

PROGRESSING EQUALITY IN SRI LANKA: A CASE REVIEW





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“When iProbono's Equality Law Program was established in Sri Lanka, there was a general assumption in the island and the wider world that prosecutions against LGBT people were almost non-existent here and that sections 365 and 365A of the penal code (which criminalised same-sex sexual relations) was a benign piece of legislation. I was guilty of assuming that myself.

However, since we established the Program in Sri Lanka, it has become abundantly clear that discrimination and prosecutions against LGBT people are not only common but that the violation of our bodies (through forced anal and vaginal examinations by Judicial Medical Officers and Court ordered sexual health screenings) was systematic and entrenched in Sri Lanka's justice system.

Through our strategic case interventions and advocacy, our work has not only given hope to LGBT Sri Lankans that one day we may see justice but has also helped redefine the national narrative and discourse on LGBT issues. Our partnership with the media and relationship with the Government has directed more focus on the injustices faced by the LGBT community. I am confident that if we continue in our path of pushing the boundaries of justice, one day all Sri Lankans may live in a more just and equitable country.”

- Aritha Wickramasinghe

Sri Lanka continues to follow archaic colonial laws that discriminate those deemed to be going against “nature’s order” through its Penal Code and other legislations. The stories that come to light through this case summary highlight the lives of diverse individuals who are discriminated against in various aspects of their lives but are tied together singularly by the fact that they were targeted based on their sexual orientation. With ambiguous laws that do not offer equal protection as they should, and provide leeway for authorities to use the loopholes in the justice system to victimise persons in the LGBT+ community, the country faces a long struggle towards decriminalisation of non-heterosexual relations. Religion, tradition and culture remain strong opposers.

As we strive for equal rights in Sri Lanka, we uncover stories of violence, invasion of bodies and minds, and dehumanisation of vulnerable people who merely seek human dignity and acceptance. The cases included in this review range from workplace discrimination and cyberbullying to the criminalisation of consensual sexual relations. Some of the cases recorded are still ongoing, others have already brought about positive change for the community. iProbono hopes to garner support towards building societies across South Asia that treat all its people equally, regardless of their gender identity or sexual orientation. We will continue to work towards creating safe spaces that do not discriminate against people for being themselves and loving who they love.

SEXUAL HARASSMENT BASED ON SEXUAL ORIENTATION

AUGUST 2018

Background: A cello player (hereinafter “SC”), was unfairly dismissed from his position based on his sexual orientation as a gay man. SC met one of the employees of a reputable Hotel in Colombo on a gay dating app and they arranged to meet at the hotel a few hours after his contracted playing hours. When SC returned to play at the hotel, he was invited by the F&B Manager (RS) for a coffee. He was taken to the security room of the hotel and subjected to degrading treatment. The hotel’s security officer/ RS asked him to confess his sexual orientation and sexual preferences and recorded SC on camera without his consent. SC’s statements were written down and he was coerced to sign the paper. He was dismissed from his position.

Intervention by iProbono: SC approached iProbono and the team wrote to the General Manager and Public Relations Officer of the relevant hotel stating that SC’s treatment was unlawful, violated his fundamental rights, breached employment law, and that his confinement in the security room amounted to criminal detention. iProbono’s lawyers arranged a meeting with the General Manager of the hotel to seek a settlement of the matter as desired by SC. Outcomes: The case was settled with the reinstatement of SC’s contract with the hotel. iProbono lawyers reviewed and helped draft the new contract for SC.

HARASSMENT OF A TRANSGENDER MAN

JULY 2019

Background: An FTM transgender man (hereinafter “D”) who had completed his legal transition and has a gender recognition certificate, was subjected to police harassment.

D was in a relationship with a cis woman. Following his transition, they got legally married in April 2019. His wife’s parents were against their relationship and filed a police complaint against him. D was arrested and verbally abused. The police challenged his gender transition and the judicial medical officer subjected him to a virginity test. The police later commenced a prosecution against D charging him for impersonation and unnatural sex.

Intervention by iProbono: iProbono lawyers represented D at the Magistrates Court and challenged the police case. The Magistrate recognised D’s gender recognition certificate and the validity of his marriage. It was also accepted that no surgical interventions are required to legally recognise someone’s gender identity under Sri Lankan law. The case was dismissed.

Outcome: Although this case was at a lower court level, it was groundbreaking in several ways:

1. The court recognised the gender transition of a person and their gender recognition certificate.
2. Judicial acknowledgement that surgical interventions are not necessary to change one's gender and that biological sex at birth can be different from a person's gender identity.
3. A marriage between a transgender man and a cisgender woman is considered legally valid.

WRONGFUL ARREST OF TWO GAY MEN FOR PRIVATE SEXUAL CONDUCT

MAY 2019

Background: Two gay men were wrongfully detained on the charges of sexual harassment and gross indecency by the police. Two men (hereinafter “S” and “D”), recorded themselves engaging in same-sex sexual relations inside their home on the mobile phone of one of the accused. D was 16 at the time of the recording, whereas S was 17. D’s uncle came across the video and reported it to the police. The police arrested S as he was now above 18 years. The police also arrested another man (hereinafter “T”) for allegedly having sexual relations with D. S and T were both charged under sections 365A which prohibits gross indecency and section 345 of the Penal Code that penalises sexual harassment. The accused were kept in police custody for five days.

Intervention by iProbono: The lawyer representing the accused at the time had requested the Magistrate to issue an order to settle the matter out of court. Considering that the offence is primarily a victimless crime. The Magistrate denied the request but released the accused on bail. iProbono was then consulted by the parents of S to represent S in the matter. A subsequent hearing was held in October 2019. In addition to the trial, iProbono prepared a letter to the Attorney General and Former Deputy Solicitor General to request intervention in this matter since the AG's Office had made statements that sections 365 and 365A cannot be used in a manner that targets the LGBT+ community and discriminated against them. iProbono did not receive a response to their letter.

Outcome: The case was postponed but is ongoing in courts.



Photo Credit: AP/Paul Sancya

DISCRIMINATION OF A MAN BASED ON HIS SEXUAL ORIENTATION

SEPTEMBER 2019

Background: A Major in the Volunteer Force of the Sri Lankan Army (hereinafter “RK”) was wrongfully dismissed from service based on his sexual orientation.

RK was not open about his sexuality during his service and that did not affect his duties in any way. In 2011, he visited the “Doctor B Cosmetic Skin Clinic” where he met Dr B. He was given an appointment at Dr B’s home clinic to undergo a minor out-patient procedure where he was drugged by Dr B. While he was in a near-comatose state, Dr B performed fellatio on him without his consent. Dr B’s assistant purportedly video recorded the incident. After regaining consciousness, RK confronted Dr B and a minor altercation took place. He then made a formal complaint to the police based on which Dr B was arrested.

RK was placed under investigation by the Army when the police commenced their enquiry. He was subsequently dishonourably discharged from service because he admitted to being homosexual. He was not given his pension and the Army had also withheld a medal he received for bravery. The Army also maliciously spread false rumours about him to potential employers in the public sector advising them not to employ him as he was gay.



Photo Credit: AP

RK filed a case against his dismissal by the army several years ago. However, as the President has signed his dismissal it is immune from litigation. The court also held that RK took an unreasonably long time to challenge his dismissal.

Intervention by iProbono: In September 2019, RK and iProbono appeared before the Public Petitions Committee in Parliament and presented his grievances to the Committee. Representatives of the Army were present. At the hearing, it also came to light that the Army

had miscalculated the Major's service days making him ineligible for his pension. However, the Committee held that since the Court of Appeal had dismissed the case, they must analyse whether the Committee had the power to make new decisions regarding the same suit.

Outcome: It was highlighted out that the case was dismissed only on technical grounds. The hearing is postponed and ongoing.

ABUSE FACED BY A WOMAN BASED ON HER SEXUAL ORIENTATION

DECEMBER 2019

Background: A 17-year-old woman (hereinafter "R") was physically, verbally, emotionally, and sexually assaulted by her father for being a lesbian. She was subjected to regular physical abuse including being hit on the head with a spanner. She also states that her father sexually abused her by lifting his sarong to expose his genitals. The police advised our lawyers and R that they will be compelled to arrest both her parents due to the gravity of the matter if the report was filed. As R has two younger siblings, she decided to not press charges provided that her parents respect her decision to live away from home. Her parents earlier filed a kidnapping complaint against Women in Need. This complaint was withdrawn after the police notification of the matter.

Intervention by iProbono: iProbono lawyers supported R with advice until she turned 18. After that our lawyers facilitated her removal from the premises, prepared a police report, undertook a medical checkup, and then took her to a safe house run by the NGO Women in Need. As R is now 18, she lives away from her parents' home with her female partner. She does not want to live with her parents again. iProbono also looked at how they can support R's education going forward as she was due to sit for her Advanced Levels exams in 2019. Since R's parents are lawyers, iProbono filed an official complaint with the Bar Association.

Outcome: The President of the Bar Association reprimanded R's parents and threatened action against them should they continue to harass her. However, no formal enquiry could take place against R's parents as no official police complaint was filed against them.



Photo Credit: Telegraph UK

HATE CAMPAIGN AGAINST LGBT+ COMMUNITY CENTRED AROUND A GAY MALE MODEL

MAY 2020

Background: An openly gay male model (hereinafter “RD”), faced threats to his physical safety and life from an organised hate group led by a Youtuber named Heshitha Bulathsinhala (HB). The hate group was compiling a list of LGBT+ persons and planning concerted attacks on the LGBT+ community. This group sent several threatening messages to RD and uploaded videos demonising RD on HB’s YouTube channel. HB falsely accused RD and other LGBT+ persons of paedophilia claiming that they are promoting homosexuality among children. RD’s address was shared amongst members of this group, compromising his and his family’s safety.

Intervention by iProbono: iProbono rallied other activist groups to draft the necessary letters and collect evidence to assist RD. On 13 May 2020, with the assistance of iProbono lawyers, RD attempted to file an official complaint with the Cyber Crimes Unit of the Criminal Investigations Department against the group. The CID refused to accept the complaint based on his sexual orientation, stating that supporting LGBT+ victims might come across to the public as the police supporting homosexuality. iProbono also assisted in filing a complaint with the Human Rights Commission of Sri Lanka against the relevant CID officers for gross discrimination.

Outcome: We are awaiting developments on the HRC complaint. The advocacy group proved to be particularly useful for organising support, connections, and information from seasoned activists to handle such emergencies. This network will continue to collaborate with us.

PROSECUTION AGAINST A SWEDISH NATIONAL AND TWO SRI LANKANS FOR SAME-SEX SEXUAL RELATIONS

JULY 2020

Background: A Swedish male (hereinafter “MH”) and two Sri Lankan nationals were arrested by the police for consensual same-sex relations. The police had raided the hotel room the three accused had met up in and arrested them for homosexuality. The Sri Lankan nationals were allegedly whipped by wires by the police. All the accused were also subjected to forced anal examinations by the Judicial Medical Officers and a Court ordered sexual health screening. One of the accused was revealed to be HIV+ in court.

Intervention by iProbono: We are currently assisting the lawyer of the accused. iProbono has provided useful legal documents, auxiliary case decisions and other statements that can be used to gain a fair decision for the accused. The case has been consistently postponed as the police have no evidence of the alleged sexual relations.

iProbono also supported an investigation by the media on forced anal and vaginal examinations by Judicial Medical Officers and the Police against LGBT people. Following the outcry following the iProbono supported investigation, Sri Lanka's Minister of Justice issued a statement condemning anal and vaginal examination of LGBT people and any form of discrimination against LGBT people. The Justice Ministry statement was following several calls by the Justice Ministry with iProbono on the allegations. iProbono provided details of the cases to the Justice Ministry. Following the Justice Ministry statement, iProbono lawyers are assisting the accused in the case to file a complaint with the Human Rights Commission of Sri Lanka.



Photo Credit: istock