

Secretary for Justice v Yau Yuk Lung

[2007] 3 HKLRD 903

The Respondents were charged with having committed buggery with each other otherwise than in private, contrary to section 118F(1) of the Crimes Ordinance (Cap. 200). It was alleged that they had developed a liaison over the Internet and that they committed the act in a private car parked beside a public road.

The Crimes Ordinance provides that “A man who commits buggery with another man otherwise than in private shall be guilty of an offence”. The Magistrate held that section 118F(1) was unconstitutional and dismissed the charges. The Secretary for Justice’s appeal by way of case stated was dismissed. He appealed to the Court of Final Appeal.

The Court of Final Appeal dismissed the appeal made by the Secretary for Justice. Chief Justice Li held that equality before the law was a fundamental human right and was in essence the right not to be discriminated against. Discrimination on the ground of sexual orientation was plainly unconstitutional under both Article 25 of the Basic Law and Article 22 of the Hong Kong Bill of Rights, as sexual orientation was within the phrase “other status”.

Chief Justice Li further held that in general, the law should accord identical treatment to comparable situations. Section 118F(1) was, however, discriminatory and unconstitutional. First, section 118F(1) gave rise to differential treatment on the ground of sexual orientation. All persons, irrespective of sexual orientation, were subject to the common law offence of committing an act outraging public decency. However, homosexuals alone were subject to the statutory offence in section 118F(1), whilst heterosexuals were subject to no comparable criminal liability in relation to vaginal intercourse or buggery otherwise than in private. Second, no genuine need for the differential treatment had been shown. It had not been established that the differential treatment pursued any legitimate aim.