EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER AND CIRCUIT

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 2022

Claim No.: SKBHCV2021/0013

IN THE MATTER OF SECTIONS 3, 7, 12, 15 & 18 OF THE CONSTITUTION OF THE FEDERATION OF SAINT CHRISTOPHER AND NEVIS

AND IN THE MATTER OF SECTIONS 56 & 57 OF THE OFFENCES AGAINST THE PERSON ACT, CAP 4.21

BETWEEN:

[1] JAMAL JEFFERS
[2] ST. KITTS & NEVIS ALLIANCE FOR EQUALITY INC.

Claimants

and

THE ATTORNEY GENERAL OF ST. CHRISTOPHER AND NEVIS

Defendant

Before: The Hon. Mr. Justice Trevor M. Ward QC

Appearances:-

Mr. E. Anthony Ross QC and Ms. Nadia Chiesa, Of Counsel, for the Claimants.
Mrs. Simone Bullen-Thompson, Solicitor General, for the Defendant.

2022: June 10
August 29

JUDGMENT

WARD, J.:

Introduction

[1] At issue in this claim is the constitutionality of sections 56 and 57 of the Offences Against the Person Act, Cap. 4.21, ("the Act"). These sections criminalise buggery and indecent assault against males respectively.

Background

[2] The first claimant, Jamal Jeffers, is a self-described gay man and a citizen of the Federation. The second claimant, the St. Kitts and Nevis Alliance for Equality (SKNAFE), is registered as a community based non-profit organisation with the Department of Social Services and Community Development. SKNAFE represents, provides services to and advocates for the rights of members of the LGBT community in St Kitts and Nevis. Ms. Tynetta McKoy is its founder and one of its directors. She identifies as a gender non-conforming queer woman.

[3] By Originating Motion dated 28th January 2021, the claimants seek declarations that sections 56 and section 57 of the Act contravene the constitutional rights enshrined in sections 3, 7, 12 and 15 of the Constitution of the Federation of Saint Christopher and Nevis, and, as such, are null and void and of no force and effect to the extent that it applies to consensual sexual intercourse in private between persons sixteen years of age or more. They further seek an order that section 56 of the Act be read as if the words "except where committed in private between consenting persons each of whom is sixteen years of age or more" were added at the end of the provision. In relation to section 57 of the Act, the claimants seek an order that it be read as if the words "save and except where the acts which would otherwise constitute an indecent assault, are done in private by and/or between persons, each of whom consents and each of whom is 16 or more years old" were added at the end of the provision.

[4] The Originating Motion was supported by affidavits filed by Mr. Jeffers and Ms. McKoy. The claimants have since indicated they are not pursuing a declaration that sections 56 & 57 of the Act contravene section 7 of the Constitution.

[5] The Originating Motion is opposed by the defendant. Affidavits in opposition were filed by the Attorney General, Pastor Everson Matthew and Crown Counsel, Greatess Gordon.

Brief history of the offences

[6] A comprehensive history of the offence of buggery is set out in the judgment of Rampersad J, in **Jason Jones v Attorney General of Trinidad and Tobago**[1]**.** For present purposes, however, I adopt a limited review of that history. Prior to the Buggery Act of 1533, the offence known as sodomy fell within the remit of the Ecclesiastical Courts. The Buggery Act 1533 made the crime of buggery punishable by death. It was repealed briefly between 1553 to 1563 and thereafter subjected to minor amendments. Buggery remained a capital crime until the enactment of the Offences Against the Person Act 1861 which removed the death penalty and imposed a term of ten years to life imprisonment. It provided that:

> "Whosoever shall be convicted of the abominable Crime of Buggery, committed either with Mankind or with any Animal, shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Ten Years."

[7] Gross indecency was introduced by section 11 of the Criminal Law Amendment Act, 1885 at a time when homosexuality was illegal only as it related to the act of buggery. Section 11 provided:

> "Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year with or without hard labour."

[8] This provision had the effect of making all homosexual acts of gross indecency illegal.

[9] Due to our colonial legacy, the Offences Against the Person Act was introduced as part of the laws of Saint Christopher and Nevis by Act 7 of 1873. Section 56 has retained its original form while section 57 was amended in 2012 to increase the maximum penalty for indecent assault from four years to ten years. In their current form, the impugned provisions of the Act are contained in Part XII of the Act under the heading "Unnatural Offences". Section 56 provides:

> "Sodomy and bestiality.
>
> 56. Any person who is convicted of the abominable crime of buggery, committed either

[1] CV2017-00720.

with mankind or with any animal, shall be liable to be imprisoned for a term not exceeding ten years, with or without hard labour."

[10] While not defined in the Act, it was not controversial that buggery consists of sexual intercourse per anum by a man with a man or a woman, or per anum or per vaginam by a man or a woman with an animal.

[11] Section 57 of the Act provides:

> "Attempt to commit an infamous crime.
>
> 57. Any person who attempts to commit the said abominable crime or is guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, commits a misdemeanour, and, on conviction, shall be liable to be imprisoned for a term not exceeding ten years, with or without hard labour."

[12] The reference to 'the abominable crime' is a reference to the crime of buggery. Notably, the offences under sections 56 and 57 are committed irrespective of whether the act takes place in public or in private, and regardless of the age of the participants involved, and whether or not they are consenting.

The relevant Constitutional provisions

[13] The Constitution of Saint Christopher and Nevis is set out in Schedule 1 to the Saint Christopher and Nevis Constitution Ord 1983 (SI 1983 No 881) ('the Order'). The supremacy of the Constitution is proclaimed by section 2, which provides:

> 'This Constitution is the supreme law of Saint Christopher and Nevis and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.'

[14] Section 3 of the Constitution declares the fundamental rights to which every person in Saint Christopher and Nevis is entitled. It provides:

"3. Whereas every person in Saint Christopher and Nevis is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his or her race, place of origin, birth, political opinions, 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, equality before the law and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for his or her personal privacy, 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 those rights and freedoms by any person does not impair the rights and freedoms of others or the public interest."

[15] Additionally, section 12 (1) of the constitution guarantees the right to freedom of expression:

"12. (1) Except with his or her own consent, a person shall not be hindered in the enjoyment of his or her freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication is to the public generally or to any person or class of persons) and freedom from interference with his or her correspondence."

[16] The right not to be discriminated against based on sex is guaranteed under section 15, which provides:

"15. (1) Subject to subsections (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to subsections (6), (7), (8) and (9), a person shall not 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, place of origin, birth out of wedlock, political opinions or affiliations, colour, sex 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 that are not accorded to persons of another such description."

[17] Section 18 of the Constitution confers jurisdiction on the High Court to entertain an application from any person for redress to enforce the protective provisions of Chapter II. So far as relevant, section 18 (1) provides:

> "If any person alleges that any of the provisions of sections 3 to 17 (inclusive) 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 that is lawfully available, that person … may apply to the High Court for redress."

[18] None of the foregoing rights is absolute; they are subject to reasonable limitations imposed by the Constitution itself and are subject to respect for the rights and freedoms of others and for the public interest.

[19] The issues arising on this claim are whether sections 56 and 57 of the Act contravene: (a) the right to protection of personal privacy contained in section 3 (c) of the Constitution; and/or (b) the right to protection of freedom of expression, contained in section 12 of the Constitution; and/or **(**c) the right to protection from discrimination on the grounds of sex, contained in section 15 of the Constitution.

Principles of Constitutional Interpretation

[20] Before turning to examine the ambit of each of these rights in turn, and then to test the compatibility of sections 56 and 57 of the Act with them, it is useful to have in mind the proper approach to be taken when construing the Constitution.

[21] In this regard, two important propositions are derived from the Privy Council case of **Minister of Home Affairs and another v Fisher and another**[2]:

> "(1) A constitutional instrument was a document sui generis, to be interpreted according to principles suitable to its character and not necessarily according to the ordinary rules and presumptions of statutory interpretation.
>
> (2) Provisions in a constitutional instrument dealing with individual rights were therefore to be interpreted according to the language used and the traditions and usages which had influenced that language."

[22] It is settled that in construing the fundamental rights, which are expressed in broad terms in the Constitution, a court should adopt a generous interpretation to ensure that persons receive the full measure of those rights and must view it as a living instrument, meaning that the text of the Constitution necessitates periodic re-examination of its application to evolving contemporary norms.

[23] This principle is clearly articulated by Lord Bingham in **DPP v Mollison**[3]:

> "First, it is now well-established that constitutional provisions relating to human rights should be given a generous and purposive interpretation, bearing in mind that a constitution is not trapped in a time-warp but must evolve organically over time to reflect the developing needs of society: see Reyes v The Queen [2002] 2 AC 235, [2002] UKPC 11, paras 25-26 and the authorities there cited."

[24] More recently, the Privy Council in **Boyce v The Queen (PC)**[4] expressed the living instrument principle in lucid layman's terms which bear setting out in full. Lord Hoffman stated:

---

[2] [1979] 3 ALL ER 21.
[3] [2003 2 AC 411.
[4] [2005] 1 AC 400 at 416.

> "[28] Parts of the Constitution, and in particular the fundamental rights provisions of Chapter III, are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions. The framers of the Constitution would have been aware that they were invoking concepts of liberty such as free speech, fair trials and freedom from cruel punishments which went back to the Enlightenment and beyond. And they would have been aware that sometimes the practical expression of these concepts—what limits on free speech are acceptable, what counts as a fair trial, what is a cruel punishment—had been different in the past and might again be different in the future. But whether they entertained these thoughts or not, the terms in which these provisions of the Constitution are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights. The judges are the mediators between the high generalities of the constitutional text and the messy detail of their application to concrete problems. And the judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary, they are applying the language of these provisions of the Constitution according to their true meaning. The text is a "living instrument" when the terms in which it is expressed, in their constitutional context, invite and require periodic re-examination of its application to contemporary life."

[25] The Caribbean Court of Justice (CCJ) in **R v Mitchell Lewis**[5] expressed the same principle this way:

> "Since this [the Constitution] is seen to be a living instrument and always speaking the words contained therein must be viewed as eminently susceptible to interpretation in order to accommodate ever-changing social realities. In light of evolving international human rights standards, what might have constituted a fair hearing in 1988 may not be seen to satisfy required conditions in 2006…what may be self-evident in one generation may not be so regarded in the next."

[26] This segues neatly into another salient principle of construction. While the rights of citizens of the Federation derive solely from the Constitution, it is recognised that international law can significantly

[5] [2007] CCJ 3 (AJ).

influence the interpretation of the Constitution. This is attributable to the settled principle that "the courts will, so far as possible, construe domestic law to avoid creating a breach of the State's international obligations**.** The Privy Council in **Boyce** defined the expression "so far as possible" as follows:

> "So far as possible means that if the legislation is ambiguous ("in the sense that it is capable of a meaning which either conforms to or conflicts with the [treaty]: see by Lord Bridge of Harwich in R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696, 747) the court will, other things being equal, choose the meaning which accords with the obligations imposed by the treaty."

[27] With those principles in mind, I turn now to test the compatibility of sections 56 and 57 of the Act with the relevant Constitutional provisions invoked by the claimants.

The right to liberty

[28] Section 3(a) of the Constitution guarantees the right to liberty, which it recognises and declares to exist. This provision gives rise to a justiciable and enforceable right, having regard to the express provisions of section 18 of the Constitution which provides for redress for any person alleging breach of any of the provisions of sections 3 to 17 inclusive. See **Nervais v The Queen.**[6]

[29] Section 5 of the Constitution is captioned: "**Protection of right to personal liberty."** It contains provisions for the protection of the right to personal liberty. Section 5(1) stipulates the circumstances under which a person may be lawfully deprived of his right to personal liberty. Such circumstances include where the deprivation is in execution of a sentence or order of the court; or for the purpose of bringing him or her before a court in execution of the order of a court; and upon reasonable suspicion of his or her having committed, or being about to commit, a criminal offence under any law.

[30] Sections 5 (2) - (6) contain several due process provisions that govern the treatment of a person who is arrested or detained. For example, they shall with reasonable promptitude, and in any case not later than forty-eight hours after such arrest or detention, be informed in a language that he or she understands of the reasons for his or her arrest or detention and be afforded reasonable facilities for privately communicating with a lawyer of his choice years, with his or her parents or guardian. If

[6] [2018] CCJ 19 (AJ).

not released, they must be brought before a court without undue delay and in any case not later than seventy-two hours after his or her arrest or detention. If not tried within a reasonable time, they must be released either unconditionally or upon reasonable conditions.

[31] The claimants contend that the right to liberty is multi-faceted and includes the right to (i) choose a sexual or intimate partner; and (ii) to engage in consensual sexual intercourse with anyone of one's choosing, and, in any way, one wishes. Sexual autonomy is said to be an aspect of liberty which is protected by section 3(a). The claimants submitted that the right to liberty goes beyond mere freedom from physical restraint or detention and includes the protection of 'decisions of fundamental importance.' The right to liberty includes and protects inherently private choices and ensures that such choices are free from undue influence, irrational and unjustified interference by others. The claimants contend that sections 56 and 57 of the Act infringe the rights of gay couples by dictating the kind of intimate sexual acts they may engage in consensually and in private. They say that the sections constitute an all-out assault on the personal autonomy of members of the public in violation of section 3(a) of the Constitution. It is further said that section 56 of the Act abridges the right of a homosexual male to have sexual intercourse in the manner and with a partner of his choosing, and as a result it infringes his right to liberty.

[32] In response, the defendant submitted that in interpreting the provisions of the Constitution pertaining to liberty, the court should have regard to the text and context of section 3(a), which must be read with section 5. It was argued that section 3 specifically states that the provisions in Chapter II are to give effect to the rights and freedoms outlined. Section 5 sets out the provisions giving effect to the right to liberty. The protections outlined address physical liberty and outline several due process provisions. The text of the Constitution in this regard does not support the expansive definition of the right to include the right to personal and/or sexual autonomy, submitted the defendant.

Discussion

[33] In my view, there is undoubtedly some relationship between section 3 (a), which declares the right to liberty, and section 5 which contains due process provisions necessary to give effect to the right to personal liberty. The question is whether section 5 is meant to define or circumscribe the ambit of the right to liberty. There may be some warrant for reading it in this way by analogy. In **The Chief**

of Police v Calvin Nias,[7] Rawlins, C.J. (as he then was) examined the relationship between the right to freedom of expression declared in section 3 (b) and the substantive provisions contained in section 12 of the Constitution. Citing the Privy Council case from Mauritius of **Matadeen v Pointou**[8]**,** Rawlins C.J. held:

> **"**Section 3 of the Saint Christopher and Nevis Constitution is comparable to section 3 of the Constitution of Mauritius. The Saint Christopher and Nevis provision declares an entitlement to the right to freedom of expression in section 3(b). Section 12 of the Constitution elaborates and circumscribes that right."

[34] This approach seems to be reflected in the Singapore Court of Appeal's decision in Lim **Meng Suang and Another v Attorney General**[9], upon which the defendant relies. That case confronted the very issue before this court: whether the right to liberty declared in Article 9 (1) of the Singapore Constitution refers only to a person's freedom from an unlawful deprivation of life and unlawful detention or incarceration or whether it included a limited right to privacy and personal autonomy.

[35] The Singapore Court of Appeal adopted a narrow construction of art 9(1) by having regard to the context and structure of art 9 itself which, in subsections (2) - (4), provide various procedural safeguards in relation to the arrest and detention of a person in much the same way that section 5 of the Saint Christopher and Nevis Constitution does. Read in this context, the Court of Appeal concluded that "it is clear that the phrase 'life or personal liberty' in art 9(1) refers only to a person's freedom from an unlawful deprivation of life and unlawful detention or incarceration."

[36] Two other factors influenced the court's approach. The first was that the narrow interpretation adopted was consistent with established Singapore jurisprudence. The second, was that section 9 was said to be derived from section 21 of the Indian Constitution. The court stated that the particular focus of section 21 was protection against unlawful detention.

[37] In the domestic context, I am not of the view that the provisions of section 5 are meant to define and circumscribe the ambit of the right to liberty declared in section 3(a) solely to the right to be protected against arbitrary formal arrest and detention.

---

[7] St. Christopher HCVAP2007/010.
[8] [1998] 3 WLR 18.
[9] [2015] 2 LRC 147.

[38] Support for this understanding of the relationship between section 3 (a) and section 5 is derived from the CCJ's analysis of the relationship between the right to protection of the law declared in section 11(a) and the substantive provisions set out in section 18 of the Barbados Constitution. Section 11 of the Barbados Constitution is the equivalent of section 3 of the Saint Christopher and Nevis Constitution. In **Nervais,** Byron, P explored the relationship between the provisions of the Constitution of Barbados relating to the right to protection of the law. That right is declared in section 11(c) and is dealt with subsequently in section 18. In explaining the nature and relationship between the two provisions, Byron, P stated:

> "[32] The CCJ has already decided that section 11(c) makes provision for the enforcement of the right to the protection of law separate and distinct from the provisions in section 18 which is the following section which deals with it. This was expressed in A-G v Joseph and Boyce in the joint judgment of de la Bastide PCCJ and Justice Saunders JCCJ. The case dealt with the right to the protection of law and the relationship of section 11(c) to section 18:
>
> > "… In the case of the right to the protection of the law, however, it is clear that section 18 does not provide, nor does it purport to provide, an exhaustive definition of what that right involves or what the limitations on it are. There is no mention in that section of the protection of the law, which is in itself an indication that section 18 is not intended to be an exhaustive exposition of that right. Indeed, the right to the protection of the law is so broad and pervasive that it would be well-nigh impossible to encapsulate in a section of a constitution all the ways in which it may be invoked or can be infringed. Section 18 deals only with the impact of the right on legal proceedings, both criminal and civil, and the provisions which it contains are geared exclusively to ensuring that both the process by which the guilt or innocence of a man charged with a criminal offence is determined as well as that by which the existence or extent of a civil right or obligation is established, are conducted fairly. But the right to the protection of the law is, as we shall seek to demonstrate, much wider in the scope of its application. The protection which this right was afforded by the Barbados Constitution, would be a very poor thing indeed if it were limited to cases in which there had been a contravention of the provisions of section 18."

[39] Adopting this approach to the sections 11 and 18 of the Barbados Constitution in **Nervais,** Byron Stated:

> "But it could not be perceived that the rights declared in section 11(a) would be incapable of being defined or protected except in the manner expressed in those following sections. One only has to look at the way in which the Indian Supreme Court has addressed the concept of life and personal liberty. There could be no justification for the courts in Barbados or the Caribbean to be prevented from considering whether the rights conferred in section 11(a) include protections not referenced in those subsequent sections."

[40] Byron went on to illustrate why such a narrow construction is to be eschewed, by reference to other provisions of the Constitution of Barbados:

> "[35] Reviewing section 11 of the Constitution of Barbados through the lens of this evolution we can describe it as an enacting section. The reasoning which was applied to the provisions for the protection of the law, 11 (c), and unconstitutional deprivation of property 11(b) is equally applicable to the other subsections. Take for example, the right contained in section 11 (a), which is the right to life, liberty, and security of the person. Section 12, which the side note identifies as dealing with the "protection of the right to life", deals only with the regulation of the intentional deprivation of life by legislation or a lawful act of war. In the world of today it would be inconceivable that the right to life can have no other meaning than that. Then there is section 13 where the side note of which refers to "protection of the right to personal liberty". The content of section 13 deals with the ways in which this right can be deprived by legislation; and the ways in which arrest and detention can be carried out without breach of the constitutional right proclaimed in section 11. There is no section with a side note reflecting the "protection of personal security" again declared by section 11, but section 14 deals with "protection from slavery and forced labour" and section 15 deals with "protection from inhuman treatment". It may be implied that these sections deal with personal security that is declared in section 11."

[41] In so doing Byron, P was adopting the approach previously taken in the case of Maya **Leaders Alliance et al. v The Attorney General of Belize**[10] in relation to the provisions dealing with arbitrary

[10] [2015] CCJ 15 (AJ).

deprivation of property and the right to the protection of the law. The court explored the relationship between sections 3 (d) and 17 of the Belize Constitution, which are the equivalent of sections 3 (c) and 8 of the Saint Christopher and Nevis Constitution.

[42] Sections 3 (d) states:

> "3. Whereas every person in Belize is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, 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…
>
> (d) protection from arbitrary deprivation of property."

[43] Section 17(1) provides that no property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under a law that includes the principles upon which the payment of reasonable compensation is to be assessed and the provision of access to the courts.

[44] The CCJ did not view the right not to be deprived of property declared in section 3(d) as limited to the compulsory acquisition of property proscribed in section 17. The court held:

> "The notion of deprivation of property is often discussed in the context of the compulsory acquisition of property. It is evident that compulsory acquisition which does not meet the conditions specified in section 17 undoubtedly amounts to arbitrary deprivation of property. However, there may be an arbitrary deprivation of property even where there is no compulsory acquisition. In other words, section 3 is not a mere preamble or introduction but rather is an enacting provision that recognizes and declares rights in property outside the boundaries contemplated by section 17."

[45] Similarly, at paragraph 41 of the judgment, in the context of the relationship between section 3(a), which declares the right to the protection of the law, and section 6, the CCJ disagreed with the Court of Appeal's restrictive interpretation of the ambit of section 3 (a) that 'the phrase 'protection of law' in section 3(a) is …an assurance to persons in Belize of a continued … right of access to the courts of Belize, under a system of law that is fair for declarations of the invalidity of executive or legislative action." The CCJ held that it would:

> "...respectfully disagree that this narrow interpretation is properly to be given to the wide spectrum of rights entailed in section 3(a). Undue emphasis should not be placed on the location of the provision. It is the case that the detailed provisions of Part II of the Constitution must be construed in light of the provisions of section 3, but those provisions do not thereby curtail the ambit of the section. As noted above at [32] the wording of section 3 is not that of a mere preamble or introduction but rather that of an enacting provision."

[46] From these authorities, the proposition emerges that declaratory fundamental rights provisions, such as section 3, contain justiciable, enforceable rights, which are not necessarily limited by the subsequent substantive provisions which follow. As it relates to the relationship between sections 3 (a) and 5, applying the authorities of **Nervais** and **Maya Leaders Alliance,** I am of the view that section 3(a) makes provision for the enforcement of the right to liberty separate and distinct from the provisions in section 5. Section 5 does not purport to be exhaustive of the content of the right to liberty or define its limitations. I therefore hold that the right to liberty is not restricted to arbitrary arrest and detention. It remains to be determined, however, whether it extends to the right to choose a sexual or intimate partner and to privately engage in consensual sexual intercourse with anyone of one's choosing, and in any way, one wishes.

[47] The claimants invite the court to adopt the expansive definition of the right to liberty given to it by the Indian Supreme Court in **Navtej Singh Johar and ors v Union of India,**[11] where Misra CJ said:

> "The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an insegregable facet of individual liberty. When the liberty of even a single person of the society is smothered under some vague and archival stipulation that it is against the order of nature or under the perceptions that the majority population is peeved when such an individual exercises his/her liberty, despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly the fundamental right of liberty of such an individual is abridged."

[11] WP Crl No 76 of 2016; AIR 2018 SC 4321.

[48] The claimants also rely on the Botswana High Court judgment in **Motshidiemang v Attorney General**[12], where, in striking down the provisions of the Penal Code criminalising same-sex sexual conduct, Leburu J held:

> "Sexual orientation is innate to a human being. It is not a fashion statement or posture. It is an important attribute of one's personality and identity; hence all and sundry are entitled to complete autonomy over the most intimate decisions relating to personal life, including choice of a partner. The right to liberty therefore encompasses the right to sexual autonomy."

[49] They have also referred the Court to the recent Antiguan case of **Orden David & anor v The Attorney General of Antigua and Barbuda,**[13] which followed these two authorities in holding that section 12 of the Sexual Offences Act, 1995, Antigua, offends the right to liberty contained in section 3 of the Antigua and Barbuda Constitution. For the reasons that follow, I do not find these authorities persuasive, and I respectfully decline to follow them.

[50] In my view, to be accommodated under the right to liberty, the proscribed conduct or measure must be in some way analogous to arrest and detention, involving an element of physical restraint or impediment. The claimants in written submissions recognise that "the framers of the Constitutions of the emerging independent nations of the English-speaking Caribbean derived inspiration from the European Convention of Human Rights"[14]. The Privy Council has also noted in **Boyce** that the drafting of the fundamental rights provisions in the Constitution of Barbados and other Caribbean islands was strongly influenced by the terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953), which had been extended by the United Kingdom to its colonies, including the Federation. ECHR case law and jurisprudence should therefore shed some light on the ambit of the right.

[51] The right to liberty is contained in Article 5 of the Convention, which provides:

> "Article 5 of the Convention – Right to liberty and security
>
> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

[12] [2019] 4 LRC 507.
[13] ANUHCV2021/0042.
[14] Claimants' written submissions at para 61.

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

[52] The European Court of Human Rights publishes guides on the Convention to inform legal practitioners of the judgments and decisions delivered by the Strasbourg Court. The guide in relation

to Article 5 was last updated on 30th April 2022. It contains the key principles and relevant precedents relating to Article 5. In describing the scope of the application of Article 5, the guide states:

> "In proclaiming the "right to liberty", Article 5 contemplates the physical liberty of the person; its aim is to ensure that no one should be deprived of that liberty in an arbitrary fashion. It is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4 (De Tommaso v. Italy [GC], § 80; Creangă v. Romania [GC], § 92; Engel and Others v. the Netherlands, § 58).
>
> 2. The difference between restrictions on movement serious enough to fall within the ambit of a deprivation of liberty under Article 5 § 1 and mere restrictions of liberty which are subject only to Article 2 of Protocol No. 4 is one of degree or intensity, and not one of nature or substance (De Tommaso v. Italy [GC]; Guzzardi v. Italy; Rantsev v. Cyprus and Russia,; Stanev v. Bulgaria [GC].
>
> 3. A deprivation of liberty is not confined to the classic case of detention following arrest or conviction but may take numerous other forms (Guzzardi v. Italy)."

[53] Other circumstances in which the applicability of Article 5 (1) has arisen, outside of the paradigm of formal arrest and detention, are illustrated by the case law. Such circumstances include: the placement of individuals in psychiatric or social care institutions (**H.L. v. the United Kingdom**); taking of an individual by paramedics and police officers to hospitals (**Aftanache v. Romania**); crowd control measures adopted by the police on public order grounds (**Austin and Others v. the United Kingdom** [GC]); and national lockdown on account of the Covid-19 pandemic (**Terheş v. Romania (dec)**)

[54] There is no escaping that the Convention guide contemplates, and the cases cited are concerned with, the physical liberty of the person. I therefore find the words of the ECHR in **Austin and Others v. the United Kingdom**[15] apposite to describe the approach to interpreting sections 3(a) and 5 of the Constitution.

> "53. Firstly, as the Court has underlined on many occasions, the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas

[15] [GC] – 39692/09, 40713/09 and 41008/09.

prevailing in democratic States today… This does not, however, mean that to respond to present-day needs, conditions, views or standards the Court can create a new right apart from those recognised by the Convention …Secondly, the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see Stec and Others v. the United Kingdom (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X)."

[55] My conclusion is that read contextually with section 5 and in a generous and purposive way, the right to liberty declared in section 3(a) of the Constitution is not confined to formal arrest and detention but it does not encompass or support the expansive definition of the right to include the right to sexual autonomy to choose a sexual or intimate partner and to engage in consensual sexual intercourse with anyone of one's choosing, and, in any way, one wishes. Thus, sections 56 and 57 of the Act do not infringe section 3 (a) of the Constitution. To my mind there is no need to attempt to force-fit sexual autonomy within the boundaries of the right to liberty where it may be commodiously accommodated within the ambit of other constitutional provisions. I turn now to test the constitutional validity of the provisions of the Act with the right to privacy.

The right to privacy

[56] Section 3(c) of the Constitution provides that every person in Saint Christopher and Nevis is entitled to protection for his or her personal privacy, the privacy of his or her home and other property…"

[57] The claimants submitted that the right to privacy is not limited to protection against unlawful searches, which is addressed in section 9. Section 3 (c) does not define privacy or prescribe its scope and limitations. The claimants urge a generous interpretation, consistent with the evolving standards of society and consistently with the Federation's international obligations. The claimants invite reliance on Commonwealth Caribbean cases such as **Jones** *(Supra)* from Trinidad and Tobago and **Attorney General v Caleb Orozco et al**[16] from Belize, and cases from the wider Commonwealth which have held that the right to privacy is inextricably linked to human dignity and includes the right to personal autonomy and the right to express one's sexual orientation. Invoking international and comparative law, the claimants submitted that the right to privacy extends beyond the right to be left alone. It includes the concept of dignity of the individual, aspects of physical and social identity including the

[16] [2016] No. 668 of 2010.

right to personal autonomy, personal development, and the right to establish and develop relationships with other human beings. Elements such as gender identification, name and sexual orientation and sexual life fall within the right to privacy.

[58] The claimants contend that both sections 56 and 57 of the Act seek to regulate sexual activity in which adults freely choose to engage in the privacy of their own homes. In the case of homosexual males, who freely choose to engage in sexual intercourse per anum in private, section 56 directly limits who they may establish sexual relationships with and is a direct attack on their sense of personal autonomy. The claimants argued that to the extent section 56 applies to consensual sexual intercourse per anum between an adult man and an adult woman, it constitutes an unwarranted intrusion in their private affairs. Section 57 similarly applies to all sexual activity engaged in between two consenting males or two consenting females. The claimants submitted that these challenged provisions constitute an egregious intrusion of the State in the bedrooms of the citizenry. Both provisions violate the right to privacy guaranteed by section 3(c) of the Constitution, they submitted.

[59] The defendant submitted that the court should interpret the right to privacy in accordance with the spirit and text of the provisions of the Constitution, bearing in mind that there is no express recognition of sexual orientation in the text of the Constitution. The Court is being asked for the first time to decide whether sexual orientation fits within the right to privacy. The defendant submitted that the right to privacy does not encompass one's sexual orientation.

The scope of the right to privacy

[60] Section 3 (c) engages the right to respect for personal privacy or private life, home and property. The claimants' complaint relates to the private life interest and thus properly falls within the scope of section 3 (c). The ensuing examination is concerned with assessing whether the State has interfered with that right.

[61] The right to respect for private life has been given a broad interpretation by Courts. In particular, personal characteristics such as gender identification, sexual orientation and sexual life have been held to be protected by the right to personal privacy. A survey of the jurisprudential landscape bears this out. On the domestic front, Williams, J led the way in **Jovil Williams et al v Attorney General of St. Christopher and Nevis et al**[17] in holding that sexual activity between consenting adults is

[17] [2016] ECSCJ No. 37.

encompassed in the right to privacy under the section 3(c) of the Constitution. This was a case where the police disseminated a sexually explicit recording of the claimants indulging in sexual activity in the privacy of their home. The recording was stored on their Blackberry phone, which had been seized by the police during an unrelated investigation.

[62] Further afield, in **Dudgeon v UK**[18], the issue was whether Northern Ireland legislation criminalising homosexual acts between consenting adult males breached the right to private life under Article 8 of ECHR. The European Court of Human rights held that the impugned legislation constituted a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8(1). The court found that the stark choice he faced was either he respects the law and refrains from engaging in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies– even in private with consenting male partners – or he commits such acts and thereby becomes liable to criminal prosecution.

[63] In South Africa, it has been held that inherent in the notion of privacy is a recognition that each individual has a right to a sphere of private intimacy and autonomy which allows for the nurturing of human relationships without interference from the outside 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:” **National Coalition of Gay and Lesbian Equality v Minister of Justice**[19]

[64] Regional jurisprudence has embraced a generous and purposive approach to the interpretation of the right to privacy and courts have not been slow to declare unconstitutional legislation criminalising sexual acts between consenting homosexuals. In Trinidad and Tobago, sections 13 & 16 of the Sexual Offences Act Chapter 11:28 (corresponding to sections 56 & 57) were the subject of constitutional challenge in **Jason Jones v AG et al.** The court granted a declaration that sections 13 and 16 of the Act were unconstitutional, illegal, null, void, invalid and of no effect to the extent that they criminalised any acts constituting consensual sexual conduct between adults.

[65] A similar conclusion was reached in Belize in **Orozco v AG of Belize.** Section 53 of the Belize Criminal Code provided that every person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years. The claimant challenged the

[18] [1981] ECHR 5; 4 EHRR 149.
[19] [1998] ZACC 15.

constitutional validity of section 53 to the extent that it operated to criminalize anal sex between two consenting male adults in private. The Chief Justice granted a declaration that section 53 contravened, inter alia, the right to privacy to the extent that it applies to carnal intercourse against the order of nature between persons.

[66] I harbour no doubt that Sections 56 and 57 of the Act intrude into the personal and private sphere of consenting adults who engage in intimate sexual activity of their choice. They impinge upon the claimants' right to determine the way they, as individuals, choose to express their sexuality in private with another consenting adult. This is encompassed within the right to privacy guaranteed under section 3(c) of the Constitution. To the extent that Sections 56 and 57 criminalise sexual acts engaged in between consenting adults they are unconstitutional, null and void and of no effect.

The right to freedom of expression

[67] Section 3 (b) of the Constitution

> 12. (1) Except with his or her own consent, a person shall not be hindered in the enjoyment of his or her freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication is to the public generally or to any person or class of persons) and freedom from interference with his or her correspondence.

[68] The claimants submitted that the right to freedom of expression protects sexual conduct. Ms. Chiesa submitted that Section 12(1) repeats the protection granted to freedom of expression by section 3(b) and provides examples of what freedom of expression entails but makes no attempt to limit the wide ambit of the right. The right also extends to conduct as a form of expression and is not limited to the verbal or written expression or communication of ideas. The claimants referred the court to several authorities from across the Caribbean and Commonwealth where courts have held that the right to freedom of expression protects sexual conduct.

[69] The Solicitor General acknowledged that the several authorities relied on by the claimants establish the principle that freedom of expression includes sexual conduct and sexual activity but urged the court to view them as persuasive but non-binding authorities. The defendant instead relied on the

decision of the Singapore High Court in **Johnson v Attorney General and other matters**[20] in arguing for a narrow construction to be placed on the concept of freedom of expression. In that case, the claimants challenged section 377A of the Singapore Penal Code which criminalised acts of gross indecency between male persons on the basis that the legislation violated their rights to personal liberty, equal protection of the law and freedom of speech. Section 14(1)(a) of the Singapore Constitution provides that "every citizen of Singapore has the right to freedom of speech and expression." The court held that: "The ordinary meaning of the term 'expression' in art 14(1)(a), when read with the term 'speech', in the marginal note to s 14, pointed towards some form of verbal communication of an idea, opinion or belief, and 'expression' in the form of male homosexual acts did not qualify for protection under art 14(1)(a). The defendant therefore contended that the forms of expression listed in section 12 (1) includes opinions, ideas, information and correspondence, which are more consistent with the right to protection of freedom of speech. The defendant argued that the Constitution ought to be interpreted in accordance with the meaning of the text as expressed by the framers. They submitted that the type of expression for which the claimants contend, is not included in the term 'expression' as contemplated in section 12 of the Constitution. The defendant counsels against stretching the limits to the text to include matters which it is said are clearly not stated or intended by the framers of the Constitution.

[70] The defendant further invoked the preamble to the Constitution, which states that the Federation is 'established on the belief in Almighty God and the inherent dignity in each individual'. In any interpretation or construction of the Constitution and the laws of the Federation, consideration should be given to the moral and religious fibre of the country which it governs. The norms and morals are the bedrock and foundation of the Federation. Any deviation from these fundamental beliefs opens the floodgates to practices that could alter and compromise survival of the culture and personality of the Federation.

[71] In reply, Ms, Chiesa submitted that on a proper interpretation of the Preamble, the reference to the Almighty God does not privilege any specific religious perspective. Rather, it affirms the historical origins of the Chapter in natural law and confirms the idea that rights are derived from sources beyond the state and its laws. That primary source is human dignity; the reference to the Almighty God confirms the centrality of human dignity and that it means all human beings are created equal

[20] [2020] 3 LRC 649.

and have equal moral worth. In referring to "the belief in Almighty God and the inherent dignity in each individual", the Preamble strongly indicates that human dignity is ecumenical and all inclusive.

[72] A comprehensive discourse on the right to freedom of expression is contained in the CCJ's judgment in **McEwan v The Attorney General of Guyana**.[21] In that case, the appellants were transgendered persons who were arrested, detained and charged with the offences of loitering and wearing female attire in a public place for "an improper purpose". They pleaded guilty to the latter offence; the loitering charges having been dropped. The material part of section 153 makes it a crime for a man to dress in female attire, or for a woman to dress in male attire, in a public place, for an improper purpose. The appellants subsequently commenced proceedings in the High Court against the State, alleging a series of constitutional rights violations. One of the issues before the CCJ was whether section 153(1)(xlvii) violated the appellants' right to freedom of expression guaranteed to them under Article 146 of the Guyana Constitution. Section 146 (1) corresponds to section 12(1) of the St. Christopher and Nevis Constitution.

[73] In construing the right to freedom of expression, the CCJ stated:

> "Article 146 of the Constitution gives every Guyanese the right to hold and communicate ideas and opinions without interference... Because it underpins and reinforces many of the other fundamental rights, freedom of expression is rightly regarded as the cornerstone of any democracy. A regime that unduly constrains free speech produces harm, not just to the individual whose expression is denied, but to society as a whole.
>
> [76] It is essential to human progress that contrary ideas and opinions peacefully contend. Tolerance, an appreciation of difference, must be cultivated, not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. A person's choice of attire is inextricably bound up with the expression of his or her gender identity, autonomy and individual liberty. How individuals choose to dress and present themselves is integral to their right to freedom of expression. This choice, in our view, is an expressive statement protected under the right to freedom of expression. These conclusions are not novel. The Indian Supreme Court in National Legal Services Authority v Union of India reached a similar determination when it held that expression of one's identity through words,

[21] [2018] CCJ 30 (AJ).

dress, action or behaviour is included in the right to freedom of expression under the comparable Article of the Indian Constitution. Other courts have also arrived at similar conclusions."

[74] This case completely undermines the defendant's argument that the right to freedom of expression should not be stretched beyond the limits of the text to include matters which are not stated. Such a restrictive approach is to be eschewed. As **Mc Ewan** exemplifies, freedom of expression is not confined strictly to speech or such forms of oral or written communication. It transcends those more obvious examples of expression and includes expressions of one's identity such as dress, action or behaviour. In that light, sexual acts between consenting adults are cognisable as a form of expression protected by the right to freedom of expression under section 3(b) and 12 of the Constitution.

[75] In **Johar**, the Supreme Court of India acknowledged that LGBT persons may express their identities in their choice of sexual partner, and their acts which express their sexual desire. Under the comparable provision of the Indian Constitution, the Supreme Court held that a law criminalising buggery breached the right to freedom of expression. Similar conclusions have been reached about the buggery laws in Trinidad & Tobago in **Jason Jones v AG**, where Rampersad, J held that the buggery and serious indecency laws in Trinidad and Tobago breached the claimants right, inter alia, to freedom of expression. And in Belize, in **Caleb Orozco v AG**, the Court of Appeal held that sexual intercourse by LGBT persons was a form of expression protected under the Constitution, which was breached by the corresponding buggery laws in Belize.

[76] I am unpersuaded that I should accept the defendant's invitation to follow the Singapore High Court and place a narrow and restrictive meaning on the content of the right to freedom of expression. That court seems to have coloured the meaning of the term 'expression' in article 14(1)(a) because, when read with the term 'speech' in the marginal note to s 14, if pointed towards some form of verbal communication of an idea, opinion or belief, which the court held was the ordinary meaning of expression in the context used. Even so, the court conceded that 'at a broad level, one common meaning that may be discerned is that 'expression' involves a form of communication that may or may not involve language. In that sense, the plain and ordinary meaning of the term itself does not rule out the possibility of sexual intercourse being a form of expression.'

[77] Notwithstanding this, the court stated that it should also have regard to the context of a term when interpreting it, and this included consideration of the marginal notes in a statutory provision which can be used as an aid to statutory interpretation. The court therefore found:

> "The marginal note states 'Freedom of speech, assembly and association', with no mention made of freedom of expression as a freestanding right. From the marginal note, at least, it appears that the right to freedom of expression was contemplated as something relating to or falling within the right to freedom of speech ie the verbal communication of an idea, opinion or belief…In line with what I have set out above, the ordinary meaning of the term 'expression', when read together with the term 'speech', must necessarily point towards some form of verbal communication."

[78] These qualifications have no application to the Saint Christopher and Nevis Constitution, and, in any event, I find the reasoning unpersuasive and inconsistent with the purposive and generous interpretation to be accorded to constitutional provisions necessary to afford citizens the full measure of the right.

[79] Nor am I persuaded that resort to the preamble of the Constitution and its reference to "the belief in Almighty God and the inherent dignity in each individual", avails the defendant. On the contrary, it affirms the essential human dignity to be accorded to all persons under the Constitution.

[80] In the premises, the conclusion that sections 56 and 57 of the Act are incompatible with the right to freedom of expression guaranteed by sections 3 and 12 of the Constitution is irresistible.

Right to protection from discrimination on grounds of sex

[81] Section 3 of the Constitution declares every person's entitlement to the fundamental rights and freedoms in Part II of the Constitution "whatever his or her race, place of origin, birth, political opinions, colour, creed or sex". Thus, section 3 enshrines a general right to protection from discrimination on the grounds of a person's sex.

[82] Section 15 of the Constitution specifically prohibits discrimination, inter alia, on the grounds of sex. Section 15 provides as follows:

> "15. (1) Subject to subsections (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to subsections (6), (7), (8) and (9), a person shall not 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, place of origin, birth out of wedlock, political opinions or affiliations, colour, sex 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 that are not accorded to persons of another such description."

[83] The claimants' case is that sections 56 and 57 of the Act violate the right to equality of treatment by discriminating against gay men. A person's right not to be discriminated against based on his or her sex is infringed when he or she is discriminated against on the basis of his or her sexual orientation. It therefore violates their rights not to be discriminated against on the basis of their sexual orientation.

[84] In support of its posited expansive definition of 'sex' as including sexual orientation, the claimants invoke the Federation's international law obligations, which they submitted oblige the State to protect against discrimination on the basis of sexual orientation. It is argued that the treaty bodies for the Convention on the Rights of the Child and the Convention on the Elimination of Discrimination Against Women (CEDAW), each of which has been ratified by St Kitts and Nevis, have all issued General Comments explaining that 'sexual orientation' is included within their respective treaty prohibitions on discrimination. The claimants further point out that the Committee on the Elimination of Discrimination Against Women has expressly condemned discrimination on the basis of sexual orientation and called for the repeal of all laws that classify homosexuality as an offence and has condemned certain states for enacting laws protecting against discrimination on the basis of sexual orientation. The claimants say that given that Saint Christopher and Nevis is a party to each of these international human rights instruments, it is obliged to respect these non-discrimination provisions as well as the decisions of treaty bodies in relation to the same. The claimants submitted that the guarantee of entitlement to fundamental rights without discrimination on the grounds of a person's "sex" should, in accordance with established principles of international law and proper constitutional interpretation, also be construed to include discrimination on the grounds of "sexual orientation."

They rely primarily on three cases which treated sexual orientation as a sub-set of sex: **Toonen v Australia[22]; National Coalition;** and **Johar.**

[85] On behalf of the defendant, it was submitted that while the Constitution does not define the term 'sex' or prescribe its scope and limitations, the ordinary and natural meanings of 'sex' includes "the state of being male or female; and, according to the 10th Edition of the Black's Law Dictionary, "the sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female". The defendant argued that the starting point for interpretation should be the literal or plain meaning rule which requires that the words be given their "plain and ordinary meaning" in common usage. The defendant argued further that discrimination on the ground of sexual orientation is outside of the scope of the prohibition contained in section 15 of the Constitution and the plain meaning of the word 'sex' does not include sexual orientation.

[86] In support of its restrictive interpretation of 'sex', the defendant places reliance on **MacDonald v Advocate General for Scotland; Pearce v. Governing Body of Mayfield School[23]**; and **Grant v South-West Trains Ltd Case.[24]**

Discussion

[87] The claimants' reliance on the **National Coalition** case does not advance the argument much for the simple reason that the Constitution of South Africa specifically stipulates that both sex and sexual orientation are proscribed grounds of discrimination. Section 8(2) of the Constitution of the Republic of South Africa 1993 provides as follows:

> "No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language…"

[88] Clearly, section 8(2) of the South African Constitution recognises a distinction between the concepts of 'sex' and 'sexual orientation' and aims to strike down any law that criminalises homosexual activity.

[22] Comm No. 488/1992.
[23] [2003] UKHL 34.
[24] C-249/96; [1998] All ER (EC) 193.

Secondly, it must be recognised that in South Africa, the position is as summarized at para 11 by Ackermann J:

> 'Before the new constitutional order came into operation in our country, the common law offence of sodomy differentiated between gays and heterosexuals and between gays and lesbians. It criminally proscribed sodomy between men and men, even in private between consenting adults, but not between men and women; nor did it proscribe intimate sexual acts in private between consenting adult women.'

[89] This is not the position here: section 56 prohibits anal sex between gay men as well as between a heterosexual male and a female. I would respectfully adopt the conclusion reached by the High Court in Zimbabwe in **Banana v State**[25] that what our Constitution forbids is discrimination between men and women; not between heterosexual men and homosexual men. I further agree with its definition of discrimination based on gender [sex] which 'means simply that women and men must be treated in such a way that neither is prejudiced on the grounds of his or her gender by being subjected to a condition, restriction or disability to which persons of the other gender are not made subject." (Per McNally, JA at page 44).

[90] In so far as the claimants rely on **Toonen v Australia,** the issue before the United Nations Human Rights Committee was whether the corresponding provisions of the Tasmania Criminal Code violated, inter alia, articles 2(1) and 26 of the ICCPR, which proscribed discrimination on the basis of sex, among other bases. In holding that the reference to 'sex' in those articles encompassed 'sexual orientation' the committee merely stated:

> "The State Party has sought the Committee's guidance as to whether sexual orientation may be considered an "other status" for the purposes of Article 26. The same issue could arise under Article 2, paragraph 1, of the Covenant. The Committee, confines itself to noting, however, that in its view, the reference to "sex" in Articles 2, paragraph 1, and 26 is to be taken as including sexual orientation…Since the Committee has found a violation of Mr Toonen's rights under Articles 17, paragraph 1, and 2, paragraph 1, of the Covenant requiring the repeal of the offending law, the Committee does not consider it necessary to consider whether there has also been a violation of Article 26 of the Covenant."

[25] [2000] 4 LRC 621.

[91] I derive little assistance from such a passing opinion expressed by the Committee, when, by its own admission, it did not address article 26 at all. Further, Saint Christopher and Nevis have not acceded to or ratified the ICCPR and are not bound by it. It therefore cannot influence construction of sections 3 and 15 of the Constitution. The committee's opinion was similarly given short shrift by the European Court of Justice in **Grant** (discussed later in this judgement) which stated:

> "..the Human Rights Committee, which is not a judicial institution and whose findings have no binding force in law, confined itself, as it stated itself without giving specific reasons, to 'noting ... that in its view the reference to "sex" in Articles 2, paragraph 1, and 26 is to be taken as including sexual orientation'. Such an observation, which does not in any event appear to reflect the interpretation so far generally accepted of the concept of discrimination based on sex which appears in various international instruments concerning the protection of fundamental rights, cannot in any case constitute a basis for the Court to extend the scope of Article 119 of the Treaty.

[92] The claimants' reliance on the **Orosco** case out of Belize, which followed **Toonen**, suffers the same fate, as it relies on **Toonen** to hold that sex includes sexual orientation under the corresponding provision of the Belize Constitution. The learned Chief Justice explained his conclusion thus way:

> "In Toonen v. Australia Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992, the UN Human Rights Committee ("UNHRC") ruled that various forms of sexual conduct including consensual sexual acts between men in private under Tasmanian law were incompatible with the International Covenant on Civil and Political Rights ("ICCPR"). The UNHRC held that the word "sex" in Articles 2 and 26 of the ICCPR were to be interpreted as including "sexual orientation". This interpretation has been adopted by other UN Agencies and bodies. Belize has acceded to the ICCPR in 1996 two years subsequent to Toonen. As such, it can be argued that in doing so, it tacitly embraced the interpretation rendered by the UNHCR. It has been further urged by the 2nd and 3rd Interested Parties that by virtue of section 65 of the Interpretation Act, Chapter 1 given that more than one interpretation is reasonably possible "a construction which is consistent with the international obligations of the Government of Belize is to be preferred to construction which is not". I accept these contentions to the effect that the word 'sex' in section 16(3) of the Constitution is to be interpreted to extend to "sexual orientation".

[93] Respectfully, it appears to me that the learned Chief Justice accepted, without more, the bare opinion expressed by the UNHCR in **Toonen** and founded his conclusion on this and the tacit embrace, which he found Belize gave to the opinion when it acceded to the ICCPR two years after **Toonen**. **Orosco** fails to illuminate the route by which I should arrive at the construction urged by the claimants. I therefore derive no assistance from this authority.

[94] In so far as the claimants rely on the Indian Supreme Court's decision in **Johar**, that was not a case where the issue was whether the term 'sex' included 'sexual orientation'. That case regarded sexual orientation as innate and a core part of one's identity. The focus of the court's discussion on discrimination on grounds of sexual orientation was in the context of the right to choose one's sexual partner as part of the right to privacy and freedom of expression. The case does not assist on the point of construction engaged in this case.

[95] As to the claimants' invitation to treat the general comments on the Convention on the Rights of the Child and the Convention on the Elimination of Discrimination Against Women - both ratified by Saint Christopher and Nevis - that 'sexual orientation' is included within their respective treaty prohibitions on discrimination', as warrant for reading 'sex' to include 'sexual orientation', the Court agrees with the defendant's submissions in this regard. In the first place, the general comments cited do not say that discrimination on the basis of sexual orientation is discrimination on the basis of sex. Further, the Constitution is the supreme law and the General Comments by international bodies do not and cannot override the language of the Constitution which is unambiguous.

[96] The court considers the cases cited by the learned Solicitor General to be instructive. In **Grant v South-West Trains Ltd,** the issue engaging the attention of the European Court of Justice was whether discrimination on grounds of sexual orientation came under discrimination on grounds of sex pursuant to art 119 of the EC Treaty and Council Directive (EEC). Ms. Grant was employed by SWT, a company which operates railways in the Southampton region. The company offered travel concessions for spouses or unmarried opposite-sex cohabiting partners but not to an unmarried cohabiting same-sex partner. The relevant provisions of the company's policy stipulated:

> "Privilege tickets are granted to a married member of staff... for one legal spouse but not for a spouse legally separated from the employee

Privilege tickets are granted for one common law opposite sex spouse of staff... subject to a statutory declaration being made that a meaningful relationship has existed for a period of two years or more."

[97] Ms. Grant applied to her employer for travel concessions for her female partner, with whom she declared she had had a meaningful relationship for over two years. Her employer refused the request on the ground that, under company regulations, travel concessions for unmarried persons could only be granted for a partner of the opposite sex. Ms Grant argued that such a refusal constitutes discrimination based on sexual orientation, which is included in the concept of 'discrimination based on sex' in Article 119 of the Treaty. She contended that differences in treatment based on sexual orientation originate in prejudices regarding the sexual and emotional behaviour of persons of a particular sex and are in fact based on those persons' sex.

[98] The European Court of Justice ("ECJ") held that the effect of the provisions was that the worker must live in a stable relationship with a person of the opposite sex to benefit from the travel concessions. Like the other alternative conditions prescribed in the company's regulations, the policy was applied regardless of the sex of the worker concerned. Thus, travel concessions are refused to a male worker if he is living with a person of the same sex, just as they are to a female worker if she is living with a person of the same sex. Since the condition imposed by the regulations applied in the same way to female and male workers, it could not be regarded as constituting discrimination directly based on sex.

[99] In **Banana v. State** the issue before the Supreme Court of Zimbabwe was whether, inter alia, the common law crime of sodomy, which criminalises sexual intercourse per anum between consenting male adults, discriminates against persons of the male gender by imposing upon them a restriction to which persons of the female gender are not subject, in nonconformity with s 23 of the Constitution of Zimbabwe which guaranteed protection against discrimination on the ground of gender. Section 23 of the Constitution, in relevant part, reads:

'(1) Subject to the provisions of this section

(a) no law shall make any provision that is discriminatory either of itself or in its effect

(2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory if, as a result of that law persons of a particular description by race colour or

gender are prejudiced (a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject ...

(5) Nothing contained in any law which discriminates between persons on the grounds of gender shall be held to be in contravention of subsection (1)(a) to the extent the law in question

(b) takes due account of physiological differences between persons of different gender; or

(c) except insofar as that law is not shown to be reasonably justifiable in a democratic society.' (My emphasis.)

[100] The court held as follows:

"Section 23 of the Constitution, which gave protection against discrimination on the ground of gender, did not include an express prohibition against discrimination on the ground of 'sexual orientation'. That provision forbade discrimination between men and women, not between heterosexual men and homosexual men. The latter discrimination was prohibited only by a constitution which proscribed discrimination on the grounds of sexual orientation. The real complaint by homosexual men was that they were not allowed to give expression to their sexual desires, whereas heterosexual men were. In so far as that was discrimination, it was not the sort of discrimination which was struck down by s 23… The real discrimination was against homosexual men in favour of heterosexual men, which was not discrimination on the ground of gender. That being so, the criminalisation of consensual sodomy was not discrimination under the Constitution."

[101] Returning to the Constitution of Saint Christopher and Nevis, the grounds of discrimination are proscribed and not at large. Sex is one of the proscribed grounds. In its natural and ordinary meaning, it refers to gender. Sexual orientation is not the same as gender. Sexual orientation is defined by the American Psychological Association as follows:

"Sexual orientation refers to an enduring pattern of emotional, romantic and/or sexual attractions to men, women or both sexes. Sexual orientation also refers to a person's sense of identity based on those attractions, related behaviours, and membership in a community of others who share those attractions. Research over several decades has demonstrated

that sexual orientation ranges along a continuum, from exclusive attraction to the other sex to exclusive attraction to the same sex."[26]

[102] In the **National Coalition** case, sexual orientation was defined in the following way

> "…sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex".

[103] In my view, the offence of buggery under section 56 does not discriminate as between males and females or even between homosexual males and heterosexual males, as in Zimbabwe. It is gender and sexual orientation neutral. The offence is prohibited whether it occurs between two gay males or between a heterosexual male and a female. Mutual consent of the parties is immaterial. The fact that sex per anum may be the way gay men commonly express their sexuality and sexual desires, or that among the general community gay males are the ones predominantly engaged in this type of activity, does not make section 56 a gender discriminatory provision even if it may be said to be discriminatory in its effect. The complaint by gay men that they are not allowed to give expression to their sexual desires, is not caught within the type of discrimination proscribed by sections 3 and 15.

[104] The same may be said of section 57 which prohibits attempted sodomy, whether by a gay male on another person or by a heterosexual male on a female. It is therefore gender neutral. It also prohibits acts of indecency upon a male person. The forms of sexual contact constituting the offence of indecency may be performed by a gay male with a male person or by a heterosexual female with a male person. These acts may or may not be an expression of sexual or gender identity. Indecency with a female under 16 is criminalised under section 47 of the Act and can be committed by 'any person'.

[105] I therefore conclude that discrimination on the grounds of sexual orientation is not proscribed by sections 3 and 15 of the Constitution as a facet or sub-set of discrimination on grounds of sex. Accordingly, the claimants are not entitled to a declaration that section 56 and section 57 of the Act

[26] Quoted in Johar at para 142.

infringe the right to protection from discrimination on the ground of sex enshrined in section 15 of the Constitution.

Are the impugned provisions reasonably justifiable in a democratic society?

[106] I have found that sections 56 and 57 of the Act contravene the right to protection for personal privacy and the right to freedom of expression. The State may legitimately limit the enjoyment of the rights to privacy and freedom of expression to ensure that the enjoyment of these rights by any person does not impair the rights and freedoms of others or injure the public interest. Public interest considerations include defence, public safety, public order, public morality and public health. Such limitations must, however, be shown to be reasonably justifiable in a democratic society for the protection of one of these objectives. The claimants bear the burden of proving that the impugned sections are not reasonably justifiable. In reviewing legislation for constitutionality, the default starting point is the presumption of constitutionality:

> "This is the presumption that in making legislation the legislature has not exceeded its constitutional powers to legislate. Legislation is presumed to be constitutional unless there is clear proof to the contrary. The burden is upon the applicant to rebut the presumption." (per Rawlins J.A. in **The Chief of Police v Calvin Nias**[27]**)**

[107] The Privy Council in **Arorangi Timberland Ltd v Minister of the Cook Islands National Superannuation Fund**[28] expressed the principle this way:

> 'The Board would accept that, save perhaps in extreme circumstances, a statute should be presumed to be constitutional until it is shown to be otherwise, that (in so far as it is helpful to speak of a burden in such circumstances) the burden is on the party alleging that a statute is unconstitutional, and that any court should be circumspect before deciding that a statute is unconstitutional.' In **de Freitas** it was 'accepted that in the construction of statutory provisions which contravene human rights and freedoms there is a presumption of constitutionality.'[29]

[27] Supra, N.5.
[28] [2016] UKPC 32.
[29] At page 137, letter j.

[108] Given the presumption of constitutionality, the claimants have a heavy burden to prove that the impugned sections are not reasonably justifiable in a democratic society. Considering the legal principles discussed above and my finding that sections 56 and 57 hinder the claimants' enjoyment of their rights to the protection of personal privacy and freedom of expression under sections 3 (b) and (c) and 12 of the Constitution, the defendant must show that sections 56 & 57 are reasonably required in pursuance of one of the legitimate constitutional objectives or for the purposes set out in subsections 3, 12 (2)(a) and (b). The state discharges this burden by providing evidence that there was a sufficiently important objective for limiting the fundamental right; that the measures designed to meet that objective was rationally connected to it; and that the means used to impair the right or freedom are proportionate, in that, they are no more than necessary to achieve that objective: **de Freitas v Permanent Secretary.**[30] I adopt and apply this approach. Whether a provision is reasonably justifiable depends on whether it "arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual:" **de Freitas v Permanent Secretary.**

[109] The sole limitation relied upon by the defendant is that of public morality. The defendant submitted that 'morality' means the accepted rules and standards of human behaviour which vary from society to society and from time to time. The defendant further submitted that 'public morality' is referable to notions of good or bad conduct in a society and the immorality of an act or representation must be determined by the moral standards of the society. Further, 'public morality' is said by the defendant to encompass those normative values of a society, which reflect the principles and moral standards, which form the society's code of good conduct, which values are generally accepted and adhered to by the society. The defendant argued that by section 56 and section 57, the legislature has placed a justifiable restriction to ensure that basic moral standards of the society are upheld and maintained. It was submitted that decriminalising the impugned sections would leave the society without any protection from the criminal law from rape amongst men or rape of any person per anum. The sections should therefore be presumed to be constitutional because they contribute to the maintenance of public order by prohibiting rape amongst men or rape of any person per anum. Striking down sections 56 and 58 is likely to cause alarm in the public and is likely to undermine public confidence in the conduct of public affairs, submitted the defendant.

[30](1998) 53 WIR 131.

[110] The claimants countered that the defendant has not adduced any evidence to prove that sections 56 and 57 of the Act are reasonably required in the interests of defence, public safety, public order, public morality, or public health or to accord respect for the rights and freedoms of others and for the public interest. The defendant is accused of engaging in 'scare tactics' by alleging that decriminalizing the consensual sexual activities prohibited by section 56 and 57 will derogate from public order because there would be no protection against rape amongst men or rape of any person per anum. The claimants say no evidence was submitted by the defendant to support this assertion. The claimants further submitted that this case is about consensual intimacy; not non-consensual anal intercourse (rape). The claimants contended that to modify the offending provisions to simply exclude consensual same-sex intimacy from criminalization would not affect the laws prohibition on non-consensual anal intercourse.

Discussion

[111] The first step is to ascertain whether there was a sufficiently important objective for limiting the fundamental rights. That objective seems to be the prohibition of 'unnatural offences,' which is the rubric under which the sections fall in Part XII of the Act. This objective is pursued in the interest of public morality. The evidence adduced to advance the public morality limitation is the affidavit of Pastor Everton Matthew, a pastor of the People's Evangelistic Centre and Chairperson of the Evangelical Association of St. Kitts. This association consists of between 30 - 35 Christian churches. Pastor Matthews does not aver that he is authorized to swear the affidavit on their behalf. However, he does say that the claim was brought to his attention by the Ministry of Ecclesiastical Affairs. I am prepared to assume that it was in his capacity as Chairman of the Evangelical Association that he was notified and that he speaks in that capacity also. The summary of his affidavit that follows disregards his attempts to improperly venture legal opinions.

[112] Pastor Matthews avers that the Evangelical Association considers the issues raised from the Biblical point of view. He invokes the statement in the preamble to the Constitution that the nation is established on the belief in Almighty God and claims that this is a reference to the Christian God. The church frowns upon buggery and believes that the criminalisation of acts of buggery 'establishes the moral position of the Government in relation to homosexuality and unnatural carnal intercourse generally.' The Pastor opined that the moral and religious fibre of the community should influence any interpretation of the Constitution.

[113] The Attorney General also swore an affidavit in opposition to the originating motion. It is completely silent in terms of justifying the limitations on any of the fundamental rights in issue. The affidavit of Crown Counsel Gordon attaches statistics on prosecutions for the offence of buggery, which have been sparse to non-existent. This is the extent of the evidence adduced by the defendant.

[114] Public morality is not synonymous with religious dogma or public opinion. I find apposite, and gratefully adopt, the statement by Chaskalson, P. of the South African Constitutional Court in State of Makwanvana [1995] (3) SA 391 (at paragraph 88) which was cited with approval by Lord Bingham in **Patrick Reyes v. R**

> "Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold the provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication … The very reason for establishing [the Constitution], and for vesting the power of judicata review of all legislation in the Courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society."

[115] I associate myself with the view that the reference to belief in the Almighty God in the Preamble to the Constitution 'does not import any specific religious perspective, but rather, it acknowledges the historical origins of the fundamental rights in natural law and that rights are derived from sources beyond the state and its laws: Per Justice Kennedy in **Lawrence v. Texas (2003) 539 US 558 at page 571.**

[116] Further, the claimants are right to submit that the defendant has adduced no evidence to show that sections 56 and 57 are reasonably required in the interests of public morality or to ground the defendant's fallacious submission that decriminalizing the consensual sexual activities prohibited by section 56 and 57 will derogate from public order because there would be no protection against rape amongst men or rape of any person per anum.

[117] On the other hand, the claimants' evidence of their experiences of discrimination and stigma as gay persons in the Federation stands completely uncontradicted. Mr. Jeffers and Ms. McKoy's evidence spoke to issues commonly affecting members of the LGBT persons in St. Kitts and Nevis. These

include: a tendency to avoid sexual health services, including being tested for HIV, for fear of being stigmatized by the health care providers or wider society; fear of being prosecuted because of their sexual behaviours; difficulty within educational institutions because of being stigmatized for their perceived sexuality, including verbal harassment and threats by other students or other forms of stigma by teachers and administrators; a tendency by men who have sex with men ("MSM") to avoid getting lubricants which facilitate safer sex, for fear of stigmatized from being perceived as homosexual; stigma and isolation from family members; discrimination in the job market, where it is difficult for LGBT persons to find or keep jobs and to be treated fairly in their workplaces; police brutality; sexual violence against LGBT persons by perpetrators who want to punish what they see as sexual transgression, or by perpetrators who want to "fix" LGBT persons through rape or other forms of sexual assault; and self-loathing and mental health issues.

[118] Whether or not sections 56 and 57 of the Act are reasonably justifiable in a democratic society, must be set against the standards of the constitutional values espoused within the preamble to the Constitution. These include its reference to “the belief in Almighty God and the inherent dignity in each individual,” which affirms the essential human dignity to be accorded to all persons under the Constitution. When set against these values, the limitation must be shown not to be reasonably justifiable in a society that has a proper respect for the fundamental rights and freedoms of individuals.

[119] Having carefully considered the matter, I conclude that the absolute nature of the prohibition created by sections 56 and 57 are not reasonably justifiable in a democratic society in circumstances where they proscribe sexual acts between consenting adults in private, which involve no element of public conduct or harm to, or sexual acts, with minors. The sections nonetheless expose the claimants to criminal sanctions and render them liable to terms of incarceration of up to ten years. To the extent that it criminalises the private lives of gay persons in this way, the law is excessive and arbitrary. In such circumstances, the sections fail to meet the constitutional qualification of being reasonably justifiable in the interest of public morality and cannot stand in their present form.

The appropriate relief

[120] As previously stated, both sections 56 and 57 pre-date independence. Section 2 of Schedule 2 to the Saint Christopher and Nevis Order 1983 (“Independence Order”) provides as follows:

> "(1) The existing laws shall, as from 19th September 1983, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.
>
> (…)
>
> (7) For the purposes of this paragraph the expression "existing law" means any Act, Ordinance, rule, regulation, order or other instrument made in pursuance of or continued in force by or under the former Constitution and having effect as law immediately before 19th September 1983 and includes any Act of the Parliament of the United Kingdom or Order in Council or other instrument made under any such Act (except this Order and the Supreme Court Order) and any order made under section 4(2) of this Order to the extent that it so had effect on that date."

[121] Section 2 is a modification clause which empowers the court to modify the language of any law that was in existence prior to Independence to bring it into conformity with the Constitution. This is not to be confused with a 'savings clause' which protects existing laws, and which is embedded in the Constitutions of some Caribbean jurisdictions but is absent from the Saint Christopher and Nevis Constitution. Such savings clauses typically provide that nothing in the fundamental rights provisions in the Constitution shall invalidate an existing law.[31] This distinction is important because Saint Christopher and Nevis' apex Court, the Privy Council, recently affirmed in **Jay Chandler v The State**[32] - contrary to the CCJ in **Nervais** and **McEwan** - that the effect of a savings clause is to make existing laws conform with the Constitution. In other words, the Constitution preserves the validity of existing laws. The power to modify a law to bring it into conformity with the Constitution only arises where the law in question is not in conformity with the Constitution. The position in Saint Christopher and `Nevis is that there is no savings clause that preserves the validity of existing laws; there is only a modification clause which requires existing laws to be construed in a manner that brings them into conformity with the Constitution.

[122] In explaining the mandate given by the corresponding provision in the Barbados Independence Order, the CCJ in **Nervais** described it in these terms:

[31] See, f.or e.g. Section 6 of the Trinidad and Tobago Constitution.
[32] [2022] UKPC 19.

> "Section 4 (1) of the Independence Order prescribes a mandatory direction to construe the existing laws to bring them into conformity. The method of bringing into conformity is not limited to modification and adaptation, but it includes the wide powers of qualifications and exceptions. No existing law is excluded from the requirement of being brought into conformity. The Constitution is the supreme law and the laws in force at the time when it came into existence must be brought into conformity with it. Of course, in exceptional cases a court must be sensitive to the warning in San Jose Farmers' Cooperative Society Ltd v Attorney General that where the nature of the inconsistency with the Constitution is such that it cannot be modified without a usurpation of the legislative power it should leave that task to the legislature…. the permitted modifications transcend those of nomenclature, reaching matters of substance and stopping only where the conflict between the existing law and the Constitution is too stark to be modified by construction."

[123] In summary, therefore, where an existing law is found to be unconstitutional, it must be construed in a manner that renders it in conformity with the constitution. This may be accomplished by modification, adaptation or qualification of the language or by excision to remove the inconsistency, except where the nature of the inconsistency with the Constitution is so stark, such that it cannot be modified without a usurpation of the legislative power.

[124] The claimants concede that section 56 is an existing law, having existed in the Federation in its present form since 1873. However, they submit that section 57 is not. The reason posited for this position is that while it existed prior to independence, section 57 was substantially amended in 2012 by changing the penalty to which a convicted person was exposed. The claimants submitted that section 57 ceased to be an existing law when the penalty which could be imposed on conviction was altered. The claimants rely on **McEwan et al v The Attorney General of Guyana** in support of this proposition. In that case, the CCJ held that the amendment of Guyana's cross-dressing law since the Constitution came into effect removed its status as existing law since, in its current form, it was not what the colonial legislature had enacted.

[125] The defendant sought to distinguish **McEwan** by observing that the CCJ came to its conclusion in the context of a discussion on Guyana's savings clause. It is said that the restrictive interpretation which the interpretation of such a clause warrants, may not be warranted in the case of a modification

clause as obtains in the Federation. The defendant cleaves to the following statement of the Privy Council in **Worme and another v Commissioner of Police**[33] to support its contention:

> "The Constitution of Grenada, by contrast, contains no such provision to exclude existing laws from the impact of the human rights provisions in Ch I. In the present case, therefore, the phrase has to be construed solely within the, very different, context of para 1(1) which is designed to help bring existing laws into conformity with all the provisions of the Constitution, including the human rights provisions. Given this different, and indeed beneficent, context, their Lordships reserve their opinion whether the narrow construction of para 1(1) advocated by Mr Nicol is appropriate or whether, rather, the paragraph should be held to extend to provisions that are identical to those in force immediately before 7 February 1974."

[126] To my mind, their Lordships reserved opinion can be treated as no more than that: they have expressed no view on the point. In any event, the Board in **Jay Chandler** expressly stated that the CCJ's conclusion in **McEwan** that the amendment of the cross-dressing law since the Constitution of Guyana came into effect removed its status as existing law, did not contradict the jurisprudence of the Board. (At para 71). Section 57 as originally enacted was amended by the Offences Against the Person Act No. 6 of 2012, which substituted a new penalty of 10 years, for the original penalty of four (4) years. It must therefore be accepted that section 57 is not an existing law because, as it currently stands, it is not identical with its pre-independence form.

[127] This does not mean that it must be struck down in its entirety. Section 2 of the Constitution provides that the Constitution is the supreme law and if any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

[128] The meaning of such a provision was explored by the Privy Council in **Boyce v The Queen (PC)**[34] the Privy Council in the following terms:

> "The power of modification is based on the premise that the law cannot be given a meaning consistent with the constitutional norm and therefore, by reason of the supremacy of the constitutional norm, must be either modified or nullified. It is a broad power which proceeds by way of adaptation or excision to remove the inconsistency."…A broad power of

[33] [2005] 1 AC.
[34] (2004) 64 WIR 37 at paragraph 49.

modification is appropriate when it forms part of the constitutional scheme for ensuring that laws inconsistent with the Constitution shall "to the extent of the inconsistency, be void". In such a scheme, there is a continuum of measures which can be taken to produce conformity, in which simply declaring the whole law to be void is the limiting case. Short of total inconsistency, there can be modification…Powers to modify and adapt are ways of giving effect to the declaration in [section 2] that laws inconsistent with the Constitution shall to that extent – and only to that extent – be void" (At paras 42 - 50)

[129] Their Lordships recognised that one limit to the court's power to modify legislation, is where the court is presented with choices which are more appropriately made by the legislature.

[130] The defendant submitted that the subject matter to which sections 56 and 57 pertain is still a sensitive issue in this society. The extent to which these sections should apply to children, the protections and defences which a legislature may put in place are issues that are likely to attract a high degree of scrutiny and much debate in the society. The subject matters engage policy issues concerning health and education and the social and cultural values of the society as a whole. The defendant submitted that these issues are more appropriately considered and determined by Parliament which is the appropriate forum where the policy, limitations, and protections to be afforded to children ought to be decided upon in an open, inclusive and transparent manner, with all relevant parties who so desire being given the opportunity to shape the debate and the eventual outcome. The defendant contends that in the circumstances of this case, a declaratory order is sufficient to vindicate the claimants' rights.

[131] I respectfully disagree. The court cannot shirk from its duty to interpret the Constitution and to uphold its provisions without fear or favour. The court is empowered by the modification clause in Schedule 2 to construe existing laws that are unconstitutional to bring them into conformity with the Constitution. It is similarly mandated by section 2 of the Constitution to void any law that is inconsistent with the Constitution to the extent of its inconsistency. This is a clear mandate to the court to be proactive in its guardianship of the Constitution unless it cannot do so without usurping the role of the legislature. The defendant has advanced no cogent argument that modification of the impugned provisions would constitute a usurpation of parliament's role.

[132] In my view, there is a continuing legitimate objective in proscribing acts of bestiality, which is repugnant to all morals and human sensibilities, and in criminalizing non-consensual sexual acts

between adults, male or female, and sexual acts involving minors. Therefore, it would be excessive if the court were to strike down the impugned sections entirely. I am satisfied that sections 56 and 57 can be modified to bring them into conformity with the Constitution in a manner that does not trespass on the turf of the legislature, and which does not wholly frustrate the intent of the elected representatives.

[133] In the premises I grant the following declarations and orders:

1. Section 56 of the Offences Against the Person Act, Cap. 4.21 contravenes sections 3 and 12 of the Constitution of the Federation of Saint Christopher and Nevis, namely, the right to protection of personal privacy and the right to freedom of expression, and, as such, is null and void and of no force and effect to the extent that it criminalises any acts constituting consensual sexual conduct in private between adults;

2. Section 57 of the Offences Against the Person Act Cap. 4.21 contravenes sections 3 and 12 of the Constitution of the Federation of Saint Christopher and Nevis, namely, the right to protection of personal privacy and the right to freedom of expression, and, as such, is null and void and of no force and effect to the extent that it criminalises any acts constituting consensual sexual conduct in private between adults;

3. For the purpose of giving effect to the declaration in 1 above, Section 56 of the Act shall be read as if the words "This section shall not apply to consensual sexual acts between adults in private" were added at the end of the section.

4.For the purpose of giving effect to the declaration in 2 above, Section 57 of the act shall be read as if the words "save and except where the acts which would otherwise constitute an offence are done in private between consenting adults."

[134] The claimants have succeeded on the claim, and as such, the normal rule that costs follow the event applies. The defendant shall pay the claimants' costs to be assessed if not agreed within 21 days.

[135] The industry and resourcefulness and thoroughness of counsel on both sides is to be highly commended.

Trevor M. Ward QC
High Court Judge

By the Court

Registrar