KANANE v. THE STATE 2003 (2) BLR 67 (CA)

Citation: 2003 (2) BLR 64 (CA)

Court: Court of Appeal, Lobatse

Case No: Crim App No 9 of 2003

Judge: Tebbutt JP, Nganunu CJ, Korsah, Zietsman and Kirby JJA

Judgement Date: July 30, 2003

Counsel: D G Boko the appellant. P Phuthego (with him B U Manewe) for the respondent.

Flynote

Constitutional law - Fundamental rights - Breach - Argument made for decriminalisation of homosexual practices between adult consenting males - Time not having arrived to take such step - Gay men and women not representing F group or class which at this stage shown to require protection under Constitution - Section 167 of Penal Code (Cap 08:01) declared in violation of Constitution not s 164(c) - Penal Code, ss 164(c) and 167 and Constitution of Botswana, s 3.

Headnote

The appellant, an adult male, had been charged with committing indecent practices with another male contrary G to s 167, as read with s 33, of the Penal Code (Cap 08:01) and alternatively with committing an unnatural offence contrary to s 164(c) of the Penal Code. The appellant pleaded not guilty, averring that the relevant sections of the Penal Code were ultra vires s 3 of the Constitution of Botswana. The constitutional issue was accordingly referred to the High Court for determination. The appellant alleged that the relevant sections (a) discriminated against male persons on the ground of gender and offended against their rights of freedom of conscience, H expression, privacy, assembly and association entrenched in s 3 of the Constitution and therefore contravened the section and (b) hindered male persons in their enjoyment of their right to assemble freely and associate with other persons as contained in ss 13 and 15 of the Constitution by discriminating against males on the basis of their gender and thus
contravened those sections. The acts alleged to have been committed had furthermore taken place between two A consenting male adults.
Held: (1) There was a need for courts to be alive to the fact that the constitutional rights of the citizens of Botswana had to, where circumstances demanded, keep abreast of similar rights in other kindred democracies. The question therefore arose whether in Botswana at the present time and circumstances demanded the decriminalization of homosexual practices as between consenting adult males. Put differently, the court had to B decide whether there was a class or group of gay men who required protection under s 3 of the Constitution.
(2) The courts would jealously guard the rights of citizens against violations of those rights by the legislature but the protection of such rights was subject to the limitations contained in s 3, viz that the enjoyment of such rights did not prejudice the rights and freedoms of others or the public interest. The public interest therefore always had C to be a factor in the court's consideration of legislation, particularly where such legislation reflected a public concern. In making a decision, parliament must inevitably take a moral position in tune with what it perceived to be the public mood. It was fettered in this only by the confines of the Constitution.
(3) There was no evidence that the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practices by gay men and women required a decriminalization of those D practices, even to the extent of consensual acts by adult males in private. The trend was not to move towards the liberalization of sexual conduct by regarding homosexual practices as acceptable conduct but showed a hardening of a contrary attitude.
(4) The time had not yet arrived to decriminalize homosexual practices even between consenting adult males in E private. Gay men and women did not represent a group or class which at this stage had been shown to require protection under the Constitution.
(5) Section 167 of the Penal Code as it stood when the appellant was charged under it was in violation of the Constitution but s 164(c) was not.

Case Information

Cases referred to: F
Attorney-General v. Dow [1992] B.L.R. 119, CA (Full Bench)
Banana v. State [2000] 4 LRC 621; [2000] (8) BHRC 345; 3 [2001] CHRLD

Bowers v. Hardwick 478 US 186 (1986)
Gaolete v. The State [1991] B.L.R. 325
Lawrence et al v. Texas 539 US 6 (2003) G
Moatshe v. The State (Crim App 26/01), CA (Full Bench), unreported
National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others 1999 (1) S.A. 6 (CC)
Patrick Reyes v. The Queen [2002] 2 W.L.R. 1034 (PC)
Petrus and Another v. The State [1984] B.L.R. 14, CA (Full Bench) H
R v. Gough and Narroway 1926 CPD 159
R v. H 1962 (1) S.A. 278 (SR)
S v. H 1995 (1) S.A. 120 (C); 1993 (2) SACR 545
S v. Kampher 1997 (4) S.A. 460 (C); 1997 (2) SACR 418; 1997 (9) BCLR 1283
S v. M 1990 (2) SACR 509 (E)
REFERRAL of constitutional issue to Court of Appeal for determination. The facts are sufficiently stated in the A judgment.
D G Boko the appellant.
P Phuthego (with him B U Manewe) for the respondent.

Judgement

TEBBUTT JP: B
Whether homosexual acts between two consenting male persons carried out in private should be decriminalised in Botswana is the essence of the issue that has arisen for determination by this court. It involves a consideration of whether ss 164, 165 and 167 of the Penal Code (Cap 08:01) are in violation of s 3 of the Constitution of Botswana.
The appellant, an adult male citizen of Botswana, was in March 1995 charged in the magistrate's court in Maun C with two offences. On the first count he was charged with committing an 'Unnatural offence, contrary to section 164(c) of the Penal Code' and on the second, which was an alternative to the first, he was charged with committing 'Indecent practices between males, contrary to section 167, as read with section 33 of the Penal Code'. The particulars of the first count alleged that on 26 December 1994 at Maun Village the appellant D 'permitted Graham Norrie, being a male, to have carnal knowledge of him (Utjiwa Kanane) against the order of nature'. The particulars of the second, or alternative count alleged that the appellant, a male person, on 26 December 1994 at Maun Village, committed 'an act of gross indecency with Graham Norrie, a male person'. Appellant pleaded not guilty to both charges, averring that the sections of the Penal Code under which he was E charged were ultra vires s 3 of the Constitution of Botswana. Counsel for the appellant and for the State and the court agreed that this raised a constitutional issue which ought to be determined by the High Court before the trial proceeded. The case was accordingly referred to the High Court in terms of s 18(3) of the Constitution, with F a statement by the magistrate of the facts as required by Order 70rule 4(1) of the Rules of the High Court (Cap 04:02) (Sub Leg). The appellant, in addition, as he was permitted to do in terms of Order 70 rule 4(2), filed a notice of motion, and an affidavit in support of it, setting out his contentions as to why the section in question contravened the Constitution. In essence they are that the sections (a) discriminate against male persons on the G ground of gender and offend against their right of freedom of conscience, of expression and of privacy, assembly and association entrenched in s 3 of the Constitution and thus contravene that section; and (b) hinder male persons in their enjoyment of their right to assemble freely and associate with other persons as contained in ss 13 and 15 of the Constitution by discriminating against males on the basis of their gender and thus contravene those sections. Moreover, the acts the appellant was alleged to have committed took place in private H between two consenting male adults.
I should record that Norrie pleaded guilty to the alternative charge and was fined P1 000, after which he left the country.
In the High Court the matter was heard by Mwaikasu J who, in a lengthy and detailed judgment, ruled that the sections of the Penal Code complained
of did not violate any of the provisions of the Constitution and were in accord with them. It is against that ruling A that the appellant now comes on appeal to this court. As the matter raises an issue of constitutionality the court consisted of a full bench of five judges.
Although s 165 of the Penal Code is one of those referred to in the reference to the High Court, it deals with an attempt to commit any one of the offences contained in s 164 and is thus not of critical importance in the present enquiry. Sections 164 and 167 are of such critical importance and I turn therefore immediately to them. B
Both these sections were amended by Act 5 of 1998. I shall deal with the amendments effected to them by the latter Act in due course. The contraventions of the sections with which the appellant was charged were allegedly committed in December 1994 and he was charged with them in March 1995. C
The charges against him were therefore brought under ss 164 and 167 of the Penal Code prior to their amendment in 1998. The Penal Code containing those sections came into effect on 10 June 1964. The sections then read as follows, s 164:
'Any person who - D
(a) has carnal knowledge of any person against the order of nature;
(b) has carnal knowledge of an animal; or
(c) permits a male person to have carnal knowledge of him or her against the order of nature,
is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.' E
And s 167:
'Any male person who, whether in public or private, commits any act of gross indecency with another male person, or

procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of an F offence.'

The first question that arises is what is meant by the words 'carnal knowledge against the order of nature'?

Dealing with the provisions of s 164(a) Livesey Luke CJ in Gaolete v. State [1991] B.L.R. 325 said this: G

'On a charge under this paragraph the important questions are, first, whether the accused had carnal knowledge of the person alleged, and secondly, whether such carnal knowledge was against the order of nature. "Carnal knowledge" is not defined in the Penal Code, but its accepted meaning is "sexual intercourse". There must be penetration, however slight H and emission of semen is not necessary. With particular reference to the offence with which the appellant was charged (otherwise known as sodomy), penetration per anum must be proved. The other party involved in the intercourse may be a man or a woman. It is the penetration through the anus that makes the intercourse "against

the order of nature" and therefore provides the other element of the offence.' A

(My emphasis.)

In the court a quo Mwaikasu J citing the definition in Black's Law Dictionary of 'Sodomy' as being 'oral or anal copulation between humans, especially those of the same sex', considered that 'having carnal knowledge of B another person against the order of nature' could not be confined to sexual intercourse per anum but would also include acts of oral sex. I do not think it does.

The same work cited by Mwaikasu J viz Black's Law Dictionary, defines 'carnal knowledge' as sexual intercourse especially with an underage female. It is said to be 'the ancient term for the act itself', the phrase 'sexual intercourse' being more common in present times. The Shorter Oxford Dictionary defines it as 'full or C partial sexual intercourse'. And Black's definition of sodomy is not subscribed to in other legal dictionaries. Stroud's Words and Phrases (4th ed) refers to it as 'being when a man carnally knows any man or woman per anum'. This was also accepted in R v. Gough and Narroway 1926 CPD 163 and in R v. H 1962 (1) S.A. 278 (SR) it was said that when the Roman-Dutch authorities spoke of 'commixtio' or 'conjunctio' between male and D female in the sense of sexual intercourse between them, they were referring ' . . . to what in English we call carnal knowledge'. I therefore respectfully agree with Livesey Luke CJ's description of 'carnal knowledge against the order of nature' as being sexual intercourse per anum. E

This I feel is also reflected in the wording of s 164(c) where the offence is committed by a person who 'permits a male person' to have sexual intercourse with him or her against the order of nature. The draftsman of that section probably considered that having regard to the physiological characteristics of males and females, it was only a male who would be able to achieve penetration of the anus of either a male or a female. Oral sexual stimulation of either a male or a female by either another male or female would no doubt be an example of gross F indecency which is the substance of the offence created by s 167. I shall come to consider that section in due course.

I turn then to consider what effect the prohibition of sexual intercourse per anum between males or the prohibition against either a male or female permitting a male to anally penetrate them has on the constitutional rights of males as contained in the Constitution of Botswana. G

The appropriate starting point is the Constitution.

Section 3 provides that every person in Botswana has the protection under the Constitution, whatever his or her race, place of origin, political opinions, colour, creed or sex, of his or her rights and freedoms of (a) life, liberty, security of the person and protection of the law; (b) freedom of conscience, expression, assembly and H association; and (c) privacy of his or her house and other property. Some of those freedoms receive further elaboration in certain sections of the Constitution referred to by the appellant in his notice of motion. They are, firstly, s 13 which provides that no person shall be hindered in his or her freedom of assembly and association ie his or her right to assemble freely and associate with other persons; and, secondly,

s 15 which provides in subsec (1) that 'no law shall make any provision that is discriminatory either of itself or in A its effect'. The expression 'discriminatory' is defined in s 15(3) as meaning:

'. . . affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place or origin, political opinions, colour or creed whereby persons of one such description are subjected to B disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description'.

As stated above, the appellant's contention is that ss 164 and 167 violate the Constitution as they hinder his right C of association with other males or are discriminatory against males, including him, on the basis of their gender.

It will immediately be appreciated that neither 'sex' nor 'gender' are included in the classes of persons, or characteristics of persons, defined in s 15(3).

In the watershed case of Attorney-General v. Dow [1992] B.L.R. 119, CA (Full Bench) this court held that in D construing the Constitution a broad and generous approach should be adopted in the interpretation of its provisions; that all the relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the Constitution, and where such rights and freedoms were conferred on persons by the Constitution, derogation from such rights and freedoms should be narrowly or strictly construed. E Dealing with the omission from s 15(3) of 'sex' - and in this respect it would equally apply to 'gender' - the court held the following (I quote from the headnote of the report of the case at p 122):

'The provisions of section 3 of the Constitution conferred on the individual the right to equal treatment of the law. That right was conferred irrespective of the person's sex. The section was the key or umbrella provision in Chapter II under which all F rights and freedoms protected under that Chapter must be subsumed. The fact that discrimination was not

mentioned in section 3 did not mean that discrimination, in the sense of unequal treatment, was not proscribed under that section. The definition in section 15(3) on the other hand was expressly stated to be valid "in this section". The right expressly conferred G by section 3 could not be abridged by section 15 merely because the word "sex" was omitted from the definition of "discriminatory" in the section. A fundamental right conferred by the Constitution on an individual could not be circumscribed by a definition in another section for the purposes of that other section. Consequently, section 15 which specifically mentioned and dealt with discrimination, therefore, did not confer an independent right standing on its own. The H omission of the word "sex" from the definition of the word "discriminatory" was neither intentional nor made with the object of excluding sex-based discrimination. The words included in the definition were more by way of example than as an exclusive itemisation.'

The court therefore held that discriminatory legislation on the basis of gender, even though not expressly A mentioned in s 15(3), would be in violation of s 3 of the Constitution.
It becomes immediately apparent when this finding is applied to the provisions prior to their amendment of s 167 of the Penal Code, with which the appellant was charged in the alternative, that they were clearly discriminatory on the basis of gender either in themselves or in their effect. The section was aimed entirely at male persons B who committed acts of gross indecency with one another, be it in public or in private. No such bar to similar activities existed for females.
The discrimination is manifest. Section 167, as it then stood, would therefore have been ultra vires as being in violation of ss 3 and 15(1) of the Constitution and appellant could accordingly not have been charged with any C offence under that section. Any need at this stage to strike down the section fell away with the enactment of the amended s 167 in 1998.
I turn then to s 164(c) as it stood prior to its amendment in 1998. It made it an offence for 'any person' (ie irrespective of whether such person was male or female) to 'permit a male person' to have carnal knowledge of him or her (ie of a male or a female person) against the order of nature. The person who commits the offence D may be either male or female; in other words there is no discrimination based on gender in so far as the person committing the offence is concerned.
Counsel for the appellant, Mr Boko, in a well researched and ably presented argument, contended, however, firstly, that the fact that the offender in committing the offence, permitted only a male person and not a female to E have carnal knowledge of him or her was discriminatory, and secondly, and more importantly, that the whole of s 164, both in its pre- and post-amendment form, was discriminatory and in violation of ss 15 and 3 of the Constitution in that it subjected one class of persons to disabilities or restrictions to which other persons in Botswana are not subjected. That class of persons is what is today colloquially and commonly referred to as 'gay men', or in the case of women as 'lesbians' F
It will be recalled that s 164(c) in its pre-amendment form read thus:
'Any person who -
(c) permits a male person to have carnal knowledge of him or her against the order of nature, G
is guilty of an offence. . . .'
In its present form ie subsequent to its amendment in 1998, it reads thus:
'Any person who -
(c) permits any other person to have carnal knowledge of him or her against the order of nature, H
is guilty of an offence. . . .'
It becomes readily apparent from the amendment that the legislature widened the scope of s 164(c) by changing the person who the offender permits to have carnal knowledge of him or her from a 'male person' to 'any person' ie both male and female. Section 164(a), which makes it an offence

for 'any person' to have carnal knowledge of 'any person' against the order of nature and s 164(c) thus prohibit A acts of an unnatural sexual nature between persons of the same sex whether male or female.
Mr Boko argues that this discriminates against gay men - and lesbians - and is in contravention of ss 3 and 15(1) of the Constitution. His submission is that because of a different approach by modern society in many democratic countries to homosexuality, the prohibition of sexual acts by consenting males - and females - in B private was no longer regarded as necessary and the criminalisation of those acts must be regarded as discriminatory against gays and lesbians. He referred in this regard to a number of decisions in which prohibition against such acts had been held to be discriminatory. C
In South Africa the change in attitude to sexual orientation has been the subject of four decisions of the courts there, including the Constitutional Court. In the earliest of these viz S v. M 1990 (2) SACR 509 (E), Jansen J said the following at 514B-D:
'The majority of people, who have normal heterosexual relationships, may find acts of sodomy unacceptable and reprehensible. We cannot close our eyes, however, to the fact that society accepts that there are individuals who have D homosexual tendencies and who form intimate relationships with those of their own sex. It has to be taken into account that homosexuality is more openly discussed and written about. It is common knowledge that so-called gay clubs are formed, where homosexuals openly meet and have social intercourse. If that is accepted by society, even with reluctance E or distaste, it is also a factor that has to be taken into account by the courts when sentence is considered. Whether homosexual conduct between consenting males in private ought still to be punishable has been the subject of considerable debate, especially since 1967, when homosexual acts in private between consenting males above the age of 21 were F legalised in England. . . .'
That passage was cited with approval in S v. H 1995 (1) S.A. 120 (C), where the consensus in Western democracies on eliminating discrimination against homosexuality and the outlawing of discrimination on the ground of sexual orientation in the then draft South African Constitution was referred to in opining that acts which G proscribe private unnatural acts between consenting adult men were likely to be struck down. In S v. Kampher 1997 (4) S.A. 460 (C), Farlam J

conducted a very extensive historical analysis of the approach to homosexual relations from the days of the Romans to modern times in showing the change in the approach of society to such relations. These included the attitude of societies in England, Wales, Scotland, Northern Ireland H and certain members of the European Union.
The change in England was brought about in 1967 when sexual acts between consenting males over the age of 21 were legalised. This occurred largely as a result of the report of the Wolfenden Committee which was appointed in 1954 to consider the state of the law in regard to prostitution and homosexuality. The committee recommended that homosexual practices

between consenting adults in private should no longer constitute a criminal offence. In so recommending the A committee said:
'There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.'
Reference was also made in the Kampher case to the great judgment in the United States Supreme Court of B Bowers v. Hardwick 478 US 186 (1986) which by a majority of five to four upheld a statute in the American state of Georgia proscribing homosexual acts but in which the minority of the court, in expressing their dissent through the opinion of Blackmun J said that the cardinal principle involved in the case was 'the most comprehensive of rights and the right most valued by civilized men' namely 'the right to be let alone'. It deserves to be noted at this C stage that Bowers v. Hardwick has since been overruled by the United States Supreme Court in a most recent case viz Lawrence et al v. Texas 539 US 6 (2003) decided on 26 June 2003. I shall refer again to this case later.
The Kampher case was referred to with approval by the South African Constitutional Court in National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others 1999 (1) S.A. 6 (CC). D
The court in that case held that the criminalisation of sodomy or of unnatural sexual acts committed between consenting males constituted unfair discrimination on the basis of sexual orientation under the South African Constitution. In delivering the judgment of the court, Ackermann J said that the discriminatory prohibitions on sex between men reinforces already existing societal prejudices against gay men reducing them to what one author E had referred to as 'unapprehended felons'. As a class they were deserving and worthy of equal protection and benefit of the law.
He said that the impact of homosexual practices being the subject of offences went beyond the immediate effect on their dignity and self-esteem. He said at p 27F-28A: F
'(a) . . . Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate. G
(b) The nature of the power and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society.
(c) The discrimination has, for the reasons already mentioned, gravely affected the rights and interests of gay men and H deeply impaired their fundamental dignity.
[27] The above analysis confirms that the discrimination is unfair. There is nothing which can be placed in the other balance of the scale. The inevitable conclusion is that the discrimination in question is unfair and therefore in breach of s 9 of the 1996 Constitution.'

The authorities cited above were heavily relied on by Mr Boko. He also relied for his submission that modern A society no longer stigmatised homosexual practices between consenting adult males on the fact that it had been decriminalised in 32 of the member states of the Council of Europe, in Germany, in Australia, in New Zealand and in Canada (see National Coalition for Gay and Lesbian Equality case at pp 32-37). In America, too, the United States Supreme Court has now in Lawrence v. Texas supra, held laws prohibiting unnatural sexual acts B between consenting adult males to be in violation of the American Constitution. In his opinion on behalf of the majority of the court (the case was decided by six judges to three). Kennedy J said at p 6:
'The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual C act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behaviour, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. . . . D
It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty E protected by the Constitution allows homosexual persons the right to make this choice.'
Should such acts be decriminalised in Botswana as well?
Section 164(a) before amendment, made it an offence for 'any person' to have unnatural carnal knowledge of 'any person'. No gender distinction was involved. Also, as pointed out above s 164(c) drew no gender distinction F between perpetrators of the offence. Permitting only males to commit the act which gave rise to the offence of the perpetrators was, in my view, not the type of gender discrimination that was envisaged when this court in Attorney-General v. Dow concluded that discrimination based on gender also had a place in the examples of discrimination contained in s 15(3) of the Constitution. G
I have already referred to the obvious gender discrimination in s 167 of the Penal Code prior to amendment which created the commission of an act of gross indecency an offence for men but not for women. That basis for discrimination has now been eliminated in the new s 167 which I quote for convenience. H
'167. Any person who, whether in public or private, commits any act of gross indecency with another person, or

procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or private, is guilty of an offence.'

What the appellant is now complaining about - and his counsel cites the authorities set out above in support of A that complaint - is discrimination of a different nature. It is the discrimination between heterosexual persons and homosexual persons in criminalising homosexual practices by the latter. It is discrimination based on sexual orientation. That is also the raison d'etre of the judgments in the South African cases of S v. Kampher, supra, and the National Coalition for Gay and Lesbian Equality case, supra. In the South African Constitution B discrimination on the ground of 'sexual orientation' is one of the grounds expressly mentioned as being in violation of its citizens' rights. Discrimination on the basis of sexual orientation was also the motivating factor in those cases in which it has been held that by criminalising homosexual acts there is no equality before the law for homosexually inclined persons and heterosexual persons. Discrimination on the basis of sexual orie C ntation is not among those forms of discrimination set out in s 15(3) of the Botswana Constitution. Should it be?

I have already adverted to the decision in Attorney-General v. Dow for this court's inclusion in the definition of 'discriminatory' in s 15(3), of discrimination on the ground of 'sex' in the sense of male or female or 'gender', which that sense also imports. The late Aguda JA at p 166 of the report of that case emphasised once again, as D he had in an earlier case of Petrus and Another v. The State [1984] B.L.R. 14, CA that the Constitution is the supreme law of the land and it is meant to serve not only this generation but also generations yet unborn. It cannot, he said, be allowed to be a lifeless museum piece; the courts must continue to breathe life into it from time to time as the occasion may arise to ensure the healthy growth and development of the State through it. He E went on to say that the courts must not shy away from the basic fact that while a particular construction of a constitutional provision may be able to meet the demands of the society of a certain age such construction may not meet those of a later age. The judges must make the Constitution grow and develop in order to meet the just demands and aspirations of an ever-developing society which is part of the wider and larger human society F governed by acceptable concepts of human dignity.

Aguda JA also referred to the need for Botswana as a country where liberal democracy has taken root, to take note of, and not be immune from, progressive movements going on in other liberal democracies.

With those expressions of the approach of the courts to the constitutional development of the country I am in respectful agreement. There must be a need for the courts to be alive to the fact that the constitutional rights of G the citizens of Botswana must, where circumstances demand, keep abreast of similar rights in other kindred democracies. In Dow Amissah JP stated that the classes of discrimination contained in s 15(3) were mentioned to highlight some vulnerable groups or classes that might be affected by discriminatory treatment. He did not think that the categories mentioned were forever closed. The categories might grow or change. In the nature of H things, the framers of the Constitution, as far-sighted people trying to look into the future, would have contemplated that with the passage of time groups or classes needing protection, other than those mentioned, would arise.

The question which therefore pertinently arises is whether in Botswana at the present time the circumstances demand the decriminalisation of homosexual

practices as between consenting adult males or put somewhat differently, is there a class or group of gay men A who require protection under s 3 of the Constitution? Should the word 'sex' therein be broadened by interpretation to include 'sexual orientation'?

This would involve broadening the definition in s 15(3) of 'discriminatory' as well to include discrimination on the basis of sexual orientation for, as set out earlier, the real complaint by homosexual men is that they are not B allowed to give expression to their sexual desires whereas heterosexual men can.

Considering whether society in Botswana required the decriminalisation of homosexual practices Mwaikasu J in the court a quo concluded it did not.

The judgment of the learned judge is, however, unfortunately of no assistance to this court in dealing with the issue. In the first place the learned judge failed to appreciate that the appellant had been charged with C contravening ss 164(c) and 167 as they existed prior to their amendment in 1998 and dealt with the appellant as if he had been charged with those sections in their amended form. In the second place the judgment contains expressions of opinions in regard to the issue in question with which this court does not associate itself. He stated that homosexual practices were generally uncommon among indigenous African societies. They had, he D said, their origin in, and were predominant among, the white societies, particularly in the West and those who had migrated from there. They were therefore more pronounced in countries like South Africa and Zimbabwe than in a country like Botswana. For this startling proposition he quoted as authority a work The Sexual Life of Savages in North-Western Melanesia by Malinowski published in 1932, where the author said 'The white man's E influence and his morality stupidly misapplied where there is no place for it, creates a setting favourable to homosexuality. The natives are perfectly aware that venereal disease and homosexuality are among the benefits bestowed on them by Western culture.' No evidence or authority is cited by the author for his views, and no evidence was placed before Mwaikasu J to support his statement. He also quoted from a book by one Dr James F Dobson citing statistics for those infected by AIDS and other sexually transmittable diseases, abortions and the divorce rate in America for the view that 'sexual liberation has been a social, spiritual and physiological disaster'. This, said Mwaikasu J demonstrated 'the likely harmful effect both to the individual and society as a whole when liberal sexuality is allowed to erode moral values in a given society'. I wish it to be known that this G court dissociates itself completely from the above views of Mwaikasu J.

The question, however, remains whether the time has arrived when society in Botswana requires that Botswana should follow those other countries where decriminalisation of homosexual practices has occurred. There are, of course, many countries who have not followed this approach. No evidence was put before the court a quo nor H before this court that

public opinion in Botswana has so changed and developed that society in this country demands such decriminalisation. In Zimbabwe a similar question required to be answered. A full bench of the Supreme Court considered the question. The minority of the court viz Gubbay CJ and Ebrahim JA opined that the retention of the offence was no longer reasonably justifiable in a

democratic society. The majority viz McNally, Muchechetere and Sandura JJA thought otherwise. (See Banana A v. State [2000] 4 LRC 621 (ZSC).)

The court in that case was dealing with the common law crime of sodomy which is defined as 'unlawful intentional sexual relations per anum between two human males'. Gubbay CJ in his minority judgment said at 645F:

'It may well be that the majority of the people, who have normal heterosexual relationships, find acts of sodomy morally B unacceptable. This does not mean, however, that today in our pluralistic society that moral values alone can justify making an activity criminal. If it could one immediately has to ask: "By whose moral values is the state guided".'

He further stated: C

'I am thus not persuaded that in a democratic society such as ours it is reasonably justifiable to make an activity criminal because a segment, maybe a majority, of the citizenry consider it to be unacceptable.'

The courts, he said, cannot be dictated to by public opinion. He further opined thus at p 646E: D

'It is irrational in my view to criminalise anal sexual intercourse between consenting male adults yet to recognise that it is not an offence for a woman to permit a man to engage with her in anal sexual intercourse.'

It must be immediately pointed out that s 164(c) both in its unamended and its amended form made it an offence for a woman to permit a man to engage with her in anal sexual intercourse. The gender discrimination to which E Gubbay CJ refers in the passage cited does not, and did not, exist in Botswana.

As to Gubbay CJ's views on public opinion I am of the view that while the courts can perhaps not be dictated to by public opinion, the courts would be loath to fly in the face of public opinion, especially if expressed through F legislation passed by those elected by the public to represent them in the legislature.

The courts would obviously jealously guard the rights of citizens against violations of those rights by the legislature, but it is not without significance that the protection of such rights is subject to the limitations contained in s 3 viz that the enjoyment of such rights does not prejudice the rights and freedoms of others or the G public interest. The public interest must therefore always be a factor in the court's consideration of legislation particularly where such legislation reflects a public concern.

As this court has held in Moatshe and Others v. The State (Crim App 26/01), CA, unreported (approving the words of Lord Bingham in Patrick Reyes v. The Queen [2002] 2 W.L.R. 1034 (PC): H

'In a modern liberal democracy it is ordinarily the task of the democratically elected legislature to decide what conduct should be treated as criminal, so as to attract penal consequences.'

In making such a decision parliament must inevitably take a moral position

in tune with what it perceives to be the public mood. It is fettered in this only by the confines of the Constitution. A

As I have stated, there is no evidence that the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practices by gay men and women requires a decriminalisation of those practices, even to the extent of consensual acts by adult males in private. In my view, the indications are to the contrary. I refer to the Penal Code Amendment Act No 5 of 1998. This Act in a number of sections broadened the B scope and ambit of offences relating to sexual acts including those sections in the earlier Penal Code dealing with rape, abduction, prostitution and, as has been seen earlier, of the offences concerning the carnal knowledge of others and gross indecency.

While the Penal Code in its original form might be criticised as having been taken holus bolus from some other C legislation, prior to Independence, thereby including, as it does, matters such as piracy by forcibly boarding a ship, which is unlikely to occur in a landlocked country like Botswana, and that therefore the legislature of the day never gave particular attention to s 164 and s 167, the same cannot be said today. The legislature, in passing the 1998 Amendment Act, clearly considered its provisions and, as with the effect of the rest of the act, broadened D them. This court can take judicial notice of the incidence of AIDS both worldwide and in Botswana, and in my opinion the legislature in enacting the provisions it did was reflecting a public concern. I conclude therefore that so far from moving towards the liberalisation of sexual conduct by regarding homosexual practices as acceptable conduct, such indications as there are show a hardening of a contrary attitude. As the majority of the E court in the Banana case, supra, held:

'From the point of view of law reform, it cannot be said that public opinion has so changed and developed in Zimbabwe that the courts must yield to that new perception and declare the old law obsolete.'

McNally JA expressed the majority view thus: F

'In the particular circumstances of this case, I do not believe that the "social norms and values" of Zimbabwe are pushing us to decriminalise consensual sodomy. Zimbabwe is, broadly speaking, a conservative society in matters of sexual behaviour. More conservative, say, than France or Sweden; less conservative than, say, Saudi Arabia. But, generally, more G conservative than liberal.

I take that to be a relevant consideration in interpreting the Constitution in relation to matters of sexual freedom. Put differently, I do not believe that this court, lacking the democratic credentials of a properly elected parliament, should strain to place a sexually liberal interpretation on the Constitution of a country whose social norms and values in such matters H tend to be conservative.'

It is not necessary for this court to express any opinion as to whether the social norms and values of the people of Botswana as to the question of homosexuality are conservative or liberal. The court has no evidence of either. It, however, does have indications before it that the time has not

yet arrived to decriminalise homosexual practices even between consenting adult males in private. Gay men and A women do not represent a group or class which at this stage has been shown to require protection under the Constitution.
Mr Boko submitted that the sections in question hindered gay men and lesbians in their association with one another. In my view, they do not. There is nothing to prevent them still so associating, subject to the law. B
I hold therefore that s 167 of the Penal Code as it stood when the appellant was charged under it was in violation of the Constitution but that s 164(c) was not.
For reasons other than those of the court a quo accordingly hold that the appeal succeeds in part but fails in part. As to the latter part, ie the allegation against the appellant by the State that he contravened s 164(c) of the Penal C Code in the particulars alleged, the court remits the matter to the magistrate's court at Maun from whence it came. No doubt the Attorney-General in deciding on the future course of the matter will give consideration to the fact that over eight years have elapsed since the offence is alleged to have been committed and in the light thereof, whether it would be fair or constitutional to proceed with the prosecution. D
Appeal succeeds, in part.