IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NOS.: HAA0085 & 86 OF 2005

BETWEEN:

DHIRENDRA NADAN
THOMAS MCCOSKAR
Appellant

AND:

STATE
Respondent

Counsel: Ms. N. Khan - for both Appellants
Mr. K. Tunidau –for the State
Dr. S. Shameem – for Human Rights Commission
Ms D. Herman – for Human Rights Commission
Ms S. Tabaiwalu – for Attorney-General
Ms M.R. Vuniwaqa – for Attorney-General

Dates of Hearing: 15th, 16th and 17th August, 2005 (in Suva)
Date of Judgment: 26th August, 2005 (in Lautoka)

JUDGMENT

Introduction

The criminal law has at times tried to keep the powerful forces of sexual expression in check. Some such laws are absolutely necessary; to protect children and the vulnerable against sexual exploitation or corruption and to protect adults from unwanted approaches by sexual predators. In most societies these necessary laws have found their limits in a citizens right to privacy and equality.

In this appeal the court is urged to find and declare some limits for the prosecution, conviction and sentencing of two homosexuals engaged in consensual, intimate, private but criminal conduct.

Background

Mr. McCoskar was a tourist in the country from Melbourne, Australia. He arrived on the 20th of March 2005 for a holiday and met up with the second appellant Mr. Nadan. They stayed together as partners. At the end of his vacation, on the 3rd of April, Mr. McCoskar suspected that Mr.

Nadan had stolen AUD$1500.00 from him during their time together. He lodged a complaint with the police, checked in at international departures and went to board his flight home.

He was not to know that Mr. Nadan was quickly under interview by the police at the Airport Police Post. After interrogation Mr. Nadan revealed that Mr. McCoskar took nude photographs of him and that the two of them had anal and oral sex. He later claimed a promise from Mr. McCoskar to pay his modelling fees after the photographs had been published on the internet.

This led the police to stop Mr. McCoskar's departure from the country and ask him to assist in their enquiries. He was taken from the transit lounge of the airport to the police post for questioning. He admitted taking the nude photographs and as a result of that admission his digital camera was seized. The images (Exhibits 1 to 18) clearly depict a couple enjoying an intimate homosexual relationship.

After further questioning both Mr. McCoskar and Mr. Nadan admitted that between March and April during this holiday they enjoyed consensual anal and oral sex.

The appellants were separately charged with offences contrary to Section 175(a) and (c) of the Fijian Penal Code (Cap. 17) that between March and April of 2005 at Nadi each had or permitted carnal knowledge of the other against the order of nature.

They were also each separately charged that during the same time they committed acts of gross indecency between males contrary to Section 177 of the Fijian Penal Code (Cap.17).

Mr. McCoskar and Mr. Nadan appeared unrepresented, before Resident Magistrate Mr. S.M. Shah in Nadi, pleaded guilty and were sentenced to 12 months imprisonment on each count to run consecutively. They were sent to jail for two years.

At the outset of this appeal other counsel represented Mr. McCoskar. The appeal was then against conviction and sentence. The appellant sought leave to withdraw his conviction appeal before my brother Justice Govind. That leave application was not refused or granted. His Honour observed that as the appeal raised important constitutional issues he would need to hear Mr. Nadan's conviction appeal first. That practically meant that Mr. McCoskar could not secure his goal of an early 'sentencing appeal' that might dispose of the matter quickly and allow him to return home. He changed his counsel and maintained his original appeal.

Through their present counsel, Ms Khan, both appellants confirm their amended appeal against both conviction and sentence.

The Arguments

Counsel provided comprehensive written submissions. These were augmented by amicus briefs from the Attorney-General and the Human Rights Commission. Each paper has extensive detail supported by authorities but as I understand it the prime arguments can be generally summarized in this way.

The appellants case is that Sections 175(a) and (c) and 177 of the Fijian Penal Code are invalid as they breach the constitutionally guaranteed, and in this instance unlimited, rights of privacy, equality and freedom from degrading treatment. Accordingly counsel submits that it was inappropriate and unlawful for the learned Magistrate to accept jurisdiction and pass sentence.

In addition the second appellant argues that his guilty plea was equivocal. He says the police assured him that crimes of this sort in Fiji between consenting male partners were inevitably dealt with by a fine and that he would not be sent to jail. Acting on this inducement the appellant refused legal representation and entered a guilty plea. This plea of convenience was designed to spare him further embarrassment and quickly see him on his way home.

The appellants submit in any event that the sentence was harsh and manifestly excessive.

The appellants seek an order for damages.

The Director of Public Prosecutions while accepting the authority and wisdom of these constitutional rights submits that they are limited, in Fiji, on public interest and moral grounds.

Inspired by the Christian preamble to the Constitution counsel claims that, in such a religious and conservative State, homosexuality is abhorrent and can be criminalized by imposing proportional limits on a citizen's rights to privacy and equality.

Counsel further submits that Section 175(a) and (c) are not discriminatory as they are gender and sexual orientation neutral. In addition he submits that Section 175 does not discriminate against sexual orientation or preference but rather proscribes certain sexual acts against the order of nature.

Counsel is concerned that if Sections 175(a) and (c) and Section 177 are struck out in total then there will be no way the State can prosecute any crime of non-consensual carnal knowledge against the order of nature or gross male indecency. Striking down either provision will, he says, fetter prosecutorial discretion.

He therefore submits the sections are constitutionally valid.

The State concedes the sentence offends the ‘one transaction rule’ but otherwise submits the judgment is unremarkable and the term of imprisonment acceptable.

The Attorney-General submits that the constitutional provisions are subject to limitations in the public interest. Counsel submits that a particularly Fijian interpretation of these internationally recognized human rights is required. In that regard counsel supports the morals based argument raised by the Director of Public Prosecutions and claims that the rights to equality and privacy are validly limited by the impugned sections.

The Human Rights Commission supports the appellants case. Dr. Shameem submitted that Sections 175(a) and (c) and 177 were invalid immediately after the 1997 Constitution commenced and must be struck down as unconstitutional. The Dr. submitted that the sections

breach the appellant's rights to privacy and equality before the law. Further counsel says there is no proper reason to limit these rights. The Human Rights Commission then submitted that this was really a case of prosecution for the wrong offence. The Human Rights Commissioner urges the authorities to consider prosecution of these two appellants for trafficking in pornography.

Offences Against Morality

This part of the penal code includes offences for rape, defilement, indecent assault, prostitution, brothel keeping, abortion, incest, unnatural offences and gross male indecency. The impugned sections read:

Unnatural offences

Any person who –

has carnal knowledge of any person against the order of nature; or

has carnal knowledge of an animal; or

permits a male person to have carnal knowledge of him or her against the order of nature,

is guilty of a felony, and is liable to imprisonment for fourteen years with or without corporal punishment.

Indecent practices between males

177. 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 a felony, and is liable to imprisonment for five years, with or without corporal punishment.

Section 175(a) and (c)

The origin of these 'sodomy' laws which make certain sexual acts into sex crimes can be traced to England. They were copied faithfully throughout the old British Empire and inherited by Fiji.

Sir William Blakestone in his 'commentaries on the Laws of England' defined the crime of sodomy as the "abominable and detestable crime against nature". This language has been imported into Section 175(a) and (c).

Historically the law followed a Christian doctrine and formed part of the vast body of offences that prohibited all forms of non procreative and non marital sex as these actions were against both God and nature. The offence of carnal knowledge against the order of nature is often

understood as referring only to buggery. It does not.

There was an argument on appeal as to whether this section was gender and sexual orientation neutral. It is convenient to dispose of this preliminary issue now.

The State submits there is no inequality in Section 175(a) and (c) as these sections are both gender and sexual orientation neutral. The Director of Public Prosecutions asserts he would prosecute anyone male or female for any act of carnal knowledge against the order of nature.

The appellant claimed that the provision was discriminatory as it only applied to gay men and criminalized their primary expressions of sexuality.

The word carnal derives from the Latin carnalis for "fleshy". Section 183 defines carnal knowledge in this way:

Definition of carnal knowledge

183. Whenever, upon the trial for any offence punishable under this Code, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only.

It is clear that Section 175 does not create another offence of sexual violation by rape that is elsewhere defined in the Code (Section 149). I accept the dicta in ***C V Tabua and The Queen,*** Criminal Appeal No. 64 of 1986 and ***Biu v The State***, HAA0085 of 2000 to the effect that the legislature could not have intended to provide for two identical offences of non-consensual vaginal penetration and that in any event at common law rape was known as vaginal rape as distinct from buggery. No doubt because of religious influences buggery was subsumed into a wider body of sodomy offences designed to outlaw any non procreative sexual acts.

The section contemplates an offence of carnal knowledge being complete upon penetration and nothing more. 'Carnal knowledge against the order of nature' applies to 'any person' but is not defined. However, as the Section 183 definition requires proof of penetration and not 'emission of seed' and as vaginal rape is elsewhere proscribed I find the sub-sections include all penetrative sexual acts against the flesh including for example oral and anal sex but excluding vaginal intercourse.

Technically Section 175(a) and (c) apply to males and females of any sexual orientation.

The section is gender and sexual orientation neutral. As such I accept the State's contention that the proscription of the law in Section 175(a) and (c) is of wide and equal application and describes offences for sex acts against the order of nature committed with or upon a male or female person. As such the Fiji section is distinguishable from those offences that proscribe only buggery or male specific sex offences. Accordingly some care needs to be taken before adopting the full measure of overseas jurisprudence that strike down such moral law as invalid against constitutionally assured rights to equality, or non-discrimination.

The technical description of the law may read as equal. The application of the law is not. State's counsel was unable to provide me with statistics to demonstrate that a prosecution had been bought in Fiji against a heterosexual couple for consensual private acts against the order of nature. I accept the Human Rights Commission's submission that while these Section 175 offences are not exclusively anti-homosexual they are selectively enforced primarily against homosexuals.

For reasons which will become clear not much pivots on this point of statutory interpretation as I find the appeal resolves on the principle of privacy supported by equality.

Section 177

As distinct from Section 175 this offence only applies to male persons, irrespective of the ages of the male persons involved and irrespective of whether the act is committed in public or private with or without consent. This section prohibits and criminalizes such conduct between male persons. No similar prohibition exists in relation to such practices for conduct between females.

What the section does is to make certain conduct between males criminal, while leaving unaffected by the criminal law comparable conduct when not committed exclusively by males.

For this reason I find that Section 177 is discriminatory of males and unequal in its legal treatment of citizens. As such it is overtly discriminatory of homosexuals as it criminalizes their sexual expression. The effect of this finding will be discussed later in the judgment.

Reform

During the course of this appeal I had occasion to review Chapter 17 of the Penal Code. The provisions are antiquated almost to the point of unworkability. An improved and amended law describing one offence of sexual violation to encompass all forms of non-consensual or predatory sexual conduct is much needed and I urge the Law Commissioner to speed up his efforts at Law Reform in this regard.

The Fijian Constitution

There is no doubt that the Fijian Constitution is framed by religion. The preamble emphasizes the enduring influence of Christianity and its contribution, along with that of other faiths, to the spiritual life of Fiji.

Article 5 acknowledges that the worship and reverence of God are the source of good Government and leadership.

The preambular principles while recalling and emphasizing the Christian conversion of these Islands as an historical fact nonetheless reaffirms for the future the human rights and fundamental freedoms of all individuals and groups safeguarded by adherence to the rule of law and respect for human dignity.

These principles are reflected in the compact provisions of the constitution. Article 6(a), (c) and (e) recognize that the conduct of Government is based on respect for the equal rights of individuals, communities and groups. These principles are non-justiciable (Article 7).

It is also important to note that while Christianity underpins much of value in Fiji we are a secular State influenced by Christianity but not predominated by it. The Constitution recognizes the influence of many faiths and beliefs. That is simply a reflection of the rich multi-cultural heritage of this nation. I reject the State contention that the Constitution of Fiji is pillared upon Christian values alone.

The Constitution is the supreme law of the State (Article 2(1)). Any law inconsistent with the Constitution is invalid to the extent of that inconsistency (Article 2(2)).

Fiji has a Bill of Rights entrenched in Chapter 4 of the Constitution. The chapter binds the legislative executive and judicial branches of Government at all levels (Article 21(1)(a)). All laws made and administrative or judicial action taken after the commencement of the Constitution are subject to the rights described (Article 21(3)) as are laws in force at the commencement of the Constitution (Article 21(5)).

In accordance with the transitional provisions contained in Article 195(2) all written laws in force on the date immediately prior to the commencement of the Constitution are presumed not to be in conflict with the Constitution at the date of their enactment or in excess of the powers of the Parliament which enacted them. They enjoy no such presumption after the Constitution commences. These pre-constitutional laws are still valid but fall to be examined under Article 195(3) as to whether or not they are inconsistent with the provisions of the Constitution. If inconsistent they are legally assumed to have such modifications and qualifications as are necessary to bring them into conformity with the Constitution (cf **The State (*Sheerin) v Kennedy*** [1966] I.R. 379 at p.386 per Walsh J; ***Frazer v State Services Commission*** [1984] I NZLR 116 at 121 and ***State v Pickering*** [2001] FJ HC 69).

I find that Sections 175 and 177 of the Penal Code were valid and continued in force as enacted at the commencement of the 1997 Constitution. However, the sections are to be construed from the commencement of the Constitution with such modifications and qualifications as are necessary to bring them into conformity with the Constitution. In other words Sections 175 and 177 of the Penal Code if they do not conform or are inconsistent with the Constitution are invalid to the extent of that inconsistency (Articles (2); 21(5) and 195).

Article 43(2) of the Constitution requires me to have regard to public international law as an interpretative aid for the rights set out in Chapter 4. I have no hesitation in adopting this principle as it has been endorsed on several occasions by this Court (cf ***State v Mark Mutch*** [1999] FJHC 149 HAC0008 of 1998; ***State v Audie Pickering***, Misc. Action No. HAM0007 of 2001S; ***State v Timoci Silatolu & Attorney General*** [intervena] and **Fijian Human Rights Commission** [intervena, by leave], Criminal Action No. HAC0001.2001).

The rights provisions to be examined must not be construed in isolation but in a context which

includes the history and background of the adoption of the Constitution, other provisions of the Constitution itself and in particular with regard to ratified conventions (cf ***Dower v Attorney General*** [1992] LRC (Const) 623 at 668 and ***Minister of State for Immigration and Ethnic Affairs v Teoh*** [1995] 128 ALR at page 353.

In ***Teoh (supra)*** the High Court of Australia held that a State's ratification of any international treaty creates a "legitimate expectation" that statutory discretion will be exercised in accordance with the treaty. The Court said:

> *".....ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights…rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention. That positive statement is in adequate foundation for a legitimate expectation."*

Fiji has ratified the International Convention on Civil and Political Rights. The appellants are entitled to expect that I will interpret these rights in accordance with its provisions.

The judiciary is the guardian of this constitution and I must in interpreting its provisions bear all these conditions in mind. The primary duty of a judge when considering such constitutional provisions must be to give them a wide and purposive interpretation to ensure that under this supreme law there is only ever a legitimate exercise of governmental power and an unremitting protection of individual rights and liberties.

The judicial function in a case such as this is therefore to lay the impugned statutory provisions down beside the invoked constitutional provisions and if, in the light of the established facts a comparison between the two sets of provisions shows an invalidity, than the statutory provisions must be struck down either wholly or in part to cure that invalidity and make those statutory provisions consistent with the Constitution.

All parties to this appeal recognize there is a strong body of genuine and sincere conviction shared by a large number of responsible members of the Fijian community that any change in the law to decriminalize homosexual conduct would seriously damage the moral fabric of society. The existence of such strongly held views among such an important sector of society is certainly relevant for the purposes of interpretation of the constitution.

However, while members of the public who regard homosexuality as amoral may be shocked, offended or disturbed by private homosexual acts, this cannot on its own validate unconstitutional law. The present case concerns the most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before the State or community can interfere with an individual's right to privacy.

Privacy

At the core of the appellants case is the principle that the State has no business in the field of private morality and no right to legislate in relation to the private sexual conduct of consenting adults.

The appellants claim that their right to privacy under Section 37 of the Constitution was violated when they were charged with these constitutionally invalid offences.

Section 37 of the Constitution provides:

> *"(1) Every person has the right to personal privacy including the right to privacy of personal communication.*
>
> *The rights set out in sub-section (1) may be made subject to such limitations prescribed by law as are reasonable and justifiable in a free and democratic society". (emphasis added)*

In International Human Rights Law the right to privacy is protected under article 17 of the International Convention on Civil and Political Rights (ICCPR). The article reads:

> *"Article 17*
>
> *(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
>
> *Everyone has the right to protection of the law against such inference or attacks".*

These rights to privacy were first described by the philosopher John Stuart Mill. His view that the law should not concern itself in the realm of private morality except to the extent necessary for the protection of public order and the guarding of citizens against injury or exploitation received significant endorsement in the report of the Wolfenden Committee on Homosexual Offences and Prostitution. That committee's report, furnished to the British Parliament in 1957, contained the following statement in support of its recommendation for limited decriminalization of homosexual acts:

> *"There remains one additional counter argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice in action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality, which is, in brief and crude terms not the law's business. To say this is not to condone or encourage private immorality."*

The Wolfenden Committee had been established by the Scottish Home Office. It recommended the removal of criminal sanctions from homosexual conduct when carried out in private between

adult responsible males. There eventually followed a series of repeals for offences with a very similar character to those impugned under this appeal. In England and Wales; (Sexual Offences Act 1967) and in Scotland; (Criminal Justice Scotland Act 1980). The British Parliament was later compelled to change the law in Northern Ireland as a result of the European Court of Human Rights Decision in ***Dudgeon v United Kingdom*** [1981] 4 E.H.R. 149.

The caution in embracing such a significant reversal in legislative policy not only in the United Kingdom but also America and eventually Australia is simply a reflection of the deep religious and moral beliefs involved.

A decision of the United Nations Human Rights Committee declared exactly the same laws then existing in Tasmania, Australia as invalid. The finding based on the right to privacy is commendable. I have no doubt that if called upon the U.N.H.R.C. would make a similar finding against Fiji's impugned provisions.

Mr. Toonen, a gay activist, challenged Sections 122(a) and (c) and 123 of the Tasmanian Criminal Code. These sections mirror Sections 175(a) and (c) and 177 of the Fijian Penal Code.

The United Nations Human Rights Committee was called upon to determine whether Mr. Toonen had been a victim of an unlawful or arbitrary interference with his privacy, contrary to Article 17(1) of the ICCPR (supra) and whether he had been discriminated against in his right to equal protection of the law contrary to Article 26.

The Committee held:

> *"In so far as Article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of "privacy", and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian Law".* cf ***Toonen v Australia*** (Common No. 488/1992)(31 March 1994)(50th session), UN H.R.Committee…No. CCPR/C/50/D/488/1992.I.I.H.R.R.97.

I accept this as a correct statement of the law and adopt it for the purposes of this appeal.

The right to privacy has been called by Brandeis J of the United States Federal Supreme Court "the right to be let alone" (cf ***Dudgeon supra***, dissent Walsh J p.8). However, what is in issue here is the extent of that right or in other words the extent of the right to be let alone.

Blackmun J in ***Bowers, Attorney General of Georgia v Hardwick et al***, 478 US 186 [1985] made it clear that the much quoted "right to be left alone" should be seen not simply as a negative right to occupy private space free from Government intrusion but as a right to get on with your life, express your personality and make fundamental decisions about your intimate relationships without penalization.

In ***Bernstein vs Besta*** [1996] (4) PCLR 449 (cc): 1996 2 SA 751(cc) at para. 67 it was said that privacy rights should not be construed in ways which deny that all individuals are members of

the broader community and are defined in significant ways by that membership:

> *"In the context of privacy this would mean that it is only the inner sanctums of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community .."*

The Constitution acknowledges that people live in their bodies, their communities, their culture, their places and their times. It is for that reason that the State protects individuals and groups through non-justiciable principles and rights. These protections are at the heart of the constitutional compact between citizen and state. The way in which we give expression to our sexuality is the most basic way we establish and nurture relationships. Relationships fundamentally affect our lives, our community, our culture, our place and our time. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct risks relationships, risks the durability of our compact with the State and will be a breach of our privacy.

There is nothing in the jurisprudence of other open and democratic societies based on human dignity equality and freedom which would lead me to a different conclusion. In many of these countries there has been a definite trend towards decriminalization of consensual adult homosexual intimacy. By 1996 sodomy in private between consenting adults had been decriminalized in the United Kingdom and Ireland throughout most of Western Europe, Australia (with the exception of Tasmania, which has now followed suit) New Zealand and Canada. The United States of America although initially following the judgment of the Supreme Court in ***Bowers*** (supra) has recently re-visited that judgment and overturned it by declaring sodomy laws in the State of Texas invalid as against a guarantee to privacy and dignity. ***Lawrence et al v Texas***, 539 US 203. South Africa saw a landmark decision against sodomy law lead to declarations decriminalizing homosexual acts. (***The National Coalition for Gay and Lesbian Equality and the South African Human Rights Commission vs The Minister for Justice, The Minister of Safety and Security and the Attorney General of The Witwatersand*** [1998] (12) PCLR 1517).

In my view the Court should adopt a broad and purposive construction of privacy that is consistent with the recognition in international law that the right to privacy extends beyond the negative conception of privacy as freedom from unwarranted State intrusion into one's private life to include the positive right to establish and nurture human relationships free of criminal or indeed community sanction.

There can be no denial that some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of the criminal law can be justified as necessary in a democratic society. The overall functions served by the criminal law in this field are in the words of the ***Wolfenden Report (supra)*** "to preserve public order and decency …..(and)….to protect the citizen from what is offensive or injurious". Furthermore, this necessity for some degree of control may even extend to consensual acts committed in private notably where there is a need "to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence" (***Dudgeon v The United***

Kingdom (7525/76) [1981] ECHR 5 (22 October 1981) at para.49).

Limitations

The right to privacy guaranteed under the Fijian Constitution is a limitable right. The limitation must however be prescribed by law, and be reasonable and justifiable in a free and democratic society. The burden of proving the need for limitation of a right rests with the party asserting limitations (***S v Makwanyane and Another*** [1995] 6 BCLR 665 at 707).

In 1984 a panel of 31 International experts met at Siracusa, Sicily, and adopted a uniform set of interpretations of the Limitation Clauses contained in the ICCPR. While they do not have the force of law, they offer important authoritative guidance on when there might be lawful limits on fundamental freedoms. The rare exceptions when the rights of a group can override the rights of an individual are:

When applied as a last resort
When provided for in the law
When shown to be in the legitimate public interest
When found to be strictly necessary, without less intrusive or restrictive means available to achieve the same end
When not imposed arbitrarily.

The State argues that declaring these entire provisions invalid will remove prosecutorial discretion from the Director of Public Prosecutions to charge offenders for offences for sexual violations such as male rape or gross male decency. Counsel further submits that limitations on the right to privacy are justified on moral grounds.

The appellants contend that no limit on the right to privacy and to make fundamental decisions about intimate relationships will be reasonable and justifiable in a democratic society.

On the one hand is the right infringed and its importance in an open and democratic society and the nature and extent of the limitation proposed on the other hand there is the importance of the purpose of the limitation.

In so far as Section 175(a) and (c) is concerned the criminalization of carnal knowledge against the order of nature while technically non discriminatory is at the same time a gross intrusion into the private sexual lives of consenting adults. In my view despite the margin of appreciation given to the State to restrict sexual acts on the grounds of morality, the suggested limitations by criminal sanction are wholly disproportionate to the right of privacy. The criminalization of carnal acts against the order of nature between consenting adult males or females in private is a severe restriction on a citizen's right to build relationships with dignity and free of State intervention and cannot be justified as necessary.

Section 177 clearly breaches a male right to equality before the law. For the same reasons the criminalization of consenting adult male sexual conduct cannot be validly restricted by the State. The arbitrary penalization of males by Section 177 is unacceptable.

The legitimate public interest in allowing prosecution for such crimes of male rape or predatory gross male indecency can be served by the specific preservation of that interest while severing from these penal provisions any offence for consensual adult male or female sex acts.

I find this right to privacy so important in an open and democratic society that the morals argument cannot be allowed to trump the Constitutional invalidity. Criminalizing private consensual adult sex acts against the course of nature and sexual intimacy between consenting adult males is not a proportionate or necessary limitation.

I have given consideration to striking down the common law and these codified provisions entirely but see no need to do so. Acts of male rape still constitute crimes in common law whether in the form of indecent assault or assault with intent to do grievous bodily harm. Nonetheless I am particularly mindful of the provisions of Articles (195) and (2) of the Constitution which empower the Court to modify such law only to the extent of its inconsistency with the Constitution. This is a criminal appeal with a limited scope. It would not be appropriate in my view to consider such a wide ranging and revisionary process as encouraged by the appellant with the support of the Human Rights Commissioner.

In my view the appropriate course is to impose some limits on the common law and Sections 175 and 177 that circumscribe the breadth of those provisions.

Equality and Privacy and Freedom from Degrading Treatment

Equality based on the premise of acceptance focuses on creating symmetry in the lived out experiences of all members of society by eliminating the unequal consequences arising from difference. Equality means equal concern and respect across difference (cf **Littleton in Reconstructing Sexual Equality** [1987] 75 California Law Review 1279 at 1285).

I adopt this definition of equality. It affirms that difference should not be the basis for exclusion, marginalization, stigma and punishment (***National Coalition Case (supra)*** at para. 132). I find that while technically the provisions of Section 175 are not anti homosexual nonetheless they proscribe criminal conduct essential to the sexual expression of the homosexual relationship and are perceived as such.

Further in the absence of any real evidence to the contrary I accept the submissions of the Human Rights Commissioner as supported by the appellants that this section is unequally applied as it is primarily used for prosecutions against homosexuals.

I find Section 177 clearly offends the constitutional guarantees of equality.

In accordance with Article 38(1) I find such unequal treatment before the law on the grounds of gender and sexual orientation to be repugnant to the Constitution and the sections invalid in that they punish males but not females for their sexual acts conducted consensually but in private.

I do not rank the rights of privacy and equality in any descending order of value. I adopt the view

propounded by Sachs SJ in the ***Coalition Case (supra)*** at paragraph 112 that the rights to equality and privacy cannot be separated here because they are both violated simultaneously by these laws. Rather I adopt the words of Madam L'heureux-Dube J in ***Egan v Canada*** [1995] 29 CRR (2d) 79120 were Her Honour remarked:

> *"In reality it is no longer the "grounds" that are dispositive of the question of whether discrimination exists, but the social context of the distinction that matters. Context is of primary importance and that abstract "grounds of distinction" are simply an indirect method to achieve the goal which could be achieved more simply and truthfully by asking the direct question: "does this distinction discriminate against this group of people?""*

I am convinced that the distinctions created by Sections 175(a) and (c) and 177 of the Penal Code do discriminate against homosexuals. The sections are accordingly invalid.

I apprehend the appellant's argument in respect of Article 25 of the Constitution regarding freedom from degrading treatment is that by charging these appellants (under Sections 175 and 177) the State subjected them to degrading and disproportionately severe treatment when they appeared before the Resident Magistrate in Nadi.

There is no doubt that the remarks of the learned Magistrate were not temperate but offensive and far exceeded the need for judicial comment to emphasize deterrence. However, I am not persuaded that these remarks or the appellant's perceived stigmatization persuades me that there has been a breach of Article 25. Indeed I do not apprehend this particular argument adds much to the appeal case at all.

I do not consider it appropriate for me to access damages in the course of the criminal appeal and I decline to do so.

<u>Unequivocal Plea</u>

This issue was the subject of a preliminary judgment by my learned brother Justice Govind following argument limited to a consideration of whether or not the guilty pleas were valid as the particulars read in Court did not substantiate the charges. I must concur with my learned brother's judgment particularly where he admonishes the lower court to ensure full disclosure is made before a plea is taken. In rejecting the discreet ground argued I infer his honour nonetheless left the remaining equivocal plea issues open.

Regrettably this was a case rushed through the Magistrates Courts system with little thought for appropriate charges let alone due process. Barely two days after they were arrested without the benefit of full disclosure or legal representation the two appellants entered guilty pleas.

I accept the second appellants evidence that he was induced into his plea by a policeman's assurance that he would not be sent to jail for this type of offending (Affidavit 12/04/05 7(m) and (n)).

I accept Mr Nadans contention that he only changed his plea after he was bullied into it by the

magistrate shaming him over the nude pictures (EX.1-18).

I am satisfied that both appellants have demonstrated that they pleaded guilty without a full understanding of the effect of their plea or the fact that they were admitting that they committed an offence that would make them liable to such a draconian penalty. The appellants have satisfied me that they have brought a valid challenge to the guilty plea that was entered.

There was a duty cast on this Magistrate to exercise the greatest vigilance with the object of ensuring before a plea of guilty was accepted that these accused had fairly comprehended exactly what that plea involved.

In my view it must have been obvious to the learned Magistrate that these serious charges were a complete embarrassment to both accused and that they did not know such a private sexual relationship was unlawful. The Magistrate knew Mr McCoskar was from Australia and may therefore not appreciate Fijian law. He must have realized the emotional pressure on this accused in that he really just wanted to go home. The Judge was obliged to make a meaningful enquiry of both accused whether they were pleading guilty voluntarily and whether they had been pressured or induced to enter that plea.

For all of these reasons I find that the pleas entered were equivocal and the entire proceedings against each accused can be treated as a nullity.

This finding is completely independent of the finding I now make that the learned Magistrate in any event wrongly assumed jurisdiction in respect of these offences as I find the law underpinning the informations was invalid.

Conclusion

What the Constitution requires is that the Law acknowledges difference, affirms dignity and allows equal respect to every citizen as they are. The acceptance of difference celebrates diversity. The affirmation of individual dignity offers respect to the whole of society. The promotion of equality can be a source of interactive vitality. The State that embraces difference, dignity and equality does not encourage citizens without a sense of good or evil but rather creates a strong society built on tolerant relationships with a healthy regard for the rule of law.

A country so founded will put sexual expression in private relationships into its proper perspective and allow citizens to define their own good moral sensibilities leaving the law to its necessary duties of keeping sexual expression in check by protecting the vulnerable and penalizing the predator.

I declare that Section 175(a) and (c) of the Penal Code are inconsistent with the Constitution and invalid to the extent that this law criminalizes acts constituting the private consensual sexual conduct against the course of nature between adults.

I declare that Section 177 of the Penal Code is inconsistent with the Constitution and invalid to the extent that this law criminalizes acts constituting the private consensual sexual conduct of

adult males.

In the event that adult males engage in consensual sexual acts in private and are prosecuted under Sections 175(a) and (c) or Section 177 of the Penal Code applying general Constitutional principles, the relevant sections in the Penal Code are invalid and the prosecutions a nullity.

In the event that adults engage in consensual sexual acts against the order of nature in private and are prosecuted under Section 175(a) and (c) of the Penal Code applying general Constitutional principles, the relevant sections of the Penal Code are invalid and the prosecutions a nullity.

Invalidity in this context does not mean that the offending sections in the Penal Code ceased to exist rather they are simply rendered inoperative to the extent of the inconsistency. Accordingly the sections dealing with carnal knowledge against the order of nature and acts of gross indecency will still apply to sexual conduct between adults and adult males where sexual activity occurs in public or without consent or involves parties under the age of 18 years.

I find the plea by both appellants taken in the Magistrates Court equivocal and declare the proceedings a nullity.

I grant these appeals and quash the conviction and sentence passed in the Nadi Magistrates Court on the 5th day of April, 2005. In the circumstances no re-hearing is ordered.

Gerard Winter
JUDGE

At Lautoka
26th August, 2005