

## “Botswana High Court decriminalizes homosexuality”

**Letsweletse Motshidiemang v Attorney General**

**[2019] MAHGB-000591-16**

**Botswana, High Court** [Decision of June 11, 2019.](#)

### **COURT HOLDING**

The Court declared sections 164(a), 164(c) and 165 of the Penal Code of Botswana,<sup>1</sup> which criminalized sexual intercourse amongst individuals of the same sex or gender *ultra vires* (contrary to) sections 3, 9 and 15 of the Constitution and accordingly struck them down. It further severed and removed the word “private” in section 167 of the Penal Code so that the section only covered public indecency.

### **Summary of facts**

An application was brought before the Botswana High Court seeking a declaratory order that sections 164(a), 164(c) and 165 of the Penal Code of Botswana were discriminatory against homosexuals. The application alleged that the provisions in question interfered with the fundamental rights of the applicant, a homosexual man. These sections prohibited and criminalized sexual intercourse and/or attempts thereof between persons of the same sex and/or gender. Sections 164(a) and 164(c) criminalized and deemed as inappropriate, sexual intercourse other than between a man and woman (carnal knowledge against the order of nature). Section 165 dealt with attempts to commit the offence and section 167 prohibited both public and private acts of gross indecency. The Court reviewed information provided by the Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) organization, which was given legal standing in this matter as *amicus curiae* (friend of the Court). LEGABIBO is an organization that represents LGBT persons and undertakes advocacy and lobbying for equal rights for lesbian, gay bisexual and transgender persons. LEGABIBO submitted expert evidence to the effect that the criminalization of same-sex sexual conduct inhibited LGBT persons from accessing health services which was contrary to public interest and public health. It also submitted that the provisions had the effect of exposing LGBT persons to violence. In permitting submissions by LEGABIBO, the Court allowed relevant matters to be brought to its attention which would otherwise have not been raised by the substantive applicant.

### **Issues**

The Court had to determine five issues in this application:

1. Whether sections 164(a), 164(c) and 165 of the Penal Code were *ultra vires* (contrary to) section 86 of the Constitution in so far as the sections were not made for the good order and governance of Botswana;

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<sup>1</sup> Law No 2 of 1964.

2. Whether sections 164(a), 164(c) and 165 of the Penal Code were void for vagueness in that it was not clear as to the exact type of conduct that “carnal knowledge against the order of nature” criminalized;
3. Whether sections 164(a), 164(c) and 165 of the Penal Code were *ultra vires* (contrary to) sections 3 and/or 15 of the Constitution in so far as they discriminated against homosexuals;
4. Whether sections 164(a), 164(c) and 165 of the Penal Code were *ultra vires* (contrary to) section 5 of the Constitution in so far as they interfered with the applicant’s right to liberty; and
5. Whether sections 164(a), 164(c) and 165 of the Penal Code were *ultra vires* (contrary to) section 7 of the Constitution in so far as they interfered with the applicant’s fundamental right not to be subjected to inhuman and degrading treatment or such other treatment?

### **Court’s analysis**

The Court interrogated the connection between law and moral values and found that, while relevant, morality was not decisive in interpreting Constitutional rights. It found that morality in relation to sexual orientation, choice and preference is relative and dependent on perception. Consequently, when dealing with questions of morality, it is important to accept a difference in views as this reflects plurality, diversity, inclusivity and tolerance. The Court recognized the importance of interpreting the Constitution as a living document of progressive human rights that is continuously evolving, as that would not only serve to protect rights in the present but in the future too.

On the question of whether the provisions were void for vagueness, the Court agreed that the Penal Code did not define “carnal knowledge” and “the order of nature.” However, it found that a definition of these terms had been provided in *Gaolete v The State*<sup>2</sup>. In that case, “carnal knowledge” was interpreted to mean sexual intercourse and “against the order of nature” was defined as anal sexual penetration. These definitions were later embraced by the Court of Appeal in *Kanane v The State*,<sup>3</sup> therefore the Court found that they were not void for vagueness.

In dealing with the issue of privacy, the Court found that the challenged provisions impaired the applicant’s right to express his sexuality in private. It found that the applicant had a right to a sphere of private intimacy and autonomy where sexual expression between consenting adults was not harmful to any person. This is protected by rights to liberty, dignity and equality which form the core values of fundamental rights as entrenched in section 3 of the Constitution which also serves as the Bill of Rights. The Court observed that sexual orientation is innate to a human being and is not a fashion statement or posture. It recognized sexual orientation as an important attribute of one’s personality and identity. The Court opined that all persons are entitled to complete autonomy over intimate decisions relating to their personal lives, including choice of partner. It found that the right to liberty encompasses the right to sexual autonomy and that the penal

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<sup>2</sup> [1991] BLR 325, Botswana High Court

<sup>3</sup> 2003(2) BLR 67

provisions interfered with the applicant's right to choose an intimate sexual partner, thereby violating his right to liberty. The Court found that the challenged sections denied the applicant the right to sexual expression in the only way available to him and that it went to the core of his worth as a human being. It considered such a denial, a violation of the applicant's inherent dignity and self-worth.

On the question of whether the provisions were indirectly discriminatory, the Court found that denying the applicant the right to sexual expression in the only way natural and available to him, even if denied to all, was discriminatory in effect. It found that this violated section 15 of the Constitution which provides that "no law shall make any provision that is discriminatory either of itself or in its effect." The Court found that the State had not advanced enough justification for the violation of the applicant's rights. The State had tried to justify the limitation of rights on assertions and speculation that anal sexual penetration is contrary to public morality and public interest. The Court found that whilst public opinion is relevant in matters of constitutional adjudication, it is not determinative. Further, the public morality arguments failed to satisfy the proportionality test. The State had failed to show how criminalizing consensual same sex in private, between consenting adults was in the public interest. The Court agreed with LEGABIBO's submissions that criminalization disproportionately impacts on the lives and dignity of LGBT persons. The Court found that criminalization perpetuates stigma and shame against homosexuals and renders them outcasts. The Court found that there was no compelling state interest necessitating such laws within the context of consensual same-sex intercourse. It found that such penal provisions exceeded the proper ambit and function of criminal law.

## **Conclusion**

The Court found that as a nation there is an ardent need to respect diversity and plurality by being tolerant to minority views and opinions. It found that personal autonomy on matters of sexual preference and choice must be respected. The Court observed that criminalization of love or finding fulfilment in love dilutes compassion and tolerance. It found that the impugned provisions oppress a minority and then target and mark them for an innate attribute that they have no control over, and which they are unable to change. The Court recognized that this was over-regulation of human conduct and expression which impaired and infringed on constitutionally entrenched rights. The Court concluded that sections 164(a), 164(c) and 165 of the Penal Code impaired the applicant's rights to dignity, privacy, liberty (autonomy) and lastly that the provisions were discriminatory in effect. In addition, the Court severed and removed the word "private" from section 167 of the Penal Code. The Court found that such proscription of private conduct violated rights to privacy and liberty.

## **Significance of the case**

The case made a watershed finding that recognized the rights of LGBT persons in Botswana. The Court found that sodomy laws do not serve any useful public purpose and in fact "deserve archival mummification, or better still, a museum peg, shelf or cabinet for archival display." The Court found that the question of private morality and decency, between consenting adults, should not be

the concern of the law. This was an important consideration that essentially challenged the harmful precedent made in the earlier *Kanane* decision which allowed public morality to limit the exercise of rights of LGBT persons. This decision reaffirms the argument by Cook and Ngwena that issues of sexual and reproductive health and rights should not be determined based on religion, morality or sentiment, but rather on the basis of evidence and fact.<sup>4</sup>

Further, the Court determined that “sex” as used in section 3 of the Botswana Constitution includes “sexual orientation.” This interpretation is in line with the findings of the Committee on Economic, Social and Cultural Rights (CESCR), which has noted that the phrase ‘other status’ in human rights instruments must be interpreted broadly to cover sexual minorities, including LGBT persons.<sup>5</sup> Moreover, the decision is consistent with Botswana’s obligations as a state party to the International Covenant on Civil and Political Rights (ICCPR) the Human Rights Committee of which has also stated that laws criminalizing consenting sexual conduct between adults, amount to violations of the rights to privacy and equality.<sup>6</sup> This generous and wide interpretation was critical for ensuring the continued protection of sexual minorities in Botswana beyond this individual case. Given that section 15 of the Constitution of Botswana does not prohibit discrimination on grounds of ‘other status,’ this constitutes a milestone in the recognition of the rights of LGBT persons in the country.

Another significant feature of this case is that the Court distinguished this application from the earlier *Kanane* case, which had established a prejudicial precedent that disregarded the rights of sexual minorities in Botswana.<sup>7</sup> Such a distinction allowed for the Court to circumvent the principle of *stare decisis* (precedent) and apply its mind to the plight of LGBT persons in Botswana. This also enabled the Court to receive evidence on how the challenged provisions were discriminatory in effect, even though facially neutral. This included expert evidence on how violations of human rights of LGBT persons manifest and how the challenged penal provisions contributed to these violations. Additionally, as a protective measure in the event distinguishing a previous case with a current one was challenged, the Court determined that the Court of Appeal in the *Kanane* decision, by stating that “the time had not yet arrived to decriminalize homosexual practices even between consenting... adults in private,” had left a window of opportunity to decriminalize same-sex sexual conduct when imperatives of events and circumstances were conducive. This allowed for evidentiary submissions by LEGABIBO which showcased a material change in attitudes towards, and growing acceptance of, LGBT persons, thereby creating a basis for decriminalization.

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<sup>4</sup> R Cook and C Ngwena ‘Women's access to health care: The legal framework (2006) 94 *International Journal of Gynecology and Obstetrics* 216-225. [Online here.](#)

<sup>5</sup> See UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20. [Online here.](#)

<sup>6</sup> *Toonen v Australia*, Communication No. 488/1992. Office of the United Nations High Commissioner for Human Rights. 31 March 1994 [Online here.](#)

<sup>7</sup> The Court in this case found that gay men and women did not represent a group or class which was shown to require protection under the Constitution.

Finally, faced with arguments that it should exercise restraint and defer to Parliament to make necessary changes in the law, the Court stayed faithful to its role in the protection of human rights and stated that it had the jurisdictional authority to intervene as the ultimate defender of the Constitution.

This case is very significant for the region, where issues relating to same sex relationships are treated cautiously and in a frugal manner. Indeed, in many African countries, there have been renewed attempts at criminalizing same-sex sexual conduct particularly in the wake of the HIV epidemic in the region.<sup>8</sup> Rather than address LGBT health needs, these criminalization attempts have fueled violence and violations of human rights of LGBT people. In response to this challenge, the African Commission on Human and Peoples' Rights in Resolution 275 condemns all forms of violence and human rights abuses against an individual based on their real or imputed sexual orientation or gender identity.<sup>9</sup> This resolution has been hailed as a significant development in protecting and promoting the rights of LGBT persons in the African region. The findings of this case not only affirmed Resolution 275 but showcased a domestic response to regional efforts in combatting discrimination and violence against sexual minorities.

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<sup>8</sup> See PM Eba, 'HIV-specific legislation in sub-Saharan Africa: A comprehensive human rights analysis' (2015) 15 *African Human Rights Law Journal* 224-262

<sup>9</sup> ACHPR/Res.275 (LV) 2014: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity adopted during the *55th Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014*. [Resolution 275 online](#).

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[https://www.law.utoronto.ca/sites/default/files/documents/reprohealth/botswana\\_2019\\_decriminalize\\_homosexuality.pdf](https://www.law.utoronto.ca/sites/default/files/documents/reprohealth/botswana_2019_decriminalize_homosexuality.pdf)