

CAJO CONFERENCE

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Introduction

Today, I'll be presenting on the findings of research I conducted for the University of the West Indies Law Faculty Rights Advocacy Project. The research project examined homicide cases involving lesbian, gay, bisexual, and transgender (LGBT) persons in the Commonwealth Caribbean. This involved analysis of appellate judgments from across the region. Our resulting findings were centred on the development of the law on defences to murder in cases where gay or lesbian persons are the victims of homicide.

Recent judicial decisions in the Commonwealth Caribbean in cases concerning the killing of gay men have ignited debate about the application of defences to homicide in the Caribbean. The first was a decision in *Marcano v The State* in which the Court of Appeal of Trinidad and Tobago accepted a defence of provocation and the more recent case was a 2012 judgment of the Eastern Caribbean Court of Appeal in *Philbert v The State* in which the defendant successfully raised the defence of justifiable homicide. In each case, the defendant's argument was founded on a 'homosexual advance defence', that is, a defence to murder which is based on an allegation that the defendant killed the victim in response to the victim making an unwanted same-sex sexual advance.

Rights Context

Our analysis of the homicide cases took place within the context of the rights and obligations arising under the constitutions of the Commonwealth Caribbean as well as the obligations arising under the rule of law and under the judicial guidelines of the region. In our study it became apparent that the two groups of rights (and corresponding obligations) that were most implicated by the homicide cases were the rights to life and equality.

Right to Life

As we are aware, all Commonwealth Caribbean Constitutions contain a provision regarding the right to life. There are two current formulations, one of which appears in section 4(a) of the Constitution of Trinidad and Tobago, for instance, which recognizes 'the right of the individual to life, liberty, security of the person ... and the right not to be deprived thereof except by due process of law'. An alternative formulation of the right is found in other Constitutions such as the Constitution of Barbados, which states that '[n]o person shall be deprived of his life intentionally save in the execution of the sentence of a court in respect of an offence ... of which

he has been convicted.’ The practical implications of this right (in either formulation), as has been recognized by judges and commentators, are that it places responsibilities on the state to safeguard life through the legislative and administrative framework. This would require that the state and its institutions (including the courts) promulgate and enforce criminal laws that deter the commission of offences against the person.

Of course, the constitutions do permit limitations on the right to life. In most Caribbean constitutions the right may be limited by the legally sanctioned use of force, which is ‘reasonably justifiable in the circumstances’.¹ In Jamaica, the permissible limitation appears narrower, only referring to such limitations as are ‘demonstrably justified in a free and democratic society’.²

Right to Equality

Turning to the right to equality, all Commonwealth Caribbean jurisdictions contain constitutional provisions that guarantee the right to equality and prohibit discrimination. The constitutional provisions take different forms but they all prohibit discriminatory laws and discrimination by institutions of the state in the performance of their functions. One set of provisions guarantees the right to equality before the law, while the second set prohibits discrimination on specified grounds.

There are grounds for arguing that in all the Constitutions, the equality and non-discrimination sections extend to LGBT persons. These grounds are particularly strong in jurisdictions in which there is an express constitutional protection of equality before the law (that is, Jamaica, Trinidad and Tobago and Guyana). These sections are broad enough to prohibit discrimination on the ground of sexual orientation. The ‘equality before the law’ provisions contain no limitation as to the classes of persons to which the right to equality applies. Accordingly, for instance, a claimant would not need to establish discrimination on the ground of sexual orientation in particular in order to establish a violation of his right to equality before the law. This is the interpretation that the Court of Appeal of Trinidad and Tobago has given to the section in the Trinidadian Constitution³ and the corresponding sections in other jurisdictions should be similarly interpreted.

¹ See, eg, s 4(2), Constitution of Antigua and Barbuda, s 4(2), Constitution of Belize.

² See s 13(2), Constitution of Jamaica 1962.

³ (1980) 32 WIR 395 (CA, T&T) 424-27 (Kelsick JA).

Attendant upon the right to equality are duties on the state and state institutions, including Parliament, the courts and public prosecutors, to respect, protect and fulfil the right to equality.⁴ This includes an obligation to take into account the on the results or impact of a legal rule, and the legal and social context in which the rule operates.⁵ It is this understanding of equality that is also reflected in some of the judicial codes and guidelines in the region. Accordingly, the Judicial Codes of the Caribbean Court of Justice and Jamaica remind judges to be aware of the diversity that arises from differences in society arising from sexual orientation and other status grounds.

Summary and Application of Criminal Laws

With that rights context in mind, I will now speak briefly about the defences to murder used in killings of LGBT persons and measure this against our constitutional rights framework. The two defences that were most prominent in the cases examined were justifiable homicide and provocation.

Justifiable homicide is an ancient defence, which entitles a defendant to use lethal force in a number of circumstances, including where the homicide is committed in prevention of ‘a forcible and atrocious crime’.⁶ It has been held that an advance with the intent to ‘commit sodomy’ constitutes a forcible and atrocious crime. Justifiable homicide is a complete defence to murder; accordingly, if the judge(s) or jury accepts that the facts support the defence of justifiable homicide, the result is acquittal of the defendant. The second defence that is relevant to our discussion is the defence of provocation. Unlike justifiable homicide, provocation is only acts as a *partial* defence to murder. If the facts support the defence, the resultant verdict is one of manslaughter, which usually attracts a variable term of imprisonment. There are two elements of the defence of provocation. The first is that ‘the defendant was provoked into losing his self-control’ and second, that the provocation was such that it was capable of causing the ‘reasonable man’ to do as the defendant did (that is, it must have been sufficient to cause the

⁴ Henry Shue, *Basic Rights* (Princeton University Press 1980) 51; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2009) 69.

⁵ Fredman, *Discrimination Law* (n 42) 2; Forell (n 42) 29.

⁶ J C Smith and Brian Hogan, ‘Criminal Law’ (Butterworths 1965 1st edn) , 230-32; T R Fitzwalter Butler and Marston Garsia, ‘Archbold Pleading, Evidence and Practice in Criminal Cases’ (Sweet & Maxwell, 1966 36th edn) §2550.

reasonable man to lose self-control and kill with the intention to kill or to cause grievous bodily harm).⁷

Right to Life

Justifiable homicide is an ancient defence, most authoritatively articulated in the 18th century. So it was these old authorities that were featured in *Bartley v The Queen*, a 1969 decision of the Jamaican Court of Appeal, which was the first reported Caribbean case in which a defendant successfully raised the defence of justifiable homicide in response to a same-sex advance.

Bartley was relied upon in the more recent *Philbert* case out of Dominica. The appellant Philbert and the deceased Joseph St. Louis were in St. Louis's room on the night of the killing. It was alleged that St. Louis made several advances to toward Philbert, whereupon the Philbert pushed St. Louis off the bed, and kicked him to death. At trial, Philbert was convicted of murder and sentenced to 18 years imprisonment. But the Court of Appeal overturned the conviction and acquitted him, finding that the trial judge failed to give adequate directions on justifiable homicide.

There are two aspects of the application of this defence that raise issues relating to the right to life. The first aspect concerns the degree of force permitted in rejecting a same-sex advance. On a fundamental level, the courts do not seem to question the reasonableness of holding that the use of lethal force in response to a non-lethal act was justifiable. Further, the judges have repeatedly held that, in response to a same-sex advance/attack, the degree of force used is irrelevant. In the course of delivering the judgment acquitting the appellant Philbert, Edwards J.A. spoke directly to the necessity and reasonableness of use of force, stating that the law does not 'require the degree of force used by the appellant in repelling the attack to be proportionate to the seriousness of the attack'⁸ And he proceeded to hold that

*... The appellant in such a case does not have to show that it was necessary for him to use ... deadly force. Necessity for using deadly force against the perpetrator is presumed by the law in such circumstances.*⁹

⁷ *Attorney General v Holley* [2005] 2 AC 580 (PC, Jersey) [5]-[6]; Jeremy Horder, *Provocation and Responsibility* (Oxford University Press 1992) 1.

⁸ *Philbert* (n) [32].

⁹ *ibid* [33] (emphasis added).

Designed in this manner, the defence of justifiable homicide offends against the right to life because the defence shows scant regard for the lives of those who are gay. The defence fails to meet the requirements of the limitations permitted by the Constitution because it does not incorporate a requirement of reasonableness or proportionality, and therefore, cannot be considered 'reasonably' or 'demonstrably justified'.

Judges in the Commonwealth Caribbean have generally developed defences to murder in a manner that emphasises the principle of proportionality. We see that, for example, in the law on self-defence. However, the defence of justifiable homicide does not allow for observance of the principle that the use of force should only be justified to the extent that it satisfies requirements of reasonableness or proportionality.

Right to Equality

The homicide cases involving LGBT persons are also in tension with the right to equality. The defence of justifiable homicide to prevent a 'forcible and atrocious crime' is inconsistent with Caribbean constitutions because in its modern instantiation in the Caribbean, the defence is almost exclusively used to defend the killing of gay men. In fact, the only Caribbean appellate cases that we have located in which the defence of justifiable homicide was successful were those in which the deceased was a gay man. Accordingly, though the defence is ostensibly neutral on the surface, it has a clear discriminatory impact on gay men. Further, rather than alleviating the impact of the prejudice against LGBT persons in society, this law suggests that gay men are worthy of not only opprobrium, but also death.

The law on provocation, as applied in homicide cases involving LGBT persons is also inconsistent with the court's duty to respect and protect equality. The provocation defence is applied in a manner that treats gay victims differently from other victims. The problems lie in the use of a non-violent sexual advance as an acceptable basis for the defence of provocation and in the suggestion in some cases that the success of the defence is due to the fact that the sexual advance was made a member of the same sex as the defendant. This, therefore, indicates that the defence operates with a discriminatory impact on gay men, which is contrary to the constitutional guarantees of equality.¹⁰ The *Marcano* case from Trinidad presents a useful example. The deceased, Christopher Lynch, was killed by the Marcano and Marcano's friend Nairoon. There was evidence that on the night of the homicide, Marcano and Nairoon were at Lynch's home, where it was alleged that Lynch made a sexual advance towards Nairoon, which

¹⁰ See Part 2; *Wade v Roches* (n 44) [36]-[38].

Nairoon rejected. Marcano stated that an argument developed and he then held Lynch while Nairoon chopped Lynch to death. Marcano argued that his actions were in defence of his friend Nairoon. At trial, the jury found Marcano guilty of murder. He appealed against his conviction, and the Court of Appeal allowed his appeal, finding that the judge should have left the issue of provocation to the jury.

In the course of delivering the judgment of the Court of Appeal acquitting Marcano, the Chief Justice appealed to the sentiment of repulsion against what he referred to as the ‘unnatural’ practices of gay men. In the view of the CJ, ‘[t]his is a case where...the acts themselves were so unnatural as to create in the minds of any right-thinking person that they would have caused’ the ‘serious reaction’ that ‘these boys’ had.¹¹ The court repeatedly stated that the defendants would have been repulsed by the deceased’s ‘overtures’, that ‘there could be nothing more reprehensible’ and ‘[t]hat is the sort of thing that sends people crazy, in a frenzy’.¹²

In addition, the characterizations of gay men in the Caribbean justifiable homicide cases have implications for the right to equality. We see gay men being represented as inherent threats to masculinity and society, and as criminals. The Court of Appeal in the *Philbert* case, for instance, referred to a deceased gay man as ‘the perpetrator’,¹³ hence casting the deceased, who would ordinarily be conceived of as ‘the victim’ in the role of ‘the criminal’. This presents the danger of legitimization of prejudice against LGBT persons and a failure to take account of societal differences in the treatment of LGBT persons.

Conclusion

If the criminal law is to reflect the rights and obligations emanating from Caribbean Constitutions, it must resolve issues concerning defences to charges of murder in a manner that respects the life and equal worth of all individuals in the state. This respect is undermined so long as we continue to permit defences to murder based on non-violent sexual advances. Accordingly, it seems advisable that we consider abolishing the defence of justifiable homicide since this defence is only successfully invoked in the Caribbean to justify killing in response to a same-sex advance. It also seems advisable that we reform the law on provocation to exclude the

¹¹ *Marcano* (n) [20]-[21].

¹² *Marcano* (n 70) 7-8, 10.

¹³ *Philbert* (n 55) [33].

availability of non-violent sexual advances (including same-sex sexual advances) as a basis for a defence of provocation.