FACTS

The applicant in this case was a homosexual student of the University of Botswana. He believed that being a homosexual was “not something new in his life but that it is something that he has learnt to live with whilst growing up”.[para. 21] At the time of this decision, he continued to be in a sexual relationship with a man. The applicant stated that he has been “taunted and called degrading names because of his disposition”. [para. 24]

The applicant challenged the constitutionality of Sections 164(a) and (c), 165, and 167 of the Penal Code that “proscribe and criminalise sexual intercourse and/or attempt thereof between persons of the same sex and/or gender”, and “both public and private gross indecency”.[para. 3] This is because these sections prohibited him from engaging in sexual intercourse per anum which for him is the only mode possible as a homosexual. Further, the presence of such provisions forced him “to live in secrecy” and not to be open about his sexual orientation to men he is interested in, in the fear that he might face prosecution. It is in light of these facts that this application was filed.

On November 1, 2017, the court admitted the Lesbians, Gays and Bisexuals of Botswana, (LEGABIBO), an organisation working towards “a tolerant social environment where diversity is appreciated”, [para. 14] as amicus curiae in the case.

DECISION OVERVIEW

Judge Leburu delivered the unanimous opinion of the High Court of Botswana.

The underlying issue was whether Sections 164(a) and (c), 165, and 167 of the Penal Code of Botswana were ultra vires the Constitution.

The arguments of the applicant along with the amicus challenging the constitutionality of the provisions were essentially based on 5 prongs. First, that the impugned provisions were “not made for the good order and governance of the Republic of Botswana”. [para. 6] Second, that the provisions are void for vagueness as they do not clearly indicate the nature of conduct being criminalised. Third, that the provisions, despite being ex facie neutral, are discriminatory against homosexuals as they perpetuate negative stigma against them, and prevents them from indulging in sexual intecourse. Fourth, that the provisions interfered with the applicant’s fundamental right to liberty as he is restricted from using his body in the manner he wishes to without harming others. Finally, that the provisions interfered “with the applicant’s fundamental right not to be subjected to inhuman and degrading treatment or other such treatment”[para. 6]. He highlighted that it is thus an unjustified violation of his privacy.

Additionally, the amicus highlighted that the LGBTI community faces greater violence and experience discrimination in accessing health care services, thereby making the criminalisation to be “contrary to public interest and public health”. [para. 17] Further, it added that Section 141 of the Penal Code concerning rape is gender neutral, thus covering non-consensual anal penetration, making the impugned provisions redundant.

The applicant also highlighted Botswana’s readiness to embrace homosexuality by pointing to the Employment Act which explicitly prohibits discrimination based on sexual orientation. He further pointed to the Botswana National Vision 2016 that seeks that Botswana should be a morally tolerant, compassionate, just, and caring nation. He also mentioned studies indicating that 43% of Botswana people aren’t opposed to homosexuality.

In response, the respondents argued for the constitutional validity of the provisions. At the outset it was stated that the provisions are not discriminatory as they apply equally to everyone, highlighting that merely being a homosexual is not criminalised but instead certain acts considered against the order of nature are. On the vagueness argument, the respondents argued that the provisions were abundantly clear as they prohibited anal penetration. In any case, the respondent highlighted that the enjoyment of fundamental rights is also subject to limitations as provided for in Section 15 of the Botswanan constitution. Further, the respondent implored the court to defer the decision making on this point to the Parliament, in line with the principles of separation of powers, and argued that Botswana was “not yet ready to embrace homosexuality” [para. 40] as depicted in the earlier decision in Kanane v The State.

The court contextualised its reasoning by mentioning how same sex intercourse has been decriminalised globally, influenced by arguments similar to those raised in this case. The court also set out the cornerstone of constitutional interpretation, that to interpret it “as a living and dynamic charter of progressive human rights, serving the past, the here and now, as well as the unborn constitutional subjects.” [para. 76] Subsequently the court moved on to addressing the arguments advanced by the parties. On the vagueness argument, relying on the decisions in Gaolete v State and Kanane v The State, it held that the provisions were not vague and had indeed been defined by the court. Then, the court turned to the arguments on privacy and held that the constitutional right to privacy, being a “multifaceted and multi-pronged” [para. 114] right, also includes right to “private intimacy and autonomy”.[para. 127] This right, as per the court, citing the US case of Lawrence v Texas, was violated by the impugned provisions.

The court held that the restriction on sexual autonomy amounted to a violation of the right to liberty. On dignity, the court defined it to mean “worthy of honour and respect”, [para. 145] and deemed it to be a core value of the fundamental rights. It held that sexual intercourse is not merely for the purposes of procreation but is “an expression of love and intimacy”.[para. 150] In this light, the court held that the criminalisation “goes to the core of his worth as a human being” [para. 151] and violates his fundamental right.

The court then turned to an elaborate discussion on the argument on discrimination. The Botswanan Constitution outlawed discrimination based on ‘sex’, which the court interpreted to cover ‘sexual interpretation’, taking help of the UNHRC Communication in Toonen v Australia supporting this interpretation in context of ICCPR which Botswana had also ratified. These provisions thus discriminated against homosexuals who were rendered “unapprehended felon[s]” [para. 169] without any justification about necessity and proportionality of these restrictions by the State. The court further held that such criminalisation also does not serve any public interest by taking recourse to the statements of the President of Botswana, the recently passed Employment (Amendment) Act, and the Botswana National Vision 2016.

Finally, the court pointed out that there existed other provisions in the penal code which criminalised non-consensual sexual acts and acts of indecency done in public. Accordingly, there existed no need for criminalising consensual same-sex sexual intercourse in private.

Consequently, the court deemed Sections 164(a) and (c), and 165 of the Penal Code to be ultra vires the constitution, and ordered the word ‘private’ to be removed from the ambit of Section 167.

SUMMARY AND OUTCOME

The applicant, Letsweletse Motshidiemang, a homosexual challenged the constitutionality of the provisions of the penal code (Sections 164(a) and (c), 165, and 167) criminalising same sex sexual intercourse, as it inhibited him from expressing his sexual emotions in the only mode available, and that it subjected him to significant trauma, and forced him to adopt secrecy about his sexual orientation.

The court struck down Sections 164(a) and (c), and 165 as unconstitutional, and removed ‘private’ indecency from the scope of Section 167. The court held that the provisions violated, *inter alia*, the applicant’s right to privacy, liberty, equality, and dignity, without any reasonable justification. In doing so, it ruled that as against the decision Kanane v The State in 2003, the time was now ripe to decriminalise consensual homosexual practices held in private.