

## Regina v. Noel Bowie

High Court  
Ward C.J.  
13 October 1988

*Gross indecency—s. 155 of the Penal Code—whether s. 155 conflicts with s. 15 of Constitution—if so, whether the whole or any part of s. 155 void—discrimination on grounds of sex.*

### Facts:

The Director of Public Prosecutions(D.P.P.) appealed against the acquittal of the respondent on a charge with gross indecency. The Principal Magistrate acquitted the respondent on the reasoning that section 155 of the Penal Code conflicts with section 15 of the Constitution and is thus void. The D.P.P. appealed on the ground that the magistrate had erred in holding that section 155 of the Penal Code conflicted with section 15 of the Constitution and thereby rendered section 155 of the Penal Code null and void.

### HELD:

- (1) Section 155 of the Penal Code limits the offence to cases of gross indecency by male persons with male persons. There being no similar provision relating to females means that there is inconsistency with section 15 of the Constitution.
- (2) Subsection 9 of section 15 of the Constitution does save certain provisions made under section 9(2) and section 13(2) of the Constitution where such provisions are inconsistent with section 15, but only insofar as those provisions relate to privacy and free association.
- (3) Subsection 9 of Section 15 of the Constitution does not save inconsistency in provisions made in the interests of public morality and public health of which section 155 of the Penal Code is one.
- (4) The intention of the legislature was to make it an offence to indulge in acts of gross indecency.
- (5) The removal of the word “male” in section 155 of the Penal Code would make the offence no longer discriminatory.
- (6) The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive, or whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires*. *Attorney-General for Alberta v. Attorney General for Canada* [1947] A.C. 503 applied.
- (7) The removal of the word “male” does not prevent the remainder of section 155 having a clear and complete meaning.
- (8) The removal of the word “male” in section 155 of the Penal Code corrects the inconsistency with section 15 of the Constitution and also increases the

scope of the felony of gross indecency to include acts of gross indecency between two females or between a male and a female. Under section 5 of the Solomon Islands Independence Order 1978, the section continues to have effect but is to be construed with such modifications as are necessary to bring it into conformity with the Constitution—i.e., in this case, by the deletion of the word “male”.

Appeal allowed. The Court ordered that the case be tried *de novo* before a different magistrate should the respondent return to the jurisdiction.

<sup>50</sup> **Case referred to in judgment:**

*Attorney-General for Alberta v. Attorney-General for Canada* [1947] A.C. 503 at 516

**Counsel:**

*Director of Public Prosecutions* for the Crown  
Accused not present and not represented

**WARD C.J.**

**Judgment:**

<sup>60</sup> This is an appeal by the Director of Public Prosecutions against the learned Principal Magistrate's acquittal of the respondent on a charge of gross indecency contrary to section 155 of the Penal Code. The offence was alleged to have been committed with one Ben Tadabara, referred to by the prosecution as the victim despite the fact that, on its own case, he appears to have been equally involved. He was not charged and was called by the prosecution as one of its five witnesses of the incident that gave rise to the charge.

At the close of the prosecution case, counsel for the respondent submitted that section 155 of the Penal Code conflicted with section 15 of the Constitution and should be considered void to the extent of the conflict. The learned trial Magistrate agreed and concluded his ruling:

<sup>70</sup> I find as a matter of law that section 155 Penal Code conflicts with the Constitution and is void. I need not consider the other points made on the facts and on this ground alone find that there is no case to answer.

Although the record does not show it, he must then have acquitted the accused under section 196 of the Criminal Procedure Code.

The Director of Public Prosecutions appeals against the acquittal on the single ground:

That the learned Magistrate erred in holding that section 155 of the Penal Code conflicted with section 15 of the Constitution and thereby rendering section 155 of the Penal Code null and void.

<sup>80</sup> It would appear to this Court that two questions arise for consideration: does section 155 conflict with the Constitution and, if it does, is the whole or any part of the section void as a result?

The relevant parts of section 15 of the Constitution read:

- 15 (1) Subject to the provisions of subsection (5), (6) and (9) of this section, no law shall make any provision that is discriminatory either of itself or in its effect. . . .
- (4) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, 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 which are not accorded to persons of another such description.

Subsections (5) and (6) have no bearing on this appeal but, in view of the submissions by the Director of Public Prosecutions, I set out subsection (9).

- (9) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (4) of this section may be subjected to any restriction on the rights and freedoms guaranteed by sections 9, 11, 12, 13 and 14 of this Constitution, being such a restriction as is authorised by section 9(2), 11(6), 12(2), 13(2) or 14(3), as the case may be.

Miss Corrin, who represented the respondent at the lower court, was not instructed for the appeal and, as the respondent has left the country, there was no one to put the respondent's case in this Court. However, it is clearly stated in the record of the lower court and can be stated simply.

Section 155 of the Penal Code provides:

155. Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private shall be guilty of a felony, and shall be liable to imprisonment for five years.

Thus the offence is plainly restricted to male persons and the terms of section 15 of the Constitution are clear. No law shall make any provision that, either of itself or in its effect, affords different treatment to different persons attributable wholly or mainly to their sex.

It would be hard to imagine a clearer case. Section 155 limits the offence to cases of gross indecency by male persons with male persons. There is no similar provision relating to females and, thus, there is an inconsistency with section 15.

The Director of Public Prosecutions suggests that, by section 15(9), anything done under sections 9(2) and 13(2) that also breaches section 15 shall not be held to contravene the latter section. In each of those sections there is a reference to provisions made in the interests, *inter alia*, of public morality and public health and those, he says, would cover the offence under section 155. However, if his argument is to succeed, it is necessary to interpret section 15 far too widely. Sections 9(2) and 13(2) exclude certain provisions from the general protection of the rights to privacy and free association, respectively. If such provisions also conflict with section 15,

they are saved by section 15(9) but it only saves those provisions in relation to privacy and free association and cannot be extended to save any provisions made in the interests of public morality and public health generally.

As I have said, I am firmly of the opinion that section 155 is inconsistent with section 15(1) and is not saved by any other provision so I must now consider the effect of that inconsistency.

By section 2 of the Constitution: "if any law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void". There appears to have been no discussion of this aspect in the lower court. The learned magistrate concluded that the section was void in its entirety but gave no reasons for that finding. I feel it is a matter requiring careful examination. The words of section 2 are clear and unambiguous, but the question the Court must answer, and the learned magistrate does not appear to have considered, relates to the effect of the words "to the extent of the inconsistency".

What is the extent of the inconsistency between section 155 and section 15? I would suggest it certainly does not offend section 15 to make it a criminal offence to indulge in acts of gross indecency. That was the intention of the legislature and the Constitution gives it the clear right to pass such laws. The only inconsistency is in the inclusion of the restrictive or, in the terms of section 15, discriminatory word "male". If that word is removed whenever it appears in section 155 the offence would no longer be discriminatory. It would, in fact, read in a similar way to almost every other section in Part XVI of the Code which, for example, makes it an offence for "any person" to commit such acts as rape and buggery without any limitation by reference to the sex of the offender.

What, then, are the powers of the Court in such a case? Can it, having found a single word contravenes section 15, simply delete that word or must it, as the learned magistrate did, declare the whole section void?

There are cases where the inconsistent parts of a section are so inextricably bound up with the remainder that the loss of the part must destroy the whole. In the case of section 155, it is, in my view, severable without such an effect. The test of severability was laid down by the Privy Council in the case of *Attorney-General for Alberta v. Attorney-General for Canada* [1947] A.C. 503 at page 516, and has been applied more than once since then.

The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all.

The removal of the word "male" does not prevent the remainder having a clear and complete meaning and, therefore, being able independently to survive.

The Constitution forms the schedule to the Solomon Islands Independence Order 1978 and became the supreme law of the Solomon Islands when, by section 4, that order came into operation on Independence Day, 7 July 1978.

Section 5 of the Order deals with the laws existing at that time including the Penal Code which was enacted in 1963. It provides:

... the existing laws shall have effect on and after the appointed day (7th July

1978) as if they had been made in pursuance of the Constitution and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with . . . this Order.

As I have said, I am sure that, had the legislature been considering section 155 in pursuance of the Constitution, it would still have made gross indecency a criminal offence. What it would not have done would be to include the discriminatory word "male" and so this Court should regard that word alone as void.

Before leaving this matter, it would be remiss if I did not mention one substantial effect of this decision.

The removal of that one word not only corrects the inconsistency with section 15 of the Constitution but also increases the scope of the felony of gross indecency. As the section is written in the Penal Code, acts of gross indecency between two females or between a male and a female are not a criminal offence. However, if the section is read without the word "male", all such acts will now be covered by the section.

One cannot escape the irony that, by invoking the protective provisions of the Constitution in the aid of part of the community, the population as a whole is now subject to a criminal offence that had not affected it hitherto but, ironical though it is, I feel that is the correct result. It may well be that, in 1963, the legislature did not even consider the question of acts of gross indecency between females but, had the matter been raised and considered a reasonable possibility, I am certain the reaction would have been to widen the offence to include them rather than abandon all attempts to make any such conduct criminal.

However, in all the circumstances, Parliament may feel it is a wise precaution to consider amending section 155 accordingly before any such charges are laid.

For all these reasons, this appeal is allowed and the case remitted to the Magistrates' Court. As both the respondent and the magistrate have left the country since this case, I order that it be tried *de novo* by another magistrate should the respondent return to the jurisdiction.

Reported by M.L.

#### Editor's Note:

Since this decision, section 155 of the Penal Code has been amended by the Penal Code (Amendment) Act 1990. This repeals section 155 and replaces it with the following new section:

Indecent practices  
between persons of  
the same sex

155. Any person who, whether in public or private —
- (a) commits any act of gross indecency with another of the same sex;
  - (b) procures another of the same sex to commit any act of gross indecency; or
  - (c) attempts to procure the commission of any act of gross indecency by persons of the same sex,
- shall be guilty of a felony and be liable to imprisonment for five years.