IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA
HELD AT GABORONE

COURT OF APPEAL CIVIL APPEAL NO. CACGB-157-19
(High Court Civil Case No. MAHGB-000591-16)

In the matter between:

ATTORNEY GENERAL (In his capacity as the legal representative of the Government of Botswana)	**APPELLANT**
AND	
LETSWELETSE MOTSHIDIEMANG	**RESPONDENT**
LESBIANS, GAYS AND BISEXUALS OF BOTSWANA (LEGABIBO)	***AMICUS CURIAE***

Advocate Dr S T Pilane with Attorney Mr G I Begane for the Appellant

Attorney Mrs P K Ramaja with Attorneys Mr T K Tlhankane and Mr B Butale for the Respondent

Attorney Mr T Rantao with Attorneys Ms A Thaga; Mr L Mokopakgosi and Mr B N Mazhani for the *Amicus Curiae*

JUDGMENT

CORAM: KIRBY P
RANNOWANE CJ
LESETEDI JA
GAONGALELWE JA
GAREKWE JA

KIRBY P:

1. This appeal is the third to be heard by a full bench of the Court of Appeal concerning the constitutionality of the conduct of State actors, or sections of statutes challenged as breaching the fundamental rights of members of the gay community. The first such case was **Kanane v The State [2003] 2 BLR 67 (CA) ("Kanane")**. This dealt with charges arising from homosexual offences alleged to have been committed in 1994, many years earlier. The second was **Rammoge and Others v The Attorney General [2017] 1 BLR 494 (CA), ("Rammoge")** which was a challenge to the refusal of the Minister to register a society formed to advocate for the rights of Lesbians, Gays and Bisexuals in Botswana. The three appeals reflect the steady development of constitutional jurisprudence dealing with gay rights in Botswana during the course of the past two decades. I will refer to them in more detail presently.

2. The appeal is brought by the Attorney General against the Orders of Leburu J (Tafa and Dube JJ concurring) handed down by a full bench

of the High Court on 11 June 2019, that –

> "(a) Sections 164(a), 164(c) and 165 of the Penal Code (Cap 08:01), Laws of Botswana be and are hereby declared *ultra vires* sections 3, 9 and 15 of the Constitution and are accordingly struck down;
>
> (b) The word 'private' in section 167 of the Penal Code is severed and excised therefrom and the section is to be accordingly amended;
>
> (c) The respondent be and is hereby ordered to pay applicant's costs of this application; and
>
> (d) There is no order as to costs in relation to the *Amicus Curiae* – LEGABIBO."

3. Immediately prior to making those orders, Leburu J placed them in context by holding that –

> "...it is the decision of this Court that sections 164(a); 164(c) and 165 of the Penal Code are declared *ultra vires* the Constitution, in that they violate section 3 (liberty, privacy and dignity); section 9 (privacy) and section 15 (discrimination). Under section 167 of the Penal Code, the word 'private' is to be excised and severed therefrom, so as to remove its unconstitutionality from the valid provision."

4. On 28 September 2016 Mr Letsweletse Motshidiemang (now the Respondent) filed a notice of motion in the High Court addressed to

the Attorney General (now the Appellant), as representing the Government of Botswana, seeking the following orders:

"(a) Declaring that section 164(a), section 164(c) and section 165 of the Penal Code (Cap 08:01) are *ultra vires* section 86 of the Constitution in so far as the said sections are not made for the good order and governance of the Republic of Botswana;

(b) Declaring that section 164(a), section 164(c) and section 165 of the Penal Code (Cap 08:01) are *ultra vires* the Constitution in so far as section 164(a) and section 164(c) are void for vagueness;

(c) Declaring that section 164(a), section 164(c) and section 165 of the Penal Code (Cap 08:01) are *ultra vires* section 3 and/or section 15 of the Constitution in so far *(sic)* the said sections discriminate against homosexuals;

(d) Declaring that section 164(a), section 164(c) and section 165 of the Penal Code (Cap 08:01) are *ultra vires* section 7 of the Constitution in so far *(sic)* the said sections interfere with the applicant's fundamental right to liberty;

(e) Declaring that section 164(a), section 164(c) and section 165 of the Penal Code (Cap 08:01) are *ultra vires* section 7 of the Constitution in so far *(sic)* the said sections interfere with the applicant's fundamental right not to be subjected to inhuman and degrading treatment or other such treatment;

(f) Any such orders, writs or directions as the Court may consider appropriate for the purpose of enforcing or securing the enforcement of the applicant's rights;

(g) That the respondent bear the costs of this application.

(h) Further and/or alternative relief."

These prayers are condensed in the draft order attached to the application, into the simple request that sections 164(a), 164(c) and 165 of the Penal Code be declared to be *ultra vires* the Constitution.

5. Although the application papers are silent as to the section or Rule under which this was being brought, it is clear from the relief being sought, and from the required citation of the Attorney General, that it was brought under section 18(1) of the Constitution. This confers upon the High Court special original jurisdiction to decide upon complaints of actual or anticipated breaches of fundamental rights, and to –

> "...make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3-16 (inclusive) of the Constitution."

6. While it may be argued that prayers (a) and (b), relating to the alleged contravention of section 86 of the Constitution and to the void for vagueness allegation could not properly be brought under section 18, which is confined to the fundamental rights provisions, that is of no consequence, since those prayers were not granted in

the Court below, (and nor was the prayer concerning degrading treatment which is proscribed under section 7 of the Constitution). The remaining issues before us all relate to Chapter 2 rights, and will be adjudicated as such. The appeal is brought as of right in terms of section 106 of the Constitution, since the High Court judgment involved constitutional interpretation.

7. At the time the application was filed, the Respondent was a student at a local university. He is of homosexual orientation, and has been naturally attracted to other male persons ever since he can remember. He was in an intimate relationship with another man. He described his grievances as follows, and all of them arose from his preferred (and only) means of full sexual expression of his feelings for his partner, and of his partner's feelings for him – namely, what is described as "carnal knowledge against the order of nature" in the impugned sections of the Penal Code – being designated as a criminal offence. It is now settled that "carnal knowledge against the order of nature" refers to sexual intercourse *per anum* (see **Kanane**, *supra*, at **p. 70**).

8. These are the Respondent's complaints, as articulated by him, omitting those relating to section 86 of the Constitution, the degrading treatment allegation, and the void for vagueness argument, with which we are not concerned in this appeal, as they were either rejected or not relied upon by the Judge *a quo*, and there is no cross appeal:

- He is aggrieved that through the criminalisation of his only available means of sexual intercourse as a gay man, his rights to liberty, privacy, dignity, and protection of the law have been denied to him contrary to section 3 of the Constitution, by section 164(a), 164(c) and 165 of the Penal Code.

- He is aggrieved, too, that these impugned sections unconstitutionally discriminate against him on the basis of his sexual orientation contrary to sections 3 and 15 of the Constitution.

9. In amplification of those complaints, he avers that his right to liberty is infringed since those sections prohibit him from using his body and comporting himself in the manner that he chooses, provided that in so doing he does not offend against the rights of others or the public interest. His right to dignity and to privacy is contravened in that the impugned laws intrude upon the most intimate and personal aspect

of his life in the absence of any adverse effect of his behaviour on other persons or upon the public interest. In regard to discrimination he avers that the impugned sections impact upon him disproportionately as opposed to those of heterosexual disposition, because as a homosexual he is forbidden, upon pain of prosecution and imprisonment, from engaging in the only means of sexual intercourse available to him, whereas heterosexuals are allowed their preferred method of sexual intercourse, with no such prohibitions.

10. The Appellant opposed the application, and a short answering affidavit was filed by the Acting Attorney General. The thrust of his defence was that the impugned sections were not discriminatory, as they were aimed not at any group, but rather criminalised a specific sexual act, regardless of whether this was committed by a homosexual person or a heterosexual person. Complaints about the breach of other constitutional rights were met with a general disclaimer that these were answered in each case by the derogation clauses. He provided no specifics. Finally, he averred that in deference to the separation of powers, if indeed the attitudes of Batswana had changed towards gays, then this was a matter to be

addressed by the democratically elected Parliament, and not by the courts.

11. On 29 June 2017 a special case was agreed upon by Counsel for the parties, to be argued without the necessity for *viva voce* evidence. This was very brief, and somewhat surprising in its list of facts in dispute. It was disputed by the Attorney General, with no apparent basis for doing so, that the Respondent was a homosexual who was sexually attracted to other men, and that he was in an intimate relationship with another man. Omitting those with which this appeal is not concerned, the only issue remaining for consideration was whether or not sections 164(a), 164(c) and 165 of the Penal Code were *ultra vires* sections 3 and 15 of the Constitution.

12. At an early stage, the Court was called upon to decide an application by Gays, Lesbians and Bisexuals of Botswana (LEGABIBO) for admission as an *Amicus Curiae*. It presented itself as an advocacy organisation promoting the rights and interests of the gay community, in the wider sense, as indicated by its name, and made no secret of its support for the Respondent's case. It wished to

present evidence, including expert evidence, which would otherwise be unavailable to the Court, and also to present arguments and refer to international authorities which were also otherwise unlikely to be available. LEGABIBO was duly admitted as an *Amicus,* and there is no appeal touching on its role in the case.

13. That notwithstanding, I should state, for future reference, that in my view, it would have been more appropriate for LEGABIBO either to have made its expert and material available to the Respondent as his witness or to have applied to be joined as a co-applicant rather than as an *Amicus*. The role of an *Amicus* is to act as a disinterested party, presenting useful and new arguments in the public interest for the assistance of the Court. It is not, in the normal course, to file evidential affidavits, and to produce exhibits for the benefit of one party or the other. LEGABIBO was permitted to present argument on the possible unconstitutionality of section 167 of the Penal Code, notwithstanding that that section was not challenged in the application before the Court. Had it been a party, this might have been permissible if an application for amendment had been made,

which did not happen. Leburu J proceeded to deal with that section in his judgment – a matter to which I will revert later.

14. After its admission, LEGABIBO filed a lengthy affidavit sworn to by its Chief Executive Officer ("the CEO") to which it attached a raft of supporting material directed at showing that not only the impugned sections, but also section 167 of the Penal Code breached the Respondent's fundamental rights to liberty, privacy, dignity and equal protection of the law. They also had the effect of improperly discriminating against him on the ground of his sexual orientation, contrary to section 15 of the Constitution.

15. Not only was the CEO herself a seasoned graduate with experience of research on key populations, but she was supported by an expert affidavit from Associate Professor Alexandra Müller of the Cape Town University, a specialist with impeccable credentials, who had conducted peer-reviewed studies in the region to gauge the life experiences of members of the gay community, and particularly of homosexual men, including surveys in Botswana. Both concluded that the characterisation of anal sex as a criminal offence by sections

164(a), 164(c) and 167 of the Penal Code caused gay men, for whom this was their preferred and most fulfilling means of sexual expression, to live in constant fear of arrest, of harassment, and of stigmatisation on account of their sexual orientation. This caused them to be reluctant to access medical services and interventions on pressing issues such as HIV/AIDS and sexually transmitted diseases ("STDs"). They were vulnerable to and experienced, to a far greater extent than their heterosexual counterparts, violence, harassment and blackmail on account of their sexual orientation, and frequently encountered negative and dismissive reactions from health professionals or police officers to whom they reported their problems. This stigmatisation still persisted at all levels of society notwithstanding a progressively greater acceptance of their status by Batswana generally, and it was likely to continue while sections 164(a), 164(c) and 167 of the Penal Code, which provide heavy prison sentences for 'offenders', remained on the Statute Books.

16. A number of studies and research papers, all authorised by the Botswana Government, confirmed the negative effect the impugned criminal sections had on gay men in Botswana as an HIV/AIDS

vulnerable group, and that they were often reluctant, owing to the stigma, and to fear of prosecution, to come forward for testing and treatment, or as complainants when they suffered blackmail or assault owing to their orientation. This had an adverse effect on their mental well-being owing to the stress of constant fear of discovery or arrest if they engaged in what for them was normal sexual conduct as an expression of their love for their partners. This sometimes led to depression, suicidal behaviour, alcoholism, or substance abuse, and at a level far higher than that of heterosexuals.

17. Also attached to LEGABIBO's affidavit were country and other reports produced by the Botswana Ministry of Health relating to high-risk vulnerable sub-populations, including prisoners and men-who-have sex with men (MSM) which also concluded that owing to concealment of their orientation for fear of arrest, or stigmatisation, they frequently failed to come forward for testing and treatment and this hindered Government efforts at overcoming the HIV/AIDS pandemic. The Ministry's conclusion was also that the criminalisation of anal sex tended to fuel negative public opinion as gays were seen as breakers

of the law. No such stigma appeared to attach to heterosexuals who engaged in similar conduct.

18. LEGABIBO did note some encouraging developments in the country. In late 2016 the Botswana Government, deported a visiting pastor for preaching a virulent anti-gay agenda, and in an interview in the same year, former President Mogae expressed his support for the Lesbian, Gay, Bisexual, Transgender and Queer community ("LGBTQ community"), and his conviction that the widespread condemnation of gays in Africa was abating.

19. The conclusion of the LEGABIBO expert evidence was that a necessary first step towards the ultimate acceptance by nay-sayers of gays as full and equal members of society was the decriminalization of homosexual behaviour.

20. In his answering affidavit to LEGABIBO's intervention, the Attorney General pointed out that the impugned sections had been specifically amended to render then gender neutral, and that they applied equally to gays and heterosexuals of either sex. No allegation had

been advanced of any person ever having been charged under the impugned sections, so that their effect on the populace was minimal. Since only certain sexual acts were prohibited, others remained available to gay men, although no suggestion was made of what these might be. While categorising the studies presented as self-serving and advocacy-based, the Attorney General merely 'noted' these and/or stated that he "had knowledge of them". He did not deny their contents or conclusions. He baldly denied that the sections caused stigmatisation of gay men, or had the effect of discriminating against them, but offered no research, no studies, and no evidence from the Government to the opposite effect.

21. In reply, LEGABIBO and Professor Müller acknowledged that the impugned sections were gender neutral in their language, but were clear that the sections had a disproportionate and more negative effect on members of the LGBTQ community, and were discriminatory in their effect. They served no useful public interest purpose.

22. After an exhaustive examination of relevant statutory and constitutional provisions, the Court found that the grievances of the Respondent were sufficient to afford him *locus standi* to seek the desired relief, and also that the High Court had the necessary jurisdiction to entertain his suit. There is no challenge to those substantive findings in the appeal filed save in relation to the effect of **Kanane**'s case, and there is no need to refer to the issue of *locus standi* further. The only rider I should add, is that Dr Pilane, for the Appellant, argued obliquely, that on the principle of *stare decisis* the Court below lacked jurisdiction to make the findings it did, because it was bound by the decision in **Kanane** and had no business to depart therefrom. That argument will be addressed presently.

23. The High Court Panel, led by Tafa J, considered extensive argument from Counsel on both sides and from the *Amicus Curiae*, and was referred to court decisions from many nations, and a number of international instruments before reaching its unanimous decision, in a judgment written by Leburu J. It handed down the Orders referred to at the commencement of this judgment, and it is those Orders against which the Attorney General now appeals.

24. The judgment is long, comprehensive and searching. It is undoubtedly the fruit of painstaking research and introspection, which is to be commended. Its exhaustive examination of a large number of foreign precedents, articles, and treaties will no doubt be a useful point of reference for future cases but, in my judgment, much of the ground covered does not need to be retraced in the present appeal, either because the issues in question have already been adequately addressed by the full court in **Kanane** and **Rammoge**, or as a result of concessions made by Mr Rantao, for LEGABIBO, during argument. I do not understand Mrs Ramaja, for the Respondent, to disagree with those concessions.

25. The first concession made is a major one. It is that the attack on the constitutionality of section 167 of the Penal Code, which criminalises acts of gross indecency, whether performed in public or in private, and whether consensual or not, upon pain of imprisonment, was introduced by the *Amicus Curiae*, and not by the Respondent. It was thus not a matter to be dealt with at all by the Court *a quo*.

26. This notwithstanding Leburu J analysed section 167 in detail, concluded that it was unconstitutional, and made an order, concurred in by the other Judges, that the word 'private' should be excised therefrom. While the learned Judge's reasoning is most persuasive, particularly on the section's inconsistency with the Respondent's right to privacy, it was not a matter properly before him, and his views expressed on the subject are *obiter dicta* only, as rightly conceded by Counsel. It may be that they will be of relevance in a future case where that issue is properly raised, but it is not a matter for present consideration by this Court either.

27. This does mean, however, that the appeal must have at least limited, though perhaps temporary success, and that Order (b) made by the Court *a quo* relating to the excision of the word 'private' from section 167 of the Penal Code cannot be allowed to stand.

28. The second concession made by Mr Rantao and by Counsel for the Respondent is that section 165 of the Penal Code, dealing with attempt, covers offences under sections 164(a), 164(b), and 164(c) of the Code, and not merely sections 164(a) and 164(c). Section

164(b) prohibits bestiality, that is, having carnal knowledge of an animal. That is not among the offences impugned in the present proceedings. If, as is the main prayer, sections 164(a) and 164(c) are struck down, then section 165 will remain as proscribing an attempt to commit bestiality under section 164(b). If they are not struck down, then section 165 will not be struck down either. It follows that the reference to section 165 in Order (a) must be removed, as that section will remain whatever the outcome.

29. In result, this judgment will deal with the real and remaining issue between the parties, namely whether sections 164(a) and 164(c) of the Penal Code should be struck down as impermissibly undermining the fundamental rights of gay men in particular, as guaranteed under sections 3 and 15 of the Constitution. These include the rights to liberty, dignity, privacy and equality before the law.

30. As has already been said, the issues of the purported vagueness of the sections in question, of their alleged contravention of section 86 of the Constitution, and of them amounting to degrading treatment of affected persons contrary to section 7 of the Constitution, were

not upheld by the Court *a quo*, and there has been no counter-appeal in that regard. So the sections of the High Court judgment touching on those issues need not be revisited either.

31. It follows that if the main appeal succeeds, the entire Order of the Court *a quo* will be set aside. If the main appeal fails, then the corrected order will read that:

> "Sections 164(a) and 164(c) of the Penal Code (Cap 08:01) are hereby declared *ultra vires* sections 3, 9, and 15 of the Constitution and are accordingly struck down."

32. The issue of costs would, in that event, fall to be considered afresh in the light of those changes.

33. I will leave full discussion of the balance of Leburu J's judgment for the assessment stage of the grounds of appeal relied upon.

34. On 22 July 2019 the Attorney General filed his notice of appeal, in a form previously unseen in this jurisdiction. He listed no fewer than 82 'decisions' of the Court below, identified only by paragraph

numbers, with no further particularity, which he wished to challenge. These were followed by twelve separate grounds of appeal, containing a number of duplications, and again citing numerous paragraph references, with no particularity. I must stress that it is not the task of this Court to puzzle out the intentions of litigants by matching paragraph numbers to their contents – particularly 82 of these. Rule 18 of the Court of Appeal Rules is specific as to the clarity and rationale required for each ground of appeal advanced, and the notice of 22 July 2019 falls far short of what the Rules demand. That being said, no objection has been taken to the way in which the grounds have been presented, and I will say no more on the subject. Virtually every finding of Leburu J was challenged, and every reference to a foreign precedent condemned.

35. Fortunately, our task has been lightened by the decision of Dr Pilane, Counsel for the Appellant, to condense these grounds (apart from the challenge to the excision from section 167 of the Penal Code of the word 'private') to three key objections to the judgment of the Court below, and I will deal with these seriatim. They are that the Court

below erred in:

(i) Purporting to depart in an impermissible way, from the decision of the full Court of Appeal on sections 164(a) and 164(c) of the Penal Code in **Kanane**'s case, by which it was bound.

(ii) Failing to respect the separation of powers, and so intruding on the space of the democratically elected Parliament by purporting to rule on a question of policy, and so to alter the law;

(iii) Failing to apply section 15(9) of the Constitution, which preserved intact statutory provisions which were in place at the time the Constitution was enacted.

36. Of these, the section 15(9) ground was not raised or argued in the Court below, and was not dealt with at all by Leburu J. Nor was it raised or dealt with in **Kanane**'s case. It is no doubt an afterthought, but since this is a constitutional case, the point is an important one, and both the Respondent and the *Amicus* have presented full argument on it, it is proper that this Court too should fully address that new ground of appeal.

ANALYSIS

(A) **KANANE'S CASE**

37. Since the Appellant's principal ground of appeal is that the decision effectively overruled the full Court's findings in **Kanane**, by which the High Court was bound on the principle of *stare decisis*, I will re-examine the *ratio* and factual foundation of that case. It was the view of the Court *a quo*, of the Respondent, and of the *Amicus*, that the present case is distinguishable from **Kanane** and that the Order appealed against was properly made.

38. In **Kanane** the appellant was charged with what was termed "an unnatural offence" contrary to section 164(c) of the Penal Code, alternatively with the offence of "gross indecency" contrary to section 167. The latter charge need not concern us in the present appeal. The offence was said to have been committed in 1994, at which time the section read as follows:

> "164. Any person who –
>
> (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 liable to imprisonment for a term not exceeding seven years."

39. The charge was preferred in March 1995. It was subsequently referred to the High Court in terms of section 18(3) of the Constitution for a determination on the constitutionality of the Penal Code sections in question. While that determination was still pending, Parliament passed the Penal Code (Amendment) Act No. 5/1998 which came into force on 30 April 1998. Prior to that, virtually all the sexual offences in the Code were gender based. Rape, for example, was committed (under section 141) by:

> "Any male person who has unlawful carnal knowledge of a woman or girl without her consent..."

40. The effect of the amendment was to widen the definition of rape (about which I will have more to say when addressing the third ground of appeal), to make it gender neutral, to add other forms of rape, and to provide for a lengthy minimum sentence. The other so-named 'offences against morality', of which there are a great

number, were also made gender neutral, and in most cases had their permissible sentences bumped up. In section 164(c) the words "male person" were replaced by "any person", but the permissible sentence remained the same. It was that amended section that was accordingly considered by this Court.

41. The full Court lent, in the main, a sympathetic ear to the appellant's grievances. He prayed for an order that sections 164(c) and 167 of the Penal Code were *ultra vires* section 3 of the Constitution in that –

(a) They discriminated against males on account of their gender contrary to section 15,

(b) They hindered male persons in their enjoyment of the right of free assembly and association contrary to section 13, and

(c) Generally offended against their right to freedom of expression, privacy, and freedom of conscience.

42. Prior to the amendment, section 164(a), (b) and (c) had, as I have said, been framed as follows, upon the entry into force of the Penal Code on 10 June 1964:

"Any person who –

(a) has carnal know'edge 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..."

43. Although initially based on gender discrimination in its ordinary sense, the argument was advanced that section 164(a) and (c) discriminated against gay men as a group (as did section 167). This applied equally to all the rights said to have been breached, so the judgment was centred on section 15 of the Constitution and its mother provision, section 3.

44. The court commenced by endorsing the views of Amissah P, expressed in **Attorney General v Dow [1992] BLR 119 (CA)** (full bench) ("**Dow**") that sections of the Constitution conferring fundamental rights (of which section 3 is the principal one) are to be broadly and generously construed, while derogation clauses, detracting from those rights are to be narrowly construed. All sections touching on the same subject matter are to be read and

considered together in the task of interpretation. That approach to the interpretation of the Constitution is now settled law in our jurisdiction.

45. Since they lie at the heart of this appeal, too, sections 3 and 15 of the Constitution, bear repeating. In terms of section 3, which introduces and lists the protected fundamental rights, it is provided that –

> "Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinion, colour, creed or sex, but subject to respect for the rights and freedoms of others, and for the public interest to each and all of the following, namely –
>
> (a) life, liberty, security of the person and protection of the law;
>
> (b) freedom of conscience, of expression and of assembly and association; and
>
> (c) protection for the privacy of his or her home and other property and from deprivation of property without compensation,
>
> the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

46. Section 15 sets out in its first three sub-sections the main provisions providing for protection against discrimination, before proceeding in nine further sub-sections, to list permissible derogations from that protection. The first three sub-sections, as they existed at the time of both **Dow**'s case and **Kanane**'s case, read as follows:

> "15 (1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.
>
> (2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
>
> (3) In this section, the expression 'discriminatory' means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to 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."

47. The full Court in **Kanane** endorsed the views expressed by Amissah P, and also by Aguda JA in **Dow**, to the effect that the list of categories provided in section 15(3) was not intended to be conclusive as changing times and circumstances would reveal further

groups or minorities worthy of, and entitled to constitutional protection from discrimination as well. Amissah P expressed it thus, at **p. 146**:

> "I do not think that the framers of the Constitution intended to declare in 1966, that all potentially vulnerable groups and classes, who would be affected for all time by discriminatory treatment, have been identified and mentioned in section 15(3). I do not think that they intended to declare that the categories mentioned in that definition were forever closed. In the nature of things, as far sighted people trying to look into the future, they would have contemplated that, with the passage of time, not only groups or classes which had caused concern at the time of writing the Constitution but other groups or classes needing protection would arise. The categories might grow or change. In that sense, the classes or groups itemised in the definition would be, and in my opinion are, by way of example of what the framers of the Constitution thought worth mentioning as potentially some of the most likely areas of possible discrimination."

48. He expressed the view, also, that it was inconceivable that the framers, having stated uncompromisingly in section 3 that every individual was entitled to the protection of his or her fundamental rights regardless of that individual's sex, would then have proceeded to negate that entitlement by the deliberate exclusion of sex in section 15(3).

49. As for Aguda JA, his views appear at **p. 166**:

> "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 be allowed to be a lifeless museum piece; on the other hand 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. ...We must not shy away from the fact that whilst 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. ...I conceive it that the primary duty of the judges is to 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 governed by some acceptable concepts of human dignity."

50. Aguda JA went on to add, and the **Kanane** Justices agreed, that Botswana, as a country where liberal democracy had taken root, was to take note of, and not be immune from, progressive movements going on in other liberal democracies.

51. The **Dow** Justices proceeded to enlarge the scope of section 15(3) by holding that this should thenceforth be read to include discrimination on the ground of sex as well.

52. Tebbutt JP made reference in **Kanane** to the origins of the section 164 offence of buggery, as it used to be known, but did not match the exhaustive exposition of Leburu J in his judgment in the present case. This also remains as a useful reference for future scholars, and I need not repeat it. Suffice it to say that the offence had its origins in Judaeo-Christian teachings, and was perpetuated in Henry V's *Buggery Act of 1533*. This ancient offence was transported abroad to the British Colonies and Protectorates where it has taken root and endured even after Independence in many, but by no means all former Colonies and Protectorates – notwithstanding that in 1967 the United Kingdom itself, following the Wolfendon Commission, recognised that the offence was outdated, and decriminalised same sex sexual intercourse, by the Sexual Offences Act of that year.

53. Tebbutt JP took note of the fact that several countries had since decriminalised the offence of sodomy, at that time, including Angola, South Africa, Mozambique, Canada and the United States of America. He cited relevant constitutional precedents in some of those countries and quoted the strong arguments there advanced to justify such abolition. He then posed the question: "Should such acts be

decriminalised in Botswana as well?" In posing that question he was clearly referring to the power of the Court in that regard, and was not presuming to offer unsolicited advice to the Parliament of Botswana. He elaborated his question in these words at **page 77**:

> "The question which therefore pertinently arises is whether in Botswana at the present time 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 who require protection under section 3 of the Constitution? Should the word 'sex' therein be broadened by interpretation to include 'sexual orientation'?
>
> This would involve broadening the definition in section 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 allowed to give expression to their sexual desires, whereas heterosexual men can."

54. On reflection, the latter description was, perhaps, inadequate. It tended to place the act of anal intercourse between gay men in the lesser category of a forbidden pleasure, rather than, as has been amply demonstrated in the present case, a key expression of their love made by and between gay intimate partners.

55. Having posed those questions, Tebbutt JP went on to find, and the other Justices concurred, that, in the absence of any evidence being

produced that negative attitudes of Batswana towards gays had abated, and in the absence of evidence of adverse consequences to gay men being caused by the impugned sections:

> "...the time (had) not yet arrived to decriminalise homosexual practices even between consenting adult males in private. Gay men and women do not represent a group or class which at this stage has been shown to require protection under the Constitution."

56. Once again, Tebbutt JP was clearly adverting to the right (and the duty) of the Court to strike down statutory provisions which are, or have become by virtue of intervening circumstances, unconstitutional. He was re-inforcing his earlier *dictum* in **Good v The Attorney General [2005] 2 BLR 337 (CA)** (full bench) **at 349** that:

> "It would be irresponsible in the extreme for this Court to make findings based on speculative submissions and on perceptions which may or may not be held by the public without any reliable factual material to support them."

57. What is clear from the judgment in **Kanane** is that the Court was not closing the door to the possibility, sometime in the future, of the court finding in another case, in the light of subsequent events, or

upon the presentation of convincing evidence, that it would then be proper and necessary to strike down the offending sections. A subsequent court, or this Court, would not in those circumstances be overruling **Kanane**. It would be endorsing the sentiments expressed therein, and taking the next logical step as decreed therein.

58. So, a statutory provision which was not ripe for striking down in 2003, may properly be shown in 2021 to now be clearly unconstitutional in the light of fresh evidence led. That is precisely what has happened in the present case. It is not therefore necessary, as all Counsel have attempted to do, to "distinguish" this case from **Kanane** as such.

59. **Kanane** was followed in 2017, fourteen years on, by **Rammoge** another full bench decision. This reflected further developments in the attitude of the courts, and of society in Botswana towards the rights of the gay community. It was stated at **p 511** that:

> "(**Rammoge** *et al*) were able to lead compelling evidence that attitudes in Botswana have, in recent years, softened somewhat on the question of gay and lesbian rights. Parliament itself has, by the Employment (Amendment) Act 10 of 2010 amended section 23(d) of

> the Employment Act (Cap 47:01) to forbid the termination of an employee's contract of employment on grounds of sexual orientation; national policies on HIV/AIDS recognise gays and lesbians as a vulnerable group requiring special support, and organisations such as BONELA have been registered which openly campaign for the rights of the LGBTI community. This Court, too, can take notice of a far more open public debate on these issues in recent years. While strong dissenting views are still expressed by religious and other groups, some prominent politicians have begun to speak out in support of gay and lesbian rights. This was a subject which only a few years ago was a virtual taboo for public discussion, unless to condemn homosexuality outright. The Minister's answering affidavit, too, is free of any homophobic nuance, and refers only to enforcement of the law as he sees it. He encourages the respondents, in his correspondence, to have his decision tested by the Court, if they disagree with it. In terms of timing, it may be that the general softening of attitude towards the LGBTI community has developed in the years that followed the adoption in 1997 of the National Vision 2016, and the widespread dissemination of the Vision document. One of the pillars of the Vision was that Botswana would be regarded as a "Compassionate, Just and Caring Nation."

60. **Rammoge** was followed in 2018 by **Tapela and Others v Attorney General and Others [2018] 2 BLR 118 (CA)**, which acknowledged the incidence of homosexual practices in male only prisons, and reversed the refusal of Government to make available anti-retroviral drugs to foreign prisoners. Again, in **ND v Attorney General and Another [2018] 2 BLR 223 (HC)**, Nthomiwa J overturned the decision of the Registrar of National Registration to refuse to amend the National Identity Card of a trans-gender man to

reflect his changed gender identity as 'male'. His birth gender – female – was reflected on his ID (or 'omang') card, and this caused him embarrassment, and sometimes resistance when he accessed or attempted to access public services.

61. I should add that in 2005, taking its cue from the decision in **Dow**, Parliament itself amended section 15(3) of the Constitution (by the Constitution (Amendment) Act No. 9 of 2005) by adding 'sex' to the list of categories in respect of which discrimination was outlawed.

62. In the present case further evidence has been produced on the progressive changes in attitude towards the gay community. Among the additional countries which have decriminalised sodomy are Belize, India, Tasmania, Hong Kong, Jamaica, Guyana, Fiji, Ireland, Cyprus, and the members of the European Union. In accordance with the *dicta* of Tebbutt JP in **Kanane**, and Aguda JA in **Dow**, this is a further indication that Botswana, if our own circumstances so dictate, should follow suit. Leburu J is to be commended for his exhaustive research and comprehensive references to pertinent case law in these and other countries, to scholarly articles of relevance, and to

applicable international treaties. In the main, those references are endorsed and I will not burden this judgment by repeating them.

63. As to changes in attitude, there can be no better barometer of prevailing public opinion than the utterances and actions of our Heads of State. In Botswana, our democratic structure dictates, as per the Constitution, that the leader of the majority party in Parliament after each election becomes President of the country. Of our last three Presidents, Hon FG Mogae in a 2016 interview, expressed the view that attitudes in Africa are becoming progressively more tolerant of and accommodating towards the LBGTI community. He commended this development. His successor, Lt. General SKI Khama, reacted to the only recent imprisonment of a gay man in Botswana, by pardoning him in the exercise of his prerogative of mercy, when the convict had served only one month of his sentence. And His Excellency Dr MEK Masisi, our sitting President, remarked in a 2018 speech that:

> "There are also many people of same sex relationships in this country, who have been violated and have also suffered in silence for fear of being discriminated. Just like other citizens, they deserve to have their rights protected."

64. The approach of the Courts in recent times has also been more empathetic towards the gay community. The one exception was the outright condemnation of homosexuality by Mwaikasu J sitting alone in the original High Court **Kanane** case, on evangelical grounds, and as being an unAfrican import from the West. That approach was roundly condemned by the full bench of this Court in **Kanane** at **p 78,** and in **Kanane** the five Justices, although finding on the material (or lack thereof) then before them that the time had not yet come to decriminalise the offence of sodomy, were generally supportive of the rights of the gay community. Since then one Judge and five Justices, in **Rammoge**, one Judge and five Justices in **Tapela** (*supra*), Nthomiwa J in **ND v Attorney General** (supra) and the three High Court Judges in the Court below in the present case, have all agreed that the constitutional rights of gay and transgender people and of men who have sex with men are fully entitled, as are all others, to the protection of the law.

65. Add to that the recent deportation by the Government of a virulently anti-gay visiting pastor, and the popularisation of a song by a local group in praise of the LGBTI community, together with the

developments recorded in **Rammoge** (*supra*), and there can be no doubt, in my judgment, that the tide has turned in support of gay rights. The historic antipathy towards this section of our community has abated considerably. Dr Pilane, too, in his address, was adamant that Batswana hold no ill-will against gays. So, unlike in **Kanane**, this Court has adequate evidence of the change of attitude of Batswana. It is proper that, applying the generous construction required in the interpretation of fundamental rights, the definition of 'sex' in both section 3 and section 15(3) falls to be expanded by the inclusion of the wider meanings of the word, which must embrace not only sexual orientation but gender identity as well. Both those characteristics are embodied in the full generic meaning of the word 'sex'. The findings of Leburu J in that regard and the precedents he relied upon are endorsed.

66. So the present appeal is clearly distinguishable from **Kanane** in respect of evidence of changed public attitudes. But, as has been frequently held, public opinion, as gauged by the Court, provides on its own no basis for any declaration that a statute or a section should be struck down. There must be proper independent evidence that

the impugned section contravenes in an improper way the fundamental rights, or certain of those, of the complainant individual or group. That, too, was lacking in **Kanane.** As was held in **Ramantele v Mmusi and Others [2013] 2 BLR 658 (CA)** (full bench) **at p 687,**

> "...prevailing public opinion, as reflected in legislation, international treaties, the reports of public commissions, and contemporary practice, is a relevant factor in determining the constitutionality of a law or practice, but it is not a decisive one."

67. The present case differs from **Kanane** fundamentally in that respect, too. Here convincing expert evidence, which was accepted by the Court below, and which was not controverted, was led that sections 164(a) and 164(c) of the Penal Code have unjustified negative consequences, particularly on homosexual men, and that those negative consequences undermine and negate their right to liberty, privacy, dignity and the equal protection of the law, as guaranteed by section 3 of the Constitution. Those are properly to be construed as applying to "every person", regardless not only of his or her sex, but of his or her sexual orientation as well. Those sections lead to the stigmatisation of gay men, make them more vulnerable to HIV/AIDS

and STDs through a resultant reluctance to access public health facilities for testing and treatment purposes, and can lead to stress-related mental health issues, and also to suicidal tendencies. They lead also to a reluctance to report assaults and blackmail attempts arising from their orientation for fear of being branded by the police as criminals themselves. No such evidence was available in **Kanane.**

68. Dr Pilane, for the Appellant, relies on the case of **State v Maauwe and Another [2006] 2 BLR 530 (CA)** (full bench), where it was held by Zietsman JA, that:

> "The Court of Appeal is the superior court in Botswana and its function is to consider and determine appeals from, amongst others, the High Court. It is the final court of appeal in Botswana, and its decisions are binding upon all other courts in the country."

69. He qualified this, by saying that it is only this Court which can overrule its own earlier decisions. It will not do so lightly, and only when it is satisfied that its previous decision was wrong, and particularly where the earlier decision was a split decision. See **Kweneng Land Board v Mpofu and Another [2005] 1 BLR 3 (CA)** (full bench). Dr Pilane argues that the full Court in **Kanane**

found that sections 164(a) and 164(c) of the Penal Code were not unconstitutional, and that this Court is bound by that decision, since it was clearly not wrong, and the High Court was also so bound.

70. The Respondent, and the *Amicus*, counter that, as laid down in **Botswana Railways Organisation v Setsogo and Others [1996] BLR 763 (CA)** (full bench) **at 806**,

> "The doctrine of the binding nature of judicial precedent applies to the *ratio decidendi* of a case and not to all *dicta* and pronouncements in it. And the *ratio decidendi* of the case depends on the issue or issues raised, the facts and arguments made in support thereof, the findings on them, if any, and the holding on the law as applied to the facts and arguments."

71. As has been demonstrated above, the evidence before the High Court in the present case was entirely different to that in **Kanane** (where there was little or no evidence at all), and the **Kanane** decision was specifically stated to be based on conditions as they pertained in 2003. Leburu J's judgment did not, in my judgment, attempt to "over-rule" **Kanane** at all. It represented a logical progression, in a different age, of the arguments and reasons advanced in **Kanane**. Counsel referred also to the case of **Canada**

(Attorney General) v Bedford 2013 SCC 72, (2013) 3 SCR 1101 where the Supreme Court in that country held that:

> "The common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. However, a lower court is not entitled to ignore binding precedent, and the threshold for re-visiting a matter is not an easy one to reach. The threshold is met when a new legal issue is raised, or there is a significant change in the circumstances or the evidence."

72. I am in respectful agreement with those sentiments. In the present case, not only was significant new evidence produced, but new legal issues which had not been dealt with either fully or at all, were raised. These related to discriminatory effect, contrary to section 15(1) of the Constitution, and also to breaches of the fundamental rights conferred by section 3, to liberty, dignity and privacy.

73. In my judgment the ground of appeal alleging an unacceptable deviation from the binding decision in **Kanane** must fail.

(B) THE SEPARATION OF POWERS

74. Dr Pilane argues strongly that the courts are, in his words, "too keen to make history at every opportunity." In his view, the Constitution is clear that it is Parliament which is given the sole power (by section 86) to make law. That is what majoritarian democracy is all about. The role of the courts is to interpret the laws made by Parliament, according to the rules laid out in the Interpretation Act (Cap 01:04) and to determine disputes arising from the application of the laws. The courts have, according to him, no mandate whatever to make law themselves. Applying those principles to the present case, he argues that LEGABIBO, as an advocacy body, is free to lobby legislators for a change in the law so as to repeal sections 164(a) and 164(c) of the Penal Code. This is a policy matter, for Parliament alone, and the courts cannot usurp the powers of Parliament by undertaking that role itself.

75. He relies for those propositions on two decisions of this Court dealing with the death penalty which, it was also argued, progressive administrations throughout the world are moving to outlaw. The decisions in question are **Ntesang v The State [1995] BLR 151**

(CA) (full bench), and **Kobedi v The State (2) [2005] 2 BLR 76 (CA)** (also full bench). He also cites the words of Lord Bingham in **Reyes v The Queen (2002) 2 AC 235** (also referred to by Tebbutt JP in **Kanane**), namely, that:

> "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, and to decide what kind and measure of punishment such conduct should attract, or be liable to attract..."

76. In **Ntesang**, Aguda JA, dealt with an attempt to dislodge, or avoid, the plain meaning of section 4(1) of the Constitution which states that:

> "No person shall be deprived of his or her life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he or she has been convicted."

And, as to hanging (as the means of carrying out that sentence) which was preserved by section 7(2), which saved punishments of a description which was lawful immediately prior to the coming into

force of the Constitution, he stated, uncompromisingly that:

> "I have no doubt in my mind that the court has no power to re-write the Constitution in order to give effect to what the appellant has described as progressive movements taking place all over the world."

77. In its context, and on the evidence before him, that statement was no doubt correct. But the sections in question are a far cry from those which this Court is called upon to construe. The death penalty is specifically authorised by section 4(1), and cannot be eliminated by interpretation. Sexual orientation, on the other hand is not mentioned in the Constitution at all, either in section 3 or in section 15. The question to be determined in this case is whether on a proper and generous interpretation of sections 3 and 15, it should be included as an unavoidable component of the generic word 'sex'.

78. Lord Bingham's words in **Reyes v The Queen**, and also Tebbutt JP's citation of those words, need to be read in context. Lord Bingham's speech contained not only those sentiments, but others as well. He

added that:

> "A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society." (*my emphasis*)

79. And Tebbutt JP, after quoting Lord Bingham's words at **p 79** of **Kanane**, added that:

> "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." (*again my emphasis*)

80. So while Parliament is given the mandate by section 86 to make laws for "the peace, order and good government of Botswana," it may only do so "subject to the Constitution", as the section says.

81. Dr Pilane has attempted to brush off as 'dangerous', Lord Denning's oft-quoted statement that "the judges do every day make law, although it is almost a heresy to say so" (see his "Reform of Equity –

Law Reform and Law making" (1953)). I do not find it to be so. It merely reflects the reality that Judges routinely, as is their duty, in fulfilling their task of statutory interpretation, tweak laws as to their meaning, so as to accord with the Constitution, or to permissibly fill *lacunae* in their wording. In the context of the Constitution, the framers made the role and responsibility of the courts in this regard plain, in carefully crafted sections thereof.

82. By section 86 the democratically elected Parliament is given the power, but always "subject to the Constitution" (and particularly subject to the entrenched fundamental rights set out in Chapter 2), to make laws in Botswana. In doing so, it no doubt gives effect to the will of the people as reflected in the views of the majority party in Parliament. And the people, in turn, will give effect to the wishes and priorities of that majority. The views and concerns of individuals, or of minority or maginalised groups will carry as little weight as their voting power dictates. And both Dr Pilane, and Aguda JA in **Ntesang** are correct that Judges do not have the power to "re-write the Constitution." What they do have, are the powers (and the

duties) accorded to them by the Constitution itself, in accordance with the deliberate will of its framers.

83. By sections 105 and 106 of the Constitution, the High Court (and, by extension, the Court of Appeal) is given the power (and the duty) to decide upon all questions which arise in civil and criminal proceedings, relating to the interpretation of the Constitution. This is additional to the general jurisdiction accorded to the High Court to determine all civil or criminal proceedings of whatever nature arising in Botswana (*vide* S. 95). Judges also have the duty, in terms of their general jurisdiction, to interrogate laws passed by Parliament to ensure that these are in accordance with the Constitution. If they are not, then they must be struck down or, where this is possible, suitably brought into line with the Constitution. As was stated in **Ramantele** *(supra)* **at p 687**,

> "The courts...have a sacred duty, which they must exercise objectively, and without fear or favour, to test any law passed by Parliament against the imperatives of the Constitution, and to strike down any law, including a customary law, that does not pass constitutional muster. That will always be so."

84. The next question considered by the framers of the Constitution, was the permissible means by which the courts could enforce their decisions arising from their interpretation of the Constitution. Their solution is to be found in section 18(1) and 18(2) thereof. These read as follows:

> "18(1)Subject to the provisions of subsection (5) of this section (*relating to Rules of Court*), if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being, or is likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.
>
> (2) The High Court shall have original jurisdiction –
>
> (a) To hear and determine any application made by any person in pursuance of subsection (1) of this section; or
>
> (b) . .(immaterial)
>
> and may make such orders, issue such writs, and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3-16 (inclusive) of this Constitution."

85. As was pointed out in **Kobedi v State [2002] 2 BLR 502 (HC) at 515** –

> "Under section 18, the relief which may be granted is also very wide, extending to whatever the court may consider appropriate for the purpose of enforcing or securing the enforcement of sections 3-16 (inclusive) of the Constitution. This may include relief which is not

available under any other law, such as indefinite stay of prosecution."

86. It also includes the power to strike down laws, or sections of laws, which it finds to be unconstitutional. So, to that extent, at least, the courts are given the power to make a law including the power to strike down that law. I also do not agree with Dr Pilane that the courts have no business interfering on matters of policy, which are for Parliament alone. I have no doubt that policies, too, can be unconstitutional and that laws based on these can properly be struck down by the Court. In **Tapela**, for example, it was held that a policy decision of the President that anti-retroviral treatment should not be accorded to foreign prisoners was a breach of their constitutional rights, and was unenforceable. And, doubtless, were Parliament to pass a law degrading, as a matter of policy, members of the Jewish race, after the manner of Adolf Hitler, such a law, too, would fall to be struck down by our courts as unconstitutional.

87. The necessity for that power and jurisdiction arises from section 3 of the Constitution, which accords to "every person" the fundamental

rights "of the individual" set out in Chapter 2. As was held in **Rammoge at p 513**,

> "...fundamental freedoms are to be enjoyed by every member of every class of society -- the rich, the poor, the disadvantaged, citizens and non-citizens, and even criminals and social outcasts, subject only to the public interest and respect for the rights and freedoms of others."

88. It is most unlikely that the popular majority as represented by its elected members of Parliament, will have any inclination to legislate for the interests of vulnerable individuals or minorities, so the framers, in their wisdom, allocated that task and duty to the Judiciary – a task which every judge must execute in accordance with his or her judicial oath. It is sometimes said by cynics that political promises last only until sundown. That is not the case with the judicial oath to uphold the Constitution. This is binding upon and must be faithfully upheld by every judge for the entire term of his or her tenure, and, hopefully, thereafter as well.

89. So, to summarise, the framers of the Constitution deliberately crafted two pathways to legislative reform. The first pathway is that given to

the elected members of Parliament who, in accordance with their democratic mandate, are given the power to make (or unmake where necessary) laws for the country. The second pathway is that given to the courts which are entrusted, through their powers conferred by sections 18, 95, and 105, with the protection and enforcement of the fundamental rights of individuals and minority groups. In the performance of that function, they are empowered by section 18(2) to strike down or modify laws which do not pass constitutional muster, to the extent that they breach, or have the effect of breaching the fundamental rights of individuals or vulnerable groups conferred in Chapter 2 of the Constitution.

90. It follows that I do not agree with Dr Pilane that the High Court had no business to 'make law' by striking down sections 164(a) and 164(c) of the Penal Code. In the circumstances of this case, and upon the convincing evidence placed before it, it was, in my judgment, correct to do so. So the second ground of appeal, too, must fail.

(C) SECTION 15(9) OF THE CONSTITUTION

91. The Appellant's third main ground of appeal was, as I have said, belatedly raised. But since the point is an important one, relating to law alone, and since it has been fully addressed by Counsel for all parties, it must be properly considered by this Court, too. It is that sections 164(a) and 164(c) of the Penal Code are fully protected and definitively classified as constitutional by section 15(9). Thus they cannot be struck down.

92. The Penal Code was promulgated in 1964 prior to Independence and the crafting of the Constitution, by Law No. 2 of 1964, which came into force on 10th June 1964. It was a long and comprehensive piece of legislation, containing almost four hundred sections, replacing or codifying virtually all the common law crimes and principles of Criminal Law which had previously been applied in the Bechuanaland Protectorate, and also adding many new ones.

93. It had its origins, it is claimed, either in the Penal Code of Uganda, or in that of India – which, is not clear. At that time it could fairly be

described, in my view, as legislation introduced for the people rather than by the people. By and large, it was in a form common to the Penal Codes introduced in many of the former Colonies of Britain. Be that as it may, among its provisions was the present section 164 (then numbered section 159, but in the same form). It read as follows:

> "159. Any person who –
>
> (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."

94. The Constitution of Botswana came into force on Independence Day, 30th September 1966. A useful description of the legislative process leading to its introduction is to be found at **p. 686** of the judgment in **Kamanakao I v Attorney General [2001] 2 BLR 654 (HC)** (full bench). The Constitution came into being by virtue of section 3 of the Botswana Independence Order, No. 117 of 1966. It was included as a Schedule to that Order. By section 4(1) of the Order, all laws in

existence immediately prior to 30 September 1966 were to continue in force, and by section 4(2), these were to be construed,

> "With such modifications, adaptations, qualifications, and exceptions as may be necessary to bring them into conformity with this Order" (i.e. with the Constitution).

95. Included in the Constitution was section 15, dealing with discrimination, the first three subsections of which I have reproduced earlier in this judgment. Also contained, among the derogation clauses, was subsection 15(9). This read, and reads, as follows:

> "(9) Nothing contained in or done under the authority of any law shall be held to be inconsistent with the provisions of this section –
>
> (a) if that law was in force immediately before the coming into operation of this Constitution and has continued in force at all times since the coming into force of this Constitution; or
>
> (b) to the extent that the law repeals and re-enacts any provision which has been contained in any written law at all times since immediately before the coming into operation of this Constitution."

96. Being a clause derogating from a fundamental right (to equal protection of the law) bestowed by section 3, it is, according to the

accepted rules of constitutional interpretation, to be narrowly construed, so as to whittle down or curtail as little as possible the right of every person not to be discriminated against on impermissible grounds.

97. Similar clauses have been included in the Independence Constitutions of various other former British Colonies or Protectorates, and these have been considered by the courts of those countries in a number of cases which were cited by the *Amicus Curiae*. The clause was also mentioned by both Amissah P and Aguda JA in their opinions in **Dow**, but it was not interrogated in depth, as it was not relied upon in that case, and their comments are *obiter* in nature.

98. Finally, in **Kamanakao** (*supra*), which dealt with tribal supremacy, it was relied upon unsuccessfully by the Attorney General. It was dealt with in different ways by the Late Nganunu CJ, in the main opinion, and by Dibotelo and Dow JJ in their concurring opinion. The common thread running through all the judgments dealing with section 15(9) or its equivalent, was that in no case has any court accepted the proposition, advanced also in this matter, namely that

section 15(9) trumped or over-rode all the other fundamental rights guaranteed by the Constitution, and so, as far as those existing laws were concerned, nullified its great purpose entirely. That suggestion was rejected on a number of different grounds, which I will advert to briefly in due course, but only for reference purposes, because in my view the Attorney General's submission in this case cannot be sustained for two reasons peculiar to sections 164(a) and 164(c) of the Penal Code in particular. I will address those first.

99. The first reason why the Attorney General's third ground of appeal cannot be upheld, arises from the Penal Code (Amendment) Act No. 5 of 1998 which, as I have said, materially amended many of the offences against morality contained in the Code up to that time. Of particular significance for this case is the offence of rape. This offence, as it stood in 1966 (and prior to its amendment) read as follows:

> "141. Any person who has unlawful carnal knowledge of a woman or girl, without her consent...is guilty of the offence termed rape."

100. Section 164, as it then stood, has already been cited. The amending Act recast the offence of rape to read (in its pertinent portions) as follows:

> "141. Any person who has unlawful carnal knowledge of another person, or who causes the penetration of a sexual organ or instrument, of whatever nature, into the person of another for the purpose of sexual gratification...without the consent of such other person...is guilty of the offence termed rape."

101. It is immediately apparent that the earlier section 141 provided no protection for a man or boy who was raped. It applied only to a woman or girl who suffered rape. But men and boys were not totally unprotected. By section 164(a) it was an offence for any person to have carnal knowledge of another person against the order of nature. Since the rape of a man or boy would normally be effected *per anum*, the rapist would commit an offence under that section, although the penalty was less. So, up to the time of the amending Act, section 164(a) could at least have been said to serve one valid public interest purpose, namely the protection of men and boys against rape. Once the amendment to section 141 was passed, however, men and boys

were properly protected against rape, and the harsher sentences applied to their rapists, too.

102. This leads to consideration of the application of section 15(9)(a) and (b) of the Constitution to the Penal Code sections. Section 164(a) of the Penal Code has retained exactly the same wording post amendment as it had pre-amendment. Section 164(c) has been substantially changed by the substitution of a solely male accused person with "any person". This is a change of substance, so that section 15(9)(b) no longer provides it with shelter from constitutional attack. But what of section 164(a), which has not been changed in its wording at all? Does it still provide such shelter? In my judgment, it does not. While its wording remains, its substance has changed in the most material way. No longer does it have any public interest role to play. It no longer protects men and boys from rape. That role is assigned to the new section 141. All that remains to justify the continued existence of section 164(a) is the ancient biblical condemnation of sodomy (upon which Dr Pilane argues that the Attorney General relies), which I have already found to be

inconsistent with the Respondent's fundamental rights, as also did the Court below.

103. The second reason flows from the wording and the reach of section 15(9), interpreted narrowly, as is the rule, and its effect on sections 164(a) and 164(c) as they stood on 30 September 1966 – and as section 15 of the Constitution stood on that date. It will be recalled that on 30 September 1966 section 15 made no reference either to 'sex' or 'sexual orientation'. Section 15(9), on the other hand, by its own wording, was to secure immunity for the affected laws from the provisions "of this section". So nothing contained in section 15 could be read to render the sodomy sections unconstitutional. It was inapplicable, in terms of its then composition, to either 'sex' or 'sexual orientation', neither of which was mentioned – and nor were sodomy, carnal knowledge or the order of nature referred to either. So neither section 164(a) or section 164(c) qualified for protection from the reach of section 15 of the Constitution. Since it is impermissible to interpret a constitutional provision in such a manner as to widen rather than to narrow the reach of a derogation clause, it cannot be argued that the subsequent expansion of section 3 in **Dow** to read in

the word 'sex' had that effect. Nor can it be argued that the subsequent formal amendment of section 15(3) by Parliament, to include the word 'sex' could have that effect either. And nor, in my judgment, can the latest interpretation of the word 'sex' as now contained in section 15(3) to embrace 'sexual orientation' as well, as held by the Court *a quo*, and as endorsed in this judgment, serve to expand the reach of section 15(9) either.

104. It follows that sections 164(a) and 164(c) of the Penal Code were not in 1966 and are not now, covered or excused from constitutional scrutiny by section 15(9) of the Constitution, as Dr Pilane has suggested.

105. I should point out that section 15(9) was not raised or drawn to the attention of the Court in **Kanane**. It was thus not interrogated or dealt with by Tebbutt JP. What he did say, in relation to the 1998 Amendment, was as follows:

> "While the Penal Code in its original form might be criticised as having been taken *holus bolus* from some other 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 sections 164 and 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 them. This Court can take judicial notice of 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 liberalization of sexual conduct by regarding homosexual practices as acceptable conduct, such indications as there are show a hardening of a contrary attitude."

106. As has already been pointed out, in the thirteen years that followed Kanane's case many indications of a softening attitude towards homosexuality have emerged, thus justifying a change of approach, as anticipated as a future possibility by the Court in Kanane. It may also be that had section 15(9) and the effect thereon been drawn to the attention of the Kanane Court, Tebbutt JP may well have arrived at a less uncompromising conclusion. But that is now all water under the bridge.

107. For completeness, I will advert briefly to, but not interrogate, the grounds relied upon by other courts for rejecting arguments based on section 15(9) or its equivalents elsewhere, to preserve otherwise unconstitutional historic provisions. In **Kamanakao**, Nganunu CJ

enforced the section 3 equal protection of the law provision, because section 15(9) applied only to discrimination under "this section", namely section 15. In the same case Dibotelo and Dow JJ held that section 4(2) of the Botswana Independence Order authorised any necessary modification of otherwise offensive existing laws to bring them into line with the Constitution. In **Ramantele**, Lesetedi JA pointed out at **p 676** that derogation clauses contained in the Constitution are not unchecked. They must be rational and justifiable either as being intended to ensure that the rights and freedoms of any individual do not prejudice the rights and freedoms of others, or as being in the public interest. In the Barbados, in **Nervais v The Queen and Severin v The Queen (2018) CCJ 19 (AJ)** the court refused to apply a meaning to such a saving clause that would cause "colonial laws to be caught in a time warp", immune to applicable fundamental rights, and so undermine the principles of the Constitution as the supreme law. In **McEwan and Others v Attorney General of Guyana (2018) CCJ 30 (AJ)**, the Caribbean Court of Justice held that saving clauses similar to our section 15(9) were included in Independence Constitutions for a limited, and not a permanent purpose, namely to secure an orderly transition from

colonial rule to Independence – 50 years later, it could no longer be said that Guyana was still in a transitory phase. Reading the Constitution as a whole, a saving clause cannot validly be construed in such a way as to make fundamental rights unenforceable.

108. All of these approaches lead to as restrictive a meaning as is possible being placed on what would otherwise be a saving clause which undermined the great purpose of the Constitution. It is not necessary to take that route in the present appeal because, as I have shown, section 15(9) does not apply to issues of discrimination on the ground of sexual orientation.

109. It follows that the third and last of the Attorney General's grounds of appeal must also fail.

110. It remains only to consider briefly the objections raised by the Attorney General to the findings of the Court below that sections 164(a) and 164(c) of the Penal Code also violated the Respondent's fundamental rights to liberty, privacy and dignity conferred by section 3 of the Constitution. That ground was not strongly pursued by Dr

Pilane, who relied principally on the three grounds already dealt with.

As I remarked in **Rammoge at page 508 H**:

> "It is unnecessary, in my judgment, to interrogate the other fundamental rights provisions of the Constitution where the breach complained of falls squarely within one of those provisions – here section 13. A breach of any of the fundamental rights provisions will, by definition, be contrary to section 3 of the Constitution as well, since this is the over-arching section of Chapter II thereof, and encompasses all of those rights. It is also true, as pointed out by Counsel for both sides, and by the Judge *a quo*, that the various fundamental rights are closely interrelated, so that a breach of one such right, will frequently constitute a breach of the others as well."

111. That is so in this case, too. Leburu J has advanced convincing arguments that sections 164(a) and 164(c) of the Penal Code are also in breach of the Respondent's rights to liberty, privacy and dignity conferred by the Constitution and I agree with those arguments. That being said, this case turned principally on the discrimination argument in terms of sections 3 and 15 of the Constitution, which deal with equal protection of the law. The Court *a quo*'s decision on that basis has been upheld by this Court, so it is not strictly necessary to go further. That notwithstanding, I will deal very briefly with the argument that those Penal Code sections also breach the Respondent's right to privacy, because in his final Order

Leburu J included not only sections 3 and 15, but section 9 as well. On the question of privacy the Court made reference to sections 3 and 9 of the Constitution, and noted that on the face of it they appeared to refer only to protection for the privacy of one's home and property (section 3(c)) and the search of one's person or property (section 9).

112. It is true that those sections make mention only of one or two aspects of the right to privacy, but this ignores the fundamental right referred to in section 3(a), namely "security of the person". It is only when that is read together with the 3(a) reference to privacy of the home that the full scope and reach of the right to privacy becomes apparent. That right, applying the **Dow** principle of generous and expansive interpretation of fundamental rights provisions, is a multi-faceted right. It goes far beyond the concept of a man's home being his castle (that is spatial privacy), or merely the right to be left alone. It extends also to protection of the right to make personal choices about one's lifestyle, choice of partner, or intimate relationships, among a host of others. As was held in **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and**

Others 1999(1) SA 6 (CC), by the Constitutional Court of our neighbour, South Africa,

> "Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from outside the community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy."

113. Those sentiments apply equally in Botswana. Many other countries have recognised that right too, as have international instruments to which Botswana is a party, such as the Universal Declaration of Human Rights of the United Nations, and the International Covenant on Civil and Political Rights. In **Lawrence v Texas 539 US 558,** for example, the US Supreme Court struck down the criminal prohibition of homosexual sodomy as it violated the right to privacy, which is precisely what sections 164(a) and 164(c) of the Penal Code seek to do here.

114. I endorse the words of Lord Wolfendon, in his report which led to the enactment of the Sexual Offences Act in England and the decriminalisation of the former offence of sodomy, that –

> "There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."

115. Since the Penal Code (Amendment) Act of 1998, there can be no discernible public interest purpose in the continued existence of sections 164(a) and 164(c) of the Penal Code. In my judgment they have been rendered unconstitutional by the march of time and the change of circumstances. At present, they serve only to stigmatise gay men unnecessarily, which has a harmful effect on them, and as far as I am aware there has never been any prosecution of a woman, or even any thought of doing so, for the offence of sodomy. Those sections have outlived their usefulness, and serve only to incentivise law enforcement agents and others to become key-hole peepers and intruders into the private space of citizens. That, in my view, is neither in the public interest, nor in the nature of Batswana.

116. In my judgment, Leburu J was correct to strike down the two sections on the ground that they breach the fundamental right to privacy, as well.

117. Since all the Appellant's grounds of appeal have been unsuccessful, there can be only one outcome, and that is that the appeal must fail. Since the unjustified addition of section 167 of the Penal Code to the impugned sections was at the instance of LEGABIBO, and not of the Respondent, there is no reason why the Respondent should be deprived of his costs awarded by the High Court.

118. Accordingly,

(1) The appeal is dismissed, with costs to the Respondent, but not to the *Amicus*.

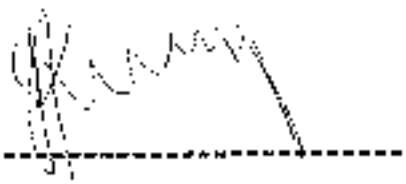
(2) The Order of the Court below is amended to read

(a) Sections 164(a) and 164(c) of the Penal Code (Cap 08:01), Laws of Botswana be and are hereby declared *ultra vires* sections 3, 9 and 15 of the Constitution, and are accordingly struck down.

(b) The Respondent be and is hereby ordered to pay Applicant's costs of the application.

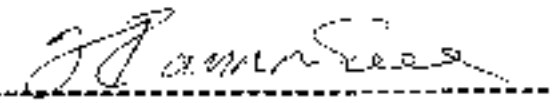
(c) There is no order as to costs in relation to the *Amicus Curiae* – LEGABIBO.

DELIVERED IN OPEN COURT AT GABORONE ON THIS 29TH DAY OF NOVEMBER 2021.



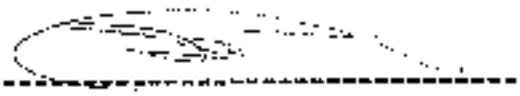
I S KIRBY
[PRESIDENT]

I AGREE



T T RANNOWANE
[CHIEF JUSTICE]

I AGREE



I B K LESETEDI
[JUSTICE OF APPEAL]

I AGREE

M S GAONGALELWE
[JUSTICE OF APPEAL]

I AGREE

M T GAREKWE
[JUSTICE OF APPEAL]