IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

MAGISTRACY APPEAL NO. 107 OF 2006

(ON APPEAL FROM TWCC NO. 3105 OF 2004)

BETWEEN

SECRETARY FOR JUSTICE Appellant
and
YAU YUK LUNG ZIGO（丘旭龍） 1st Respondent
LEE KAM CHUEN（李錦全） 2nd Respondent

Before: Hon Ma CJHC, Woo VP & Tang JA in Court

Dates of Hearing: 6 & 7 July 2006

Date of Handing Down Judgment: 20 September 2006

J U D G M E N T

Hon Tang JA :

1. The respondents were charged with having committed buggery with each other, otherwise than in private, contrary to section 18F(1) of the Crimes Ordinance, Cap. 200. Following the respondents' pleas of not guilty, counsel for the respondents applied for a stay of proceedings on the basis that section 118F(1) of the Crimes Ordinance was unconstitutional. Mr John Glass, Permanent Magistrate, dismissed the charges against each of the respondents on the ground that section 118F(1) was unconstitutional.

2. The appellant filed a Notice of Appeal by way of case stated, challenging the correctness of that conclusion of law. The magistrate signed the case stated on 24 January 2006 and Pang J, on 6 March 2006, ordered, pursuant to section 118(1)(d) of the Magistrates Ordinance, Cap. 227, that their appeal be argued before the Court of Appeal. Pursuant to the Chief Judge's direction this appeal was heard at the conclusion of the hearing in CACV 317 of 2005.

3. The sole issue in this appeal is whether section 118F is unconstitutional.

4. Section 118F created the offence of homosexual buggery otherwise than in private which carried a sentence of 5 years' imprisonment on conviction as follows:

"118F. Homosexual buggery committed otherwise than in private

(1) A man who commits buggery with another man otherwise than in private shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 5 years.

(2) An act which would otherwise be treated for the purposes of this section as being done in private shall not be so treated if done-

(a) when more than 2 persons take part or are present; or

(b) in a lavatory or bathhouse to which the public have or are permitted to have access, whether on payment or otherwise.

(3) In this section, 'bathhouse' (浴室) means any premises or part of any premises maintained for the use of persons requiring a sauna, shower-bath, Turkish bath or other type of bath."

5. Section 118F(2)(a) as well as section 118J(2)(a) have been held by Hartmann J as unconstitutional in Leung TC William Roy v Secretary for Justice [2005] 3 HKLRD 657. There was no appeal from these findings. The only appeal from HCAL 160 of 2004 was in respect of section 118C of the Crimes Ordinance (CACV 317 of 2005). The judgment of this court in that appeal will be handed down at the same time as this judgment. Section 118J created the offence of gross indecency between men otherwise than in private, and is otherwise identical to section 118F.

6. Since the offence is homosexual buggery otherwise than in private, no question of privacy is involved in this appeal unlike in Leung. We are concerned with an offence of public indecency.

7. The sole ground of challenge by the respondents is that section 118F is discriminatory.

8. It is said to be discriminatory because there is an absence of an equivalent statutory offence criminalizing:

"(i) consensual vaginal sexual intercourse between heterosexuals other than in private;

(ii) consensual buggery between heterosexuals other than in private; or

(iii) consensual sexual conduct (akin to sexual intercourse) between lesbians other than in private."

9. As Mr Dykes SC, who led for the 1st respondent (and whose submissions were adopted by Mr Stanley Ma, counsel for the 2nd respondent), correctly put it:

"The issue is whether this different treatment is objective and reasonable, pursues a legitimate aim and is proportional to the aim at which it is directed."

Legislative history

10. Section 118F offence was created by the Crimes (Amendment) Bill 1991 which was enacted for the dual objectives of:

"(i) decriminalising male homosexuality; and

(ii) extending to men and boys the protection from sexual exploitation afforded to women and girls."

11. There were no existing equivalent offences which corresponded to the offence created by section 118F or section 118J but these provisions do not appear to fall into the category of either of the objectives just mentioned.

12. Mr Dykes submitted that the enactment of section 118F and section 118J was a wholly gratuitous and unnecessary reference to male homosexuals because the existing common law offence of outraging public decency in fact continued to apply to and was adequate for the purpose of penalising "public behaviour by homosexuals likely to cause offence to the public". See Legislative Council Brief: Review of Laws on Homosexual Offences (20.3.1991), para. 8.

13. Mr Dykes further submitted that the effect of the enactment of section 118F is to subject male homosexuals to a less favourable treatment than heterosexuals and lesbians in that:

"i it exposes male homosexuals to the risk of prosecution and conviction for an additional or alternative offence which would otherwise not apply to heterosexuals and lesbians;

ii it singles out male homosexuals as a class of persons and imposes a social and moral stigma which does not apply to anyone else."

14. For the appellant, Mr McCoy SC submitted that the court must not substitute its own views for those of the Legislative Council. He argued that a significant

discretionary area of judgment should be accorded by the court to the legislature, particularly in relation to policy matters and moral and social issues. It is said that in this case the legislature only prohibits homosexual buggery in a public place or otherwise than in private. It is not the task of the court to "tidy up the statue book". R(Rusbridger) v Attorney General [2004] AC 357 at 371H, 377D, 378B. Mr McCoy also reminded us of the off-quoted words of Bokhary J (as he then was) in The Queen v Man Wai-keung [1992] 2 HKCLR 207 at 217:

"… Thirdly, we are now concerned with equality before the courts as an entrenched fundamental human right, so that no departure from its strict terms is valid unless such departure is necessary, proportionate to such need and rational. And finally, at no time does common sense go out the window when these things are judged.

Clearly, there is no requirement of literal equality in the sense of unrelentingly identical treatment always. For such rigidity would subvert rather than promote true even-handedness. So that, in certain circumstances, a departure from literal equality would be a legitimate course and, indeed, the only legitimate course. But the starting point is identical treatment. And any departure therefrom must be justified. To justify such a departure it must be shown: one, that sensible and fair-minded people would recognize a genuine need for some difference of treatment; two, that the difference embodied in the particular departure selected to meet that need is itself rational; and, three, that such departure is proportionate to such need."

15. He also warned us of the danger of over-intrusive judicial intervention in matters of broad social policy. He submitted the issues of the type which arise in this appeal should be resolved by the legislature rather than by the court. In support of the last proposition he cited the case of Banana v State [2002] 8 BHRC 345 at 388 C-D, and R v Kirk [2002] EWCA Crim 1580 at paras. 14 and 26.

16. In Banana v State, McNally JA said at 388 C-D:

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

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

17. However, I prefer the dissenting judgment of Gubbay CJ. A quotation from his judgment at page 363 explained why "conservatism" may in fact be unacceptable entrenched prejudice:

"As Professor R Dworken, in his work Taking Rights Seriously, p 258, emphatically proclaimed:

'Even if it is true that most men think homosexuality an abominable vice and cannot tolerate its presence, it remains possible that this common opinion is a compound of prejudice (resting on the assumption that homosexuals are morally inferior creatures because they are effeminate), rationalisation (based on assumptions of fact so unsupported that they challenged the community's own standards of rationality), and personal aversion (representing no conviction but merely blind hate rising from unacknowledged self-suspicion). It remains possible that the ordinary man could produce no reasons for his view, but would simply parrot his neighbour who in turn parrots him, or that he would produce a reason which presupposes a general moral position he could not sincerely or consistently claim to hold. If so, the principles of democracy we follow do not call for the enforcement of a consensus, for the belief that prejudices, personal aversions and rationalisations do not justify restricting another's freedom, itself occupies a critical and fundamental position in our popular morality.'"

18. R v Kirk concerned the offence of unlawful sexual intercourse with a girl who was under 16 years of age under section 6(3) of the Sexual Offences Act 1956. The appellants were each over 24 years old. The Crown conceded that the girl could well have given the impression that she was over 16 years old but the statutory defence of reasonable belief was only open to men under the age of 24. The arguments put before the court on behalf of the appellants were that the limitations of the statutory defence only to men under 24 years old, made it incompatible with the provisions of Article 6 (the right to a fair trial) and Article 14 (prohibition against discrimination) of the European Convention on Human Rights. The argument was that section 6(3) was sexually discriminatory against men. The appeal was dismissed. The main point of relevance in that decision concerns the argument that:

"… Parliament has not made unlawful sexual intercourse between a woman and an under age boy an offence by the woman in its own right."

At para. 26 Judge LJ said:

"26. We therefore do not accept that the absence of such an offence is discriminatory against men or provides the slightest justification for holding that such conduct by a man should no longer be proscribed. Further, even if we assume that this legislation may be discriminatory in the ways indicated in argument, we can see no justification for reducing or suggesting any reduction in the protection for girls provided by section 5 or section 6 of the Act. Moreover, we see nothing unreasonable or disproportionate about Parliament concluding that once a man has reached 24 years of age, the statutory defence should no longer be available. That issue was canvassed in the written arguments. In one sense, of course, the choice of any age is arbitrary. All such choices, 13 years old or 14 years old, or 16 years old, or 24 years old, all of which appear in the Sexual Offences Act are, because different boys and girls mature at different speeds and

indifferent ways. But that does not introduce an element of disproportionality in using age as a basis for definition. It is for Parliament to decide where the appropriate line should be drawn. That is what Parliament has done. We cannot discern the slightest problem or difficulty arising from those definitions."

19. Earlier at para. 25 Judge LJ said:

"… In summary, therefore, fewer boys are at risk than girls, and they do not become pregnant. Although not identical, there is in existence a law which adequately protects them. That may serve to explain why Parliament has not made unlawful sexual intercourse between a woman and an under age boy an offence by the woman in its own right."

20. A recent challenge to a similar offence (save that in Hong Kong under section 124 of the Crimes Ordinance, there is no exception for young men below 24 years of age) in So Wai Lun v Hong Kong Special Administrative Region [2006] 3 HKLRD 394, was unsuccessful. The Court of Final Appeal concluded in paras. 27 to 29:

"27. We have examined the reasoning behind the majority and minority views in Michael M's case. And we have examined the reasoning in Nguyen's case, both for the view that equality was not infringed and for the view that it was infringed but justifiably so. Various considerations were canvassed. These included: the problem of teenage pregnancies; not criminalising the female's conduct because that might deter her from reporting the matter; the legislature's role in resolving issues engaging society's code of sexual morality; and the extent to which it was for the legislature to form a view on issues such as whether the initiative in these matters is generally taken by the male, often older than the female, sometimes very considerably so.

28. Considerations of that kind are ones which the legislature are entitled to take into account and weigh. In our view, the legislation under challenge, while it departs from identical treatment, is justified by reference to genuine need, rationality and proportionality. It does not violate the equality guarantees of the constitution. In so holding we are not deferring to the legislature. Rather are we acknowledging the legislature's proper role.

29. Accordingly the complaint of inequality fails."

21. We accept the law does not require literal equality, but as the quotation from Man Wai-keung has made clear (and reinforced by So Wai Lun):

"… To justify such a departure it must be shown : one, that sensible and fair-minded people would recognize a genuine need for some difference of treatment; two, that the difference embodied in the particular departure selected to meet that need is itself rational; and, three, that such departure is proportionate to such need."

22. It is not clear from Mr McCoy's submission what is the justification for section 118F or section 118J. He seemed to have accepted that the common law offence of outraging public decency would cover male buggery or gross indecency otherwise than in private. It does not seem that section 118F is based on any moral consideration. It is not suggested that either section 118F is needed for the protection of men or boys.

23. Mr McCoy at one stage seemed to seek to justify section 118F on the basis of the prevalence of the offence. However, there is no evidence to support that.

24. In the end, Mr McCoy submitted that declaring the section 118F to be unconstitutional is tantamount to spring-cleaning or a tidying up exercise.

25. Mr McCoy compared the present proceedings to Rusbridger. That case concerned section 3 of the Treason Felony Act 1848. The following quotation from the judgment of Lord Walker of Gestingthorpe shows the clear difference between that case and the present one:

"61 In my opinion it is most undesirable that obsolete statutes should remain unrepealed. Quaint language and interesting historical associations are no justification for preserving obsolete statutes in a mummified state. But as the Attorney General replied to Mr Rusbridger, it is still the role of the legislature, rather than that of the courts, to decide whether to repeal or retain legislation. Sections 3 and 4 of the Human Rights Act 1998 are intended to promote and protect human rights in a practical way, not to be an instrument by which the courts can chivvy Parliament into spring-cleaning the statute book, perhaps to the detriment of more important legislation. Such a spring-cleaning process might have some symbolic significance but I can see no other practical purpose which this litigation would achieve.

62 However to conclude (as I do) that the litigation is unnecessary does not display the slightest enthusiasm for the continued existence of section 3 of the 1848 Act if and so far as it could theoretically apply to the expression of political opinion advocating non-violent constitutional change."

26. It is also instructive to note what Lord Steyn said in para. 28:

"VI. Issue (3): The appropriate order

28 It is now necessary to look at the matter in the round. Ought the matter to be heard again by the Administrative Court? It would certainly be competent for the House to allow the case to go back. But what purpose would it serve? The part of section 3 of the 1848 Act which appears to criminalise the advocacy of republicanism is a relic of a bygone age and does not fit into the fabric of our modern legal system. The idea that section 3 could survive scrutiny under the Human Rights Act 1998 is unreal. The fears of the editor of 'The Guardian' were more than a trifle alarmist. In my view the courts ought not to be troubled further with this unnecessary litigation."

27. Section 118F is not obsolete. The respondents have been prosecuted under section 118F. The fact that absent section 118F they might have been prosecuted at common law is beside the point.

28. I agree with Mr Dykes that the mischief of section 118F is that:

"ii it singles out male homosexuals as a class of persons and imposes a social and moral stigma which does not apply to anyone else."

29. Although Mr McCoy has forcefully submitted that the courts should defer to the legislatures on matters touching on moral issues, he has not identified the moral issues involved in section 118F. He has not submitted that section 118F could be justified because it targeted homosexuals or homosexual activities otherwise than in private.

30. Unlike So Wai Lun, I see no relevant moral consideration which could support the targeting of homosexual activities (as opposed to other indecent behaviour) otherwise than in private.

31. I can see no justification for section 118F which punishes homosexual buggery as homosexual buggery. It stigmatizes homosexuality and distinguishes it from other acts of indecency in public.

32. To conclude, I would answer affirmatively the following questions which are raised in the case stated:

"i) whether I was correct in finding that section 118F(1) of the Crimes Ordinance, Cap. 200 is discriminatory and therefore inconsistent with the BL and the HKBOR, and invalid; and

ii) whether I was bound to dismiss the charges."

Section 19 of the Magistrates Ordinance

33. Mr McCoy submitted that under section 19 of the Magistrates Ordinance, the magistrate should not have entertained the application for a stay before he had heard the evidence of the prosecution. Section 19(1) and (2) provide:

"(1) Where the defendant is present at the hearing, the substance of the complaint or the information (or the summons which has been issued under section 8 pursuant to such complaint or information) shall be read over to him, and explained if necessary, and he shall be asked whether he admits or denies the truth of the complaint or information. If the defendant admits the truth of the complaint or information, his admission shall be recorded as nearly as possible in the words used by him, and the magistrate shall convict him or make an order against him accordingly; but if he does not admit the truth of the complaint or information as aforesaid, then the magistrate shall proceed to hear upon oath the complainant or informant and such witnesses as may be produced in support of the complaint or information, and also to hear the defendant and such evidence

as may be adduced in defence; and also to hear and examine such other witnesses as the complainant or informant may examine in rebuttal, if the defendant or his counsel has examined any witnesses or given any evidence other than as to the defendant's general character.

(2) The magistrate, having heard what each party has to say and the witnesses and evidence so adduced, shall consider the whole matter and determine the same, and shall convict or make an order against the defendant or dismiss the complaint or information, as the case may be."

34. Mr Dykes on the other hand submitted that the magistrate should simply have declined jurisdiction. He submitted that:

"… a stay gives the unconstitutional ordinance some specious authenticity".

35. Common sense must prevail. Summary trials are not designed with such niceties in mind.

36. The reality of the situation is that the magistrate had to deal with the charge and the proper way to deal with it, when the charge has not been made out, whether on the facts or as a matter of law (including the constitutionality of the law), was to dismiss it. I am of the view that the proper order to make is the dismissal of the charge.

37. I do not agree that under section 19, the magistrate was obliged to hear the entirety of the prosecution's case before he could dismiss the charge on a point of law. I do not believe the language of section 19(1) requires that. Mr McCoy relied on the following:

"… the magistrate shall proceed to hear upon oath the complainant … and such witnesses as may be produced in support …".

38. But section 19(1) goes on to provide that the magistrate shall proceed:

"… to hear the defendant and such evidence as may be adduced in defence …".

39. But it is clear that a charge may be dismissed at the end of the prosecution's case. So, I do not believe section 19(1) and (2) require a magistrate to hear the entirety of the prosecution's evidence before dismissing the charge.

40. I would add, however, given the uncertainty of litigation and the risk of delay in criminal trials, magistrates should, save in exceptional cases, only deal with an application to stay or dismiss the charge at the end of the prosecution's case. However, it is a matter of discretion for the magistrate and common sense should prevail.

41. I would accordingly dismiss the appeal.

Hon Ma CJHC :

42. I have read in draft the judgment of Tang JA and for the reasons contained in it, I too would dismiss the appeal. I wish, however, to highlight a number of matters.

43. The focus of the present appeal by way of case stated is whether section 118F of the Crimes Ordinance, Cap.200 is constitutional, the relevant right here being the right to equality guaranteed under the Basic Law and the Bill of Rights. The circumstances of the challenge are unique in that the point of attack is not the content of the law itself but the form of it in targeting only male homosexuals. That provision (see paragraph 4 above) is headed "Homosexual buggery committed otherwise than in private".

44. As the present appeal involved the examination of the constitutionality of legislation dealing with sexual offences relevant to homosexuals (in particular homosexual men), it was heard at the same time as the appeal in Leung TC William Roy v Secretary for Justice (CACV317/2005). I wish, however, to emphasize that this was done purely for case management convenience and it is therefore important to point out that the parties in the two appeals (the Applicant in CACV317/2005 and the Respondents in the present appeal) have no connection with each other.

45. As pointed out in the judgment in the Leung case, where a piece of legislation is challenged as being unconstitutional, a two-stage enquiry by the court is involved, namely : -

(1) First, has a right protected by the Basic Law or the Bill of Rights (the ICCPR) been infringed?

(2) Secondly, if so, can such infringement be justified?

46. Regarding the second stage, any restriction on a constitutional right can only be justified if (a) it is rationally connected to a legitimate purpose and (b) the means used to restrict that right must be no more than is necessary to accomplish the legitimate purpose in question.

47. As to the first stage, it is clear that, as my Lord Tang JA has pointed out, there is inequality : section 118F(1) criminalizes only buggery committed in public places by homosexual men.

48. Moving on to the second stage, I can see no justification either for this inequality : -

(1) It was argued by Mr Gerard McCoy SC (for the Appellant) that the content of this law (buggery committed in public) was obviously justifiable as a criminal offence. Indeed it is, but this does not answer the question why only male homosexuals are targeted.

(2) Then it is said that in fact male homosexuals are not targeted because the common law offence of outraging public decency (which would cover buggery committed in public whether between men or as between a man and a woman) applied to both sexes. And so it does but again no justification is shown as to why male homosexuals alone are targeted in section 118F. I am happy here to assume that as far as buggery is concerned, section 118F and the common law offence have the same requirements, although this was not the position of Mr Philip Dykes SC (who represented the 1st Respondent and whose submissions were adopted by Mr Stanley Ma for the 2nd Respondent). He submitted the two offences were quite different. It is unnecessary to determine whether any differences exist since either way, the targeting of male homosexuals in section 118F cannot be justified. If the offences are the same, this begs the question just why it was then felt necessary to highlight the position of male homosexuals in section 118F. If they are different, then why would male homosexuals be singled out for different treatment in section 118F?

(3) As the provision itself (or for that matter the Ordinance in which it is contained), provides no discernible justification for the inequality, one then looks for any justification that may exist in extrinsic materials, such as the debates in the Legislative Council when this provision was discussed. The relevant debates were those in relation to the Crimes (Amendment) Bill 1991 but nothing can be found to provide any form of rational justification. As is pointed out in the judgment of this court in Leung, the burden is on the Government to demonstrate justification and this it must do by cogent evidence unless it is obvious from the relevant statutory provision itself.

(4) It was suggested by Mr McCoy that the purpose of section 118F was really to deal with the problem of male homosexual activity in lavatories and bathhouses (see section 118F(2)(b)). I am not prepared to make this assumption since no evidence was provided to us to this effect. One may ask rhetorically : if a problem did exist, was it restricted only to males rather than females? It should be recalled that section 118F is gender specific and does not apply across the board (contrast here section 71 of the Sexual Offences Act 2003 in the United Kingdom). I should perhaps add finally in this context that even if there was a problem only with males in lavatories and bathhouses, the legislative response in criminalizing all acts of buggery in public (whether or not in lavatories or bathhouses) and targeting only males, was a disproportionate one.

(5) There is simply no material before us even to accord the legislature a margin of appreciation. In matters involving infringements of basic rights, there is no room for the courts simply to take things on trust without more.

49. Lastly, I would like to deal with the procedural aspect of the appeal. The Magistrate, in an application for a stay, dismissed the charges which had been brought under section 118F(1). I agree with the analysis of Tang JA relating to section 19 of the Magistrates Ordinance section 227. However, towards the end of counsel's submissions, we were referred to section 27(1)(a) of the Ordinance, which reads : -

"27 Defects in and amendment of complaint, information or summons

(1) Where it appears to the adjudicating magistrate that there is-

(a) a defect in the substance or form of any complaint, information or summons; or

(b) …

he shall, subject to subsection (2)–

(i) …

(ii) dismiss the complaint, information or summons."

50. We did not hear any arguments on this provision and so I do not wish to say anything more than that it is possible for the Magistrate's order to be justified under this provision. It seems to me arguable that where a statutory provision giving rise to a charge is unconstitutional and therefore of no effect, it is defective in substance and form.

Hon Woo VP :

51. I agree with the judgments of Tang JA and the CJHC.

Hon Ma CJHC :

52. Accordingly, for the above reasons, the appeal is dismissed.

(Geoffrey Ma)
Chief Judge, High Court (K H Woo)
Vice-President (Robert Tang)
Justice of Appeal

Mr Gerard McCoy SC & Mr Stephen Wong, Deputy Solicitor-General instructed by the Department of Justice for the Appellant

Mr Philip Dykes SC & Ms Po Wing Kay instructed by Messrs Tang Tso & Lau for the 1st Respondent

Mr Stanley Ma instructed by Messrs Tang Tso & Lau for the 2nd Respondent

Appeal dismissed: see FACC12/2006 dated 17 July 2007