

MANU/KE/1319/2018

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

WP(Crl.) No. 215 of 2018

Decided On: 12.06.2018

Appellants: **Tessy James**
Vs.

Respondent: **The Director General of Police, Thiruvananthapuram and Ors.**

Hon'ble Judges/Coram:

V. Chitambaresh and K.P. Jyothindranath, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Siji Antony, P.M. Joseph and P.S. Sajeev, Advs

For Respondents/Defendant: K.B. Ramanand, Senior Government Pleader and A.K. Maya Krishnan, Adv. for Detenu

***Case Note:**

Constitution of India - Article 19 (1) (8)--Freedom of speech and expression guaranteed under Article 19 (1) (a) takes within its sweep, the right of a person to live as a transgender--Transgender has the right to decide for himself and he has the right to associate with like-minded people and cannot be compelled to be at his parental home--Article 21.

Petitioner is the mother of a major son and approached the High Court seeking the issue of a writ of Habeas Corpus to produce son her who is allegedly detained by some transgenders and to set him at liberty. Petitioner stated that her son had left his parental home on 9-5-2018 and has not returned so far. On the basis of the complaint given to the police, the alleged detenu was produced before the Magistrate who permitted the detenu to go on his own after finding that he is a major person who is competent to take decisions on his own. The petitioner points out that her son's life is at risk as he is going about dressed as a woman, Petitioner also pointed out the history of psychiatric treatment taken by the alleged detenu and requested the court to send him for psychiatric evaluation. The alleged detenu who appeared before the court dressed as a female asserted that he is a transgender by birth and does not suffer from any sort of mental aberration as alleged by the petitioner. The court directed medical/psychological evaluation of the detenu and found that the orientation of the detenu was normal and there is no thought disorder or hallucinations or inappropriate mood indicative of mental incompetence. Dismissing the writ petition, the court held that transgenders have the right to decide for themselves and the detenu has the right to associate with like-minded people and cannot be compelled to be at his parental home as desired by the petitioner;

Held:

The Supreme Court has held that the transgenders are neither male nor female who however fall within the expression 'person' entitled to all rights recognized by law. The freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution of India takes within its sweep the right of a person to live as a transgender. The detenu has undoubtedly the right to wander about or associate with like-minded people and cannot be compelled to be at his parental home as wished by the petitioner who is before us with folded hands and tearful eyes. [6]

JUDGMENT

V. Chitambaresh, J.

"There's a gender in your brain and a gender in your body. For 99 percent of people, those things are in alignment. For transgender people, they're mismatched. That's all it is. It's not complicated, it's not a neurosis. It's a mix-up. It's a birth defect, like a cleft palate."

said Chaz Salvatore Bono who himself was a transgender, advocate, writer, musician and actor.

2. A hapless mother seeks the issue of a writ of habeas corpus or other appropriate writ to produce her son by name Aby James who is allegedly detained by some transgenders and set him at liberty. The petitioner states that her son (the detenu) has of late started behaving abnormally and is violent at times necessitating admission in Stella Maris Hospital, Padupuram. The petitioner adds that the detenu is diagnosed as having mood disorder with psychotic features and was treated as an inpatient that helped him to gain insight temporarily. It appears that the detenu went out once to return after a week and thereafter has permanently left the parental home on 9.5.2018 and has not returned so far. It also transpires that Crime No. 477/2018 was registered under Section 57 of the Kerala Police Act, 1960 for 'man missing' on the complaint of the petitioner to the Police. The detenu was later produced before the Judicial First Class Magistrate-II, Aluva on 19.5.2018 who however let him off after finding that he is a major competent to take decisions. The petitioner laments that she could not bear the sight of the detenu in the robes of a woman and she also learns that he has rechristened his name as 'Arundhathi'. The petitioner states that the detenu has shown no inclination to return home and is wandering with transgenders exposing himself to the risk of physical abuse and organ transplant.

3. The detenu appeared before us dressed as a female and asserted that he is a transgender by birth and does not suffer from any sort of mental aberration as is alleged by the petitioner. But the petitioner brought to our notice the past history of psychiatric treatment being extended to the detenu and wanted an immediate medical/psychological evaluation. We paused here for a moment to ponder as to whether acceding to such request would be termed as a judicial overreach and violative of the right of a 'person' to live with dignity. The Supreme Court has recently delineated the powers of the Constitutional Court exercising *Parens Patriae* jurisdiction in *Shafin Jahan v. Asokan* [MANU/SC/0340/2018 : 2018 (2) KLT 571 (SC)]. It was held therein as follows:

"45. Thus, the Constitutional Courts may also act as *Parens Patriae* so as to meet the ends of justice. But the said exercise of power is not without limitation. The courts cannot in every and any case invoke the *Parens Patriae* doctrine. The said doctrine has to be invoked only in exceptional cases where

the parties before it are either mentally incompetent or have not come of age and it is proved to the satisfaction of the court that the said parties have either no parent/legal guardian or have an abusive or negligent parent/legal guardian."

(emphasis supplied)

4. We directed medical/psychological evaluation of the detenu by the Kusumagiri Mental Health Centre, Kakkanad, Ernakulam which was necessitated only because it was alleged that he is a psychiatric patient. A team of doctors comprising of the Chief Psychiatrist, Psychiatrist & Medical Superintendent and Clinical Psychologist evaluated the detenu for about two days. It was found that the orientation of the detenu was normal and he has no thought disorder or hallucinations or inappropriate mood indicative of no mental incompetency. The following extract from the medical report dated 6.6.2018 furnished by the Kusumagiri Mental Health Centre after evaluation throws light on the mental state of the detenu:

"Aby James informed that he used to dress himself like girls from childhood. He used to keep company with girls during school life. He has aversion to males and avoid their company. In his words "I have the mind of a woman and the features of a man which does not suit me". He said he realised there are people like him only when he saw the malayalam movie "Chandupottu". He asserts that unless he is allowed to live like a woman, he will commit suicide. Also expresses the desire to undergo corrective surgery to change the sex."

It is abundantly clear therefore that the detenu is undergoing an identity crisis which reminds us of the oft quoted words of Iago the villain in the Shakespeare's play 'Othello':

'I am not what I am.'

5. The medical report refers to the criteria for diagnosis as per Gender Dysphoria in Adolescents and Adults Code 302.85 International Classification of Diseases Code F 64.1 which are as follows:

"A) A marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least two of the following:

- 1 .** A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics).
- 2.** A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).
- 3 .** A strong desire for the primary and/or secondary sex characteristics of the other gender.
- 4.** A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).

5 . A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).

6 . A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).

B) The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning."

The medical report further confirms that the detenu though has normal male genitalia on external examination fits the label 'transgender' as per the Diagnostic and Statistical Manual 5th Edition (2013).

6 . The self identification of the detenu as a transgender is clearly expressed by speech, mannerism, clothing etc. which we noticed during our interaction and fortified by the medical report. The Supreme Court has held that the transgenders are neither male nor female who however fall within the expression 'person' entitled to all rights recognized by law. The freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution of India takes within its sweep the right of a person to live as a transgender. The following excerpt from National Legal Services Authority v. Union of India [MANU/SC/0309/2014 : (2014) 5 SCC 438] dispels any lingering doubt as regards the rights of the detenu as a transgender:

"71. Principles referred to above clearly indicate that the freedom of expression guaranteed under Article 19(1)(a) includes the freedom to express one's chosen gender identity through varied usage and means by way of expression, speech, mannerism, clothing etc.

72 . Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behavior and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that the values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognize those rights."

(emphasis supplied)

The detenu has undoubtedly the right to wander about or associate with likeminded people and cannot be compelled to be at his parental home as wished by the petitioner who is before us with folded hands and tearful eyes.

7 . We part with this judgment after recording our appreciation to the efforts put in by Mr. Siji Antony, Advocate for the petitioner, Ms. A.K. Maya Krishnan, Advocate for the detenu and Mr. K.B. Ramanand, Senior Government Pleader.

The writ petition is dismissed. No costs.

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