



Suresh Kumar Koushal and another v. Naz Foundation and others

Civil Appeal No. 10972 of 2013

Country: India

Region: Asia

Year: 2013

Court: Supreme Court

Health Topics: HIV/AIDS, Sexual and reproductive health

Human Rights: Freedom from discrimination, Right to bodily integrity, Right to life, Right to privacy

Facts

Section 377 of the Indian Penal Code, 1860 (the Section) penalized voluntary “carnal intercourse against the order of nature with any man, woman or animal” and described them as “unnatural offences.” An offence under this Section was non-bailable and carried a maximum punishment of life imprisonment.

Naz Foundation, the Petitioner, was an NGO working in the field of HIV/AIDS intervention and prevention. It filed a public interest litigation in the Delhi High Court, successfully challenging the constitutional validity of the Section (the lower court ruling is linked in additional documents).

The ruling was appealed to the Supreme Court, which granted leave and accepted numerous interlocutory applications.

Decision and Reasoning

The Court found that Section 377 was constitutional.

The Court begins noting that pre-Constitution laws, since parliament has had an opportunity to remove them and hasn't, should be given a presumption of constitutionality equal to a post-Constitution law.

The use of the presumption of constitutionality also includes the steps that a court should “read down” a law in order to save it and that a court should sever any unconstitutional parts to save the constitutional portion. The Court concludes that “unless a clear constitutional violation is proved” a court cannot strike down a law simply because of disuse or changing social norms.

The Court determined the constitutionality of all parts of the Section and upheld it all. The Court agreed that certain sexual acts are “against the order of nature.” After assessing a number of cases, primarily focused on non-consensual sex or with children, the Court said that it's impossible to make a uniform test to determine which acts are “against the order of nature.” Out of concern that courts might not as vigorously seek justice for the victims in consensual cases between adults, the Court determined that the Section should apply to all ages regardless of consent.

The Court rejected the conclusion that the law discriminates against LGBT people. The Court found the respondent hadn't provided sufficient evidence of discrimination by public authorities against LGBT people, and found that the law merely divides people into two classes depending on whether they engage in “carnal intercourse against the order of nature.” The Court also noted that the LGBT community is a “miniscule fraction of the country's population” and is not a sound reason for finding the Section ultra vires under Articles 14, 15, and 21.

The Court found that the statute neither violated substantive due process, nor the right to life or privacy in Article 21 of the constitution as nothing in the law requires the harassment and persecution of the LGBT community that the respondent argues.

Finally, the Court criticizes the High Court for overly relying on foreign judgments.

Decision Excerpts

“38. ... No uniform test can be culled out to classify acts as “carnal intercourse against the order of nature”. In our opinion the acts which fall within the ambit of the section can only be determined with reference to the act itself and the circumstances in which it is executed. All the aforementioned cases refer to non consensual and markedly coercive situations and the keenness of the court in bringing justice to the victims who were either women or children cannot be discounted while analyzing the manner in which the section has been interpreted. We are apprehensive of whether the Court would rule similarly in a case of proved consensual intercourse between adults. Hence it is difficult to prepare a list of acts which would be covered by the section. Nonetheless in light of the plain meaning and legislative history of the section, we hold that Section 377 IPC would apply irrespective of age and consent.”

“42. Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the later [sic] category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. What Section 377 does is merely to define the particular offence and prescribe punishment for the same which can be awarded if in the trial conducted in accordance with the provisions of the Code of Criminal Procedure and other statutes of the same family the person is found guilty. Therefore, the High Court was not right in declaring Section 377 IPC ultra vires Articles 14 and 15 of the Constitution.”

51. Respondent No.1 attacked Section 377 IPC on the ground that the same has been used to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community. In our opinion, this treatment is neither mandated by the section nor condoned by it and the mere fact that the section is misused by police authorities and others is not a reflection of the vires of the section. It might be a relevant factor for the Legislature to consider while judging the desirability of amending Section 377 IPC.”