

**FOKEERBUX N. A. & ORS v THE STATE OF MAURITIUS**

**2023 SCJ 400**

**Record No. 120222**

**THE SUPREME COURT OF MAURITIUS**

**In the matter of:-**

- 1. Najeeb Ahmad Fokeerbux**
- 2. Vipine Aubeeluck**
- 3. Imesh Fallee**
- 4. Jürgen Soocramanien Lasavanne**

**Plaintiffs**

**v.**

**The State of Mauritius**

**Defendant**

**In the presence of:-**

- 1. The Director of Public Prosecutions**
- 2. The Commissioner of Police**

**Co-Defendants**

**JUDGMENT**

By way of a plaint with summons (“the plaint”), the plaintiffs are seeking constitutional redress under sections 17 and 83 of the Constitution. It is their contention that section 250 of the Criminal Code, which provides for the offence of sodomy, is unconstitutional inasmuch as it violates their fundamental rights as guaranteed under sections 1, 3, 4, 9, 12 and 16 of the Constitution.

In their plaint the plaintiffs have averred that section 250 of the Criminal Code treats them as criminals, reduces their sexuality to a crime and disrespects their relationships. They are praying for the following orders:-

- (a) a declaration that sexual orientation forms part of and is implied in the definition of sex as enacted under sections 3, 3(a) and 16 of the Constitution;
- (b) a declaration that section 250 of the Criminal Code is unconstitutional; and
- (c) alternatively, a declaration that section 250 of the Criminal Code does not apply to consensual acts of sodomy “performed by consensual adults”.

In its plea the State (the defendant) has averred, in a gist, that –

1. it is not insensitive to the concerns 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;
2. 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;
3. the amendment of section 250 to allow for consensual sexual activities between members of the same sex is on its agenda; this is 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 defendant denies any breach of the fundamental rights and freedoms guaranteed by sections 1, 3, 4, 9, 12 and 16 of the Constitution as alleged and avers that –

- (a) in view of the interpretation given so far to the above sections of the Constitution by the Supreme Court of Mauritius and the Judicial Committee of the Privy Council, none of the rights conferred under those provisions is engaged by section 250(1) of the Criminal Code;
- (b) there is no constitutionally protected general right to private life, but only a statutorily protected right to private life under the Code Civil Mauricien;

- (c) section 250(1) of the Criminal Code does not apply solely to the LGBT community;
- (d) any act covered under that section and done between individuals, be it lesbians, gays, bisexuals, transexuals, homosexuals or heterosexuals would invite penal liability;
- (e) members of the LGBT community have at all times been entitled, as other citizens, to the full range of constitutional rights, including the liberties provided for under the Constitution; and
- (f) section 250(1) of the Criminal Code, in its present form, is not violative of any of the plaintiffs' constitutional rights mentioned in the said paragraphs.

Co-defendant No. 1, the Director of Public Prosecutions ("the DPP"), did not file any plea but offered submissions in law. Co-defendant No. 2, who is abiding by the decision of the Court, has, in its plea, taken note of the averments made by the plaintiffs without making any admission to the averments made by them regarding the unconstitutionality of section 250(1) of the Criminal Code.

### **The plaintiffs' case**

With regard to whether section 250(1) breaches section 16 of the Constitution which affords protection against discrimination, the evidence of the plaintiffs is as follows.

### **Plaintiff No. 1**

Plaintiff No. 1 is the founder of the Young Queer Alliance. He was a representative of Gay and Bisexual Men and Boys on the Mauritius Country Coordinating Mechanism which is the coordinating platform against HIV and AIDS. Since the age of around 5 or 7, he discovered that he was attracted to persons of the same sex and despite the fact that he was bullied to change his sexual orientation, he could not do so. He is an irreversible homosexual person who is inclined to commit the act of sodomy with his partner when there is consent. In fact, the act of sodomy is the only way in which he can show his appreciation or love to his partner. Section 250 is like a sword of Damocles which creates restrictions in his relationship with his partner.

Plaintiff No. 1 explained that sex includes the way in which he expresses himself sexually. It includes his sexual orientation which is a core and fundamental part of him as a human being. He feels that he is being discriminated under section 16 of the Constitution in the sense that, unlike heterosexual persons who have so many other means to express themselves romantically, he can only express himself by practising anal sex which is criminalised.

In so far as discrimination and the inclusion of sexual orientation under the definition of “sex” is concerned, plaintiff No. 1 pointed out that there are other laws (the Worker’s Rights Act and the Equal Opportunities Act) which have been enacted which provide for protection against discrimination on the basis of sexual orientation. It is the contention of plaintiff No. 1 that the existence of section 250 discriminates against him on the basis of his sexual orientation.

Under cross-examination, plaintiff No. 1 maintained that section 250 has affected him in his career inasmuch as he is constantly subjected to homophobic attacks by virtue of his sexual orientation and no action is taken by the institution for which he works to protect him. He, however, admitted that he has neither been demoted nor subjected to any disciplinary action. He has also not been prevented by the Ministry where he works to either intervene on national media to advocate for the human rights of the LGBT community or to hold positions within associations.

Plaintiff No. 1 agreed that section 250 targets both homosexuals and heterosexual persons but asserted that section 250 prevents him as a homosexual person to express himself sexually through the only means which he has of doing so by criminalising the act of sodomy.

To a question of Counsel as to whether the harassment and discrimination would stop if section 250 were to be struck out, plaintiff No. 1 explained that, in such a case, he would not need to fear or feel discriminated against and, also, he would not need to be limited in his freedom with regard to section 250.

## **Plaintiff No. 2**

Plaintiff No. 2 stated that he is a gay man. He holds a degree in Microbiology from the University of Mauritius and a Masters Degree in Business Administration with

specialisation in Human Resource Management from the Open University of Mauritius. He has been in a committed relationship with plaintiff No. 1 since 2016. He declared that, being a homosexual person, the only way in which he can practise the sexual act is by anal penetration. Since section 250 criminalises the act of sodomy, by the very fact that he is a homosexual, he is treated as a criminal. Given that section 250 also criminalises the offence of bestiality, plaintiff No. 2 affirms that his sexuality is linked with sexual practices involving animals, which for him is extremely demeaning and degrading. He further asserted that he lives in constant fear of being arrested and subjected to an investigation due to the fact that, at any time, a complaint may be lodged against him.

Plaintiff No. 2 explained that since he is a homosexual, the only way in which he can explore his sexuality is by committing the act of sodomy as compared to heterosexual couples who have alternative ways other than sodomy of exploring their sexuality. Section 250 prevents him from enjoying the physical side of his relationship. He feels that he is discriminated against compared to other couples as section 250 creates a restriction for him.

Under cross-examination, he agreed that section 250 applies to consenting adults and heterosexuals as well; he, however, stressed that heterosexuals have other means of exploring their sexuality. He does not agree that section 250 imposes a complete restriction on heterosexual couples to explore their sexuality.

### **Plaintiff No. 3**

Plaintiff No. 3, who is a graphic designer, stated that he is a homosexual and a member of the Young Queer Alliance. He stated that he is considered as a criminal under section 250 of the Criminal Code. He cannot freely express himself as a homosexual. He feels that he is discriminated against and judged by society. He declared that he wished he could live his life freely, have a partner of his choice and express his love without any restrictions and without being treated as a criminal. He explained that he was once bullied by hospital staff when he went to seek treatment for depression. He was so depressed by that situation that he wanted to commit suicide.

Under cross-examination, Plaintiff No. 3 agreed that he would not know if society would continue to judge him if section 250 were to be repealed.

### **Plaintiff No. 4**

Plaintiff No. 4 stated that he is a Management Support Officer posted at the Ministry of Education. He is the holder of both an undergraduate and postgraduate degree from the University of Mauritius. He is also a member of the Young Queer Alliance and African Queer Youth Initiative. He identifies himself as a homosexual person. He realised that he was a homosexual at the age of 6 as he was attracted to boys. He explained that he was always bullied since his childhood, he was a victim of mockery, harassment and persecution. In the year 2009, he was bullied by his classmates and following that incident he refused to attend his classes. His French teacher later sent him a letter encouraging him to assert himself.

Plaintiff No. 4 affirmed that he feels discriminated in view of section 250 which creates a discrimination between homosexual couples and heterosexual couples. Heterosexual couples have other means of engaging in sexual intercourse as opposed to homosexual couples who can only practise sodomy. He further stated that he is compared to an animal under section 250 as the said section criminalises both bestiality and sodomy.

### **The defendant's case**

Mr Rajkumar Sookun, Minister Counsellor at the Ministry of Foreign Affairs, deposed on behalf of the defendant. He produced a 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 (Document D1). The Resolution was supported by Mauritius. He also produced a Statement on Human rights, sexual orientation and gender identity dated 22 December 2008 which was co-sponsored by Mauritius along with 66 other countries and which was delivered at the United Nations General Assembly (Document D2). It is relevant to reproduce the following excerpts of the Statement –

" .....

3. *We reaffirm the principle of non-discrimination, which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity.*

4. *We are deeply concerned by violations of human rights and fundamental freedoms based on sexual orientation or gender identity.*

.....

10. *We call upon all States and relevant international human rights mechanisms to commit to promote and protect the human rights of all persons, regardless of sexual orientation or gender identity.*
11. ***We urge States to take all the necessary measures, in particular legislative or administrative, to ensure that sexual orientation or gender identity may under no circumstances be the basis for criminal penalties, in particular executions, arrests or detention.***
12. *We urge States to ensure that human rights violations based on sexual orientation or gender identity are investigated and perpetrators held accountable and brought to justice.”*  
[emphasis added]

Mr A. N. Joorawon, Deputy Permanent Secretary at the Ministry of Foreign Affairs produced a Statement made on 7 November 2018 by the Attorney-General and Minister of Justice, Human Rights and Institutional Reforms, Hon. Maneesh Gobin during the 3<sup>rd</sup> Universal Periodic Review at the Palais des Nations in Geneva and another Statement made on 14-15 March 2019 at the same forum (Documents D3 and D4). It is interesting to note that at paragraph 7 of page 25 of Document D3, the Minister states the following

–

“7. LGBT RIGHTS

*The judgment of 5-judge Bench of the Supreme Court of India comes at an opportune time and will go a long way to inspire countries such as Mauritius to have a fresh assessment of their laws on this subject matter. On the criminalisation of the consensual homosexual activity in Mauritius, we have yet to embark on consultations. My Ministry is planning to do so early next year. In this respect, my Ministry is discussing with the Human Dignity Trust and Justice Alliance in the UK, to determine how best to proceed. Suffice it to say at this stage that my Ministry, and my personal Office for that matter, are in consultations with NGOs championing a change in the law.*

*There is however need, in view of the social fabric of the country, for wide sensitization and acceptance among the population at large in the first instance before consideration can be given in due course for the current legislation be to amended.*

.....”

Further, the following can be read at page 10 of Document D4 –

***“Madam Vice President,***

*We have observed that several Members of the HRC have made recommendations pertaining to the protection and advancement of the LGBTI Community, the combating and prohibition of discrimination based on sexual orientation and gender identity and also for the repeal of Section 250 of the Mauritian Criminal Code that criminalize same-sex relationship between consenting adults.*

*Though we have taken note of these various recommendations (115.40-115.54), please rest assured that the Government of Mauritius will take initiatives for the recognition of the rights of LGBTI community. We are proceeding in a holistic manner. Legislative reforms will be brought once there is general consensus taking into consideration the social fabric of the country. We hope to report positively by the 4<sup>th</sup> UPR cycle on this subject matter.*

*At this stage, I can state that my Ministry is indeed committed to advancing the rights of the LGBTI community and with a view to achieving the said general consensus, the Ministry has secured technical assistance from the Human Dignity Trust, one of the members of the Equality & Justice Alliance based in UK. The assistance provided includes the undertaking of sensitization activities, engaging with international networks of experts and champions, and receiving support to develop resources, knowledge and capacity to draft and amend legislation with a view to promoting the human rights of the LGBTI community in Mauritius.”*

The representative of the clerk of the National Assembly, Miss Seetul, also deposed on behalf of the defendant. She stated that the Sexual Offences Bill was introduced in Parliament on 10 April 2007 but the then Attorney-General proposed not to go ahead with the second reading on that date. No reason was provided as to why the Attorney-General decided not to go ahead with the Bill. On 17 April 2007, the Bill was again proposed for a second reading but it was postponed as the Attorney-General decided to set up a select committee to study all the implications in relation to the enactment of the Bill.

The Select Committee was initially set up on 8 May 2007. It met on a number of occasions but in March 2010, following the dissolution of Parliament, the Select Committee lapsed. She produced a copy of the Sexual Offences Bill (Document D5). She stated that clause 24(2) of the Bill makes provision for section 250 of the Criminal Code to be repealed and replaced by another section. A copy of the Parliamentary debates dated 15 November 2011 which sets out the reply of the Prime Minister to a Parliamentary Question (PQ No. B/872) was also produced (Document D6).



It can be seen from the reply to the question as to whether with regard to sexual offences the Government proposes to introduce amendments to the law relating thereto, that the Prime Minister referred to the Resolution on “Human Rights, sexual orientation and gender identity” which was adopted on 17 June 2011 (Document D1) and observed that Mauritius had voted in favour of the Resolution. It can also be gleaned from the reply that the Attorney-General’s Office was at that time finalising a revised version of the Sexual Offences Bill which would be re-introduced in the National Assembly.

## **DISCUSSIONS AND CONCLUSIONS**

We have duly considered the whole evidence on record and the submissions of learned Counsel.

The question as to whether section 250 is discriminatory has been amply discussed in the case of **Ah Seek v. State of Mauritius** [\[2023 SCJ 399\]](#). In that judgment, we have already held that the word “sex” in section 16 of the Constitution should be interpreted as including “*sexual orientation*”. We have also considered the question as to whether section 250(1) of the Criminal Code is discriminatory on the ground of sexual orientation in breach of section 16 of the Constitution.

All the plaintiffs in the present case have asserted that they are homosexuals and that section 250(1) discriminates against them. In this respect, their evidence is to the effect that section 250(1) prevents them as homosexuals from expressing themselves sexually through the only means which they have of doing so by criminalising the act of sodomy. They have explained that, unlike heterosexual persons who can engage in sexual relationship with their partners in other ways, they are unable as homosexuals to express themselves in the only way which is natural to them, i.e, by anal sexual intercourse because section 250(1) criminalises the act of sodomy.

For the reasons given in **Ah Seek** (supra), we find that section 250(1) is discriminatory in its effect against the plaintiffs in breach of section 16 of the Constitution inasmuch as it criminalises the only natural way for the plaintiffs 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, reiterate 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 to exclude such consensual acts from the ambit of section 250(1).

The plaintiffs have also alleged that section 250(1) of the Criminal Code is in breach of sections 1, 3, 4, 9 and 12 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**

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**Judgment delivered by Hon. D. Chan Kan Cheong, Judge and Hon. K. D. Gunesh-Balaghee, Judge**

<b>For Plaintiffs</b>	<b>:</b>	<b>Mr. B. Ramlochund, Attorney-at-Law Mrs P. Balgobin-Bhojrul, of Counsel together with Mr. S. Bhaganooa, of Counsel and Mr. E. Luchmun, of Counsel</b>
<b>For Defendant</b>	<b>:</b>	<b>Ms V. Nirsimloo, Chief State Attorney Ms N. Ramsoondar, Acting Deputy Solicitor General, together with Ms K. K. Domah, Senior State Counsel</b>
<b>For Co-Defendant No.1:</b>		<b>Principal State Attorney Mr J. Muneesamy, Principal State Counsel, together with Ms V. Dawoonauth, State Counsel</b>
<b>For Co-Defendant No.2:</b>		<b>State Attorney Mrs R.B.S. Sohawon-Abdullatif, Principal State Counsel, together with Ms A. Punchoo, State Counsel</b>