

*Pursuant to this Report, the House of Lords initiated legislation to de-criminalise homosexual acts done in private by consenting parties. The Sexual Offences Act, 1967 came to be passed in England which de-criminalised homosexual acts done in private, provided the parties had consented to it, and were above the age of 21.*

10. *The trend of decriminalizing anti-sodomy laws world over has gained currency during the past few decades since such laws have been recognised to be violative of human rights. In 2017, the International Lesbian Gay, Bisexual, Trans and Intersex Association noted in its Annual State Sponsored Homophobia Report that 124 countries no longer penalise homosexuality. The change in laws in these countries was given effect to, either through legislative amendments to the statutory enactments, or by way of court judgments."*

It is the plaintiff's contention that section 250(1) is discriminatory against him under section 16 of the Constitution, the relevant part of which we find it worthwhile to reproduce anew below:-

**"16. Protection from discrimination**

(1) *... no law shall make any provision that is discriminatory either of itself or in its effect.*

(2) *... ..*

(3) *In this section --*

*"discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description.*

*... .."*

It is noteworthy that section 250(1), which criminalises anal intercourse, applies to all men without distinction, be it homosexual men or heterosexual men who engage in sodomy. The section is therefore ostensibly neutral as it is not exclusively directed against homosexual men.

It is, however, the plaintiff's case that section 250(1) is discriminatory against him on the ground of his sexual orientation for the following reasons. Section 250(1) proscribes the only mode of sexual expression available to homosexual men which is anal intercourse. The fact that sodomy is an offence has a crippling effect on the plaintiff's sexual life and that of homosexual men. Every time a homosexual man engages in sexual intercourse, which is an act whereby he expresses his love for his

partner, he commits the offence of sodomy. Homosexual men therefore live in constant fear of being arrested, prosecuted and convicted as their only mode of sexual intercourse is rendered illegal by section 250(1). The situation is different in so far as heterosexual men are concerned. They are free to express their love through vaginal intercourse with women, a form of sexual intercourse which is not proscribed.

The plaintiff further explained that homosexual men are subjected to psychological and moral harm by section 250(1). They feel that they are not individuals who are worthy of protection due to the criminalisation of sodomy.

In this respect, as already stated above, the plaintiff's case was supported by the evidence of Mr Ritter, one of the founders of CAEC, who explained the negative and traumatic consequences of section 250(1) on the LGBT community, namely the jeopardy of their mental and physical health. Mr Ritter was of the view that the decriminalisation of the offence of sodomy would have a positive impact on society and would allow the LGBT community to freely enjoy their constitutional rights.

The plaintiff's evidence, supported to a certain extent by that of Mr Ritter, has remained largely unchallenged and unrebutted. It is the plaintiff's contention that he is being discriminated on the ground of his sexual orientation. In *Johar (supra)*, the Supreme Court of India noted that sexual orientation is natural and inherent in a person. Malhotra J., pointed out that sexual orientation is not an aberration but a variation of sexuality. It is an innate attribute of one's identity and cannot be altered. We find it relevant and appropriate to reproduce the following extract from the judgment of Malhotra J.:

**"13. HOMOSEXUALITY – NOT AN ABERRATION BUT A VARIATION OF SEXUALITY**

***13.1. Whilst a great deal of scientific research has examined possible genetic, hormonal, developmental, psychological, social and cultural influences on sexual orientation, no findings have conclusively linked sexual orientation to any one particular factor or factors. It is believed that one's sexuality is the result of a complex interplay between nature and nurture.***

***Sexual orientation is an innate attribute of one's identity, and cannot be altered. Sexual orientation is not a matter of choice. It manifests in early adolescence. Homosexuality is a natural variant of human sexuality."***

In the present case, the plaintiff explained that he started to realise that he is a homosexual since the age of 13. Although he tried to behave like a heterosexual, he quickly realised that being a homosexual person was his true nature.

### Discussions and Conclusions

We accept the plaintiff's evidence that his sexual orientation is natural and innate in him. It cannot be altered and is a natural variant of his sexuality. For the reasons given by him, set out above, we find that section 250(1) of the Criminal Code, albeit ostensibly neutral, is discriminatory "*in its effect*" against him on the ground of his sexual orientation, thereby violating section 16 of the Constitution. Even though section 250(1) applies to all men, it in effect denies the plaintiff, as a homosexual, the right to sexual expression and gratification in the only way available to him, i.e. by anal intercourse whereas heterosexuals are permitted the right to sexual expression in a way which is natural to them, i.e. by vaginal intercourse.

In other words, the effect of section 250(1) is to afford a different treatment to the plaintiff and other homosexual men attributable to their sexual orientation by subjecting them to restrictions with regard to the expression of their sexuality in a way natural to them whereas heterosexual men are not subjected to such restrictions. Section 250(1) is therefore discriminatory under section 16 of the Constitution against the plaintiff and other homosexual men on the basis of their sexual orientation. It proscribes in effect the only mode of sexual expression available to the plaintiff. It has the effect of criminalising the plaintiff's sexual orientation which is an innate attribute of his identity and over which he has no choice. We, however, are of the view that the plaintiff's choice of a sexual partner cannot be the basis of discrimination and it is not for the State to make such a choice for him.

In *Lawrence v Texas* 539 US 558 (2003), at page 575, the US Supreme Court stated as follows:-

*"When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and private spheres."*

In *Leung v Secretary for Justice* HKCA Civil Appeal No.317 of 2005, the Hong Kong Court of Appeal, in reply to the submission that there was no inequality in

that the restriction on buggery applied to both men and women, observed that the answer was that for gay couples, the only form of sexual intercourse available to them is anal intercourse. For heterosexuals, the common form of sexual intercourse open to them is vaginal intercourse, which is obviously unavailable as between men. The Court of Appeal agreed that *"denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them"*.

Nevertheless, are there any valid reasons for the State to discriminate against the plaintiff having sexual intercourse in the only way available to him? The present case concerns the most private and intimate aspects of the identity of homosexual men, namely the manner in which they have sexual intercourse. Accordingly, there must exist particularly serious reasons before the State can justifiably interfere with the manner in which homosexual men choose to have consensual sexual intercourse in private.

It is not the case for the defendant that there are legitimate State interests such as national security or public interest except an averment that allowing for consensual sexual activities between members of the same sex remains a highly sensitive issue in view of the delicate socio-cultural and religious fabric of the Mauritian society and that the time is not ripe for introducing legislation in Parliament to amend section 250 of the Criminal Code.

With respect to the socio-cultural and religious fabric of the Mauritian society, we simply wish to point out that Mauritius is a secular State and that section 11 of the Constitution provides for the protection of freedom of conscience, which includes freedom of thought and of religion. Moreover, for any interference to be reasonably justifiable in a democratic society, it must follow a legitimate purpose. The defendant did not point to any in the case at hand. As seen above, the right which the plaintiff seeks in this case has been accepted as an integral part of fundamental human rights in many other countries. The defendant has simply not shown *"that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent"* (vide *Lawrence (supra)*).

With regard to the defendant's averment that the Court should not intervene and should leave it to Parliament to pass amending legislation when there is general



consensus and favourable public opinion on a highly sensitive issue in Mauritius, we can do no better than refer to what was stated by the Judicial Committee in *Patrick Reyes v The Queen* [2002] 2 AC 235:-

*"A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society [...] In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion, for reasons given by Chaskalson P in S v Makwanyane 1995(3) SA 391, 431, para 88:*

*'Public opinion may have some relevance to the inquiry, but, in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution... The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society.'*

As a matter of fact, as already stated above, the defendant itself has averred that it has enacted laws to prohibit discrimination on the ground of sexual orientation in a number of spheres of activities, such as employment, education, and provision of goods, services and facilities, e.g. the Equal Opportunities Act, the Workers' Rights Act and the Employment Relations Act.

Two observations are called for here: firstly, the fact that the State itself has enacted legislation to provide for protection against discrimination on the ground of sexual orientation demonstrates that the State recognises that such discrimination is present in our society and that it is a ground worthy of protection. Secondly, whilst it is true that provisions of the above laws aim to eliminate discrimination on the ground of sexual orientation, the said laws only concern a limited sphere of activities and are patently no answer to the plaintiff's claim which concerns the discriminatory character of section 250(1) in the sphere of his sexual life.

As rightly submitted by learned Counsel for the plaintiff, since the defendant has itself recognised through the enactment of the above laws that it is unfair to discriminate on the ground of sexual orientation in the sphere of certain activities, it must *à fortiori* be illegitimate to discriminate against persons on the ground of their sexual orientation by reference to the expression of the most private and intimate aspects of their identity, which is the manner in which they choose to have sexual intercourse.

True it is that, in practice, consensual male adults engaging in anal intercourse in private are very rarely, if ever, arrested and prosecuted for the offence of sodomy. But the fact remains that the threat of arrest, prosecution and conviction under section 250(1) hangs like the sword of Damocles over the heads of homosexual men. As stated in *National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6:-*

*"Even when these provisions are not enforced, they reduce gay men... to what one author has referred to as 'unapprehended felons', thus entrenching stigma and encouraging discrimination in employment and insurance and in judicial decisions about custody and other matters bearing on orientation."*

### **Final Conclusions**

Taking into consideration all the above, we find that section 250(1) of the Criminal Code is discriminatory in its effect against the plaintiff in breach of section 16 of the Constitution inasmuch as it criminalises the only natural way for him and other homosexual men to have sexual intercourse whereas heterosexual men are permitted the right to have sexual intercourse in a way which is natural to them.

We, accordingly, declare that section 250(1) of the Criminal Code is unconstitutional and violates section 16 of the Constitution in so far as it prohibits consensual acts of sodomy between consenting male adults in private and should accordingly be read so as to exclude such consensual acts from the ambit of section 250(1).

The plaintiff has also alleged that section 250(1) of the Criminal Code is in breach of sections 3, 5, 7, 9, 12 and 13 of the Constitution. Since we have already found that section 250(1) is in breach of section 16 in so far as it applies to consensual acts of sodomy between consenting male adults in private, we do not consider it

necessary to make any pronouncement with regard to the constitutionality of section 250(1) in relation to the other above provisions of the Constitution.

**D. Chan Kan Cheong**  
Judge

**K. D. Gunesh-Balaghee**  
Judge

**4..... October 2023**