FACC No. 12 of 2006

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 12 OF 2006 (CRIMINAL)

(ON APPEAL FROM HCMA NO. 107 OF 2006)

Between:

SECRETARY FOR JUSTICE Appellant

- and -

YAU YUK LUNG ZIGO 1st Respondent

LEE KAM CHUEN 2nd Respondent

Court: Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Sir Anthony Mason NPJ

Dates of Hearing: 25 and 26 June 2007

Date of Judgment: 17 July 2007

J U D G M E N T

Chief Justice Li:

1. Equality before the law is a fundamental human right ("the right to equality"). Equality is the antithesis of discrimination. The constitutional right to equality is in essence the right not to be discriminated against. It guarantees protection from discrimination. The right to equality is enshrined in numerous international human rights instruments and is widely embodied in the constitutions of jurisdictions around the world. It is constitutionally protected in Hong Kong.

2. Discriminatory law is unfair and violates the human dignity of those discriminated against. It is demeaning for them and generates ill-will and a sense of grievance on their part. It breeds tension and discord in society.

3. The question in this appeal is whether s.118F(1) of the Crimes Ordinance, Cap. 200 ("s. 118F(1)"), which criminalises homosexual buggery committed otherwise than in private, is unconstitutional on the ground that it is discriminatory and infringes the constitutional right to equality.

The charges

4. The respondents were charged with having committed buggery with each other otherwise than in private, contrary to s. 118F(1). It is alleged that they had developed a liaison over the Internet and that they committed the act in a private car parked beside a public road. This case is the first prosecution under s. 118F(1) since its enactment in 1991.

The Magistrate

5. At the commencement of their trial before the Magistrate (Mr John Glass), the respondents challenged the constitutionality of s. 118F(1) and applied for a stay of the proceedings. The Magistrate upheld the constitutional challenge and dismissed the charges.

The Court of Appeal

6. The appellant appealed by way of case stated to challenge the Magistrate's conclusion of law. The Court of First Instance ordered that the appeal be heard by the Court of Appeal.

7. The Court of Appeal (Ma CJHC, Woo VP and Tang JA as he then was) upheld the conclusion that s. 118F(1) is unconstitutional and dismissed the appeal. Secretary for Justice v Yau Yuk Lung and Another [2006] 4 HKLRD 196.

Leave to appeal

8. The appellant appeals to the Court with the leave of the Appeal Committee which certified two questions of law:

"1. Is [s. 118F(1)] discriminatory to the extent that it is inconsistent with the Basic Law and the Hong Kong Bill of Rights?

2. What is the proper order to be made when the charge against the defendant is found to be unconstitutional?"

In seeking leave, the appellant gave undertakings (i) not to seek remittal of the case; (ii) not to bring any charge in relation to the conduct alleged in this case; and (iii) not to seek an adverse costs order against the 1strespondent and to pay the reasonable costs of the 2nd respondent to be taxed if not agreed.

The constitutional provisions

9. The right to equality is guaranteed by art. 25 of the Basic Law which provides:

"All Hong Kong residents shall be equal before the law."

10. Further, the right is protected by the Bill of Rights ("the BOR") contained in the Hong Kong Bill of Rights Ordinance, Cap. 383, which implements in accordance with art. 39 of the Basic Law the provisions of the International Covenant on Civil and Political Rights ("the ICCPR") as applied to Hong Kong. Article 22 of BOR (corresponding to art. 26 of the ICCPR) provides:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 1(1) of the BOR provides that the rights recognised therein:

"shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

As art. 22 itself guarantees the right to equality, it is unnecessary to rely on art. 1(1) in the present case.

11. Discrimination on the ground of sexual orientation would plainly be unconstitutional under both art. 25 of the Basic Law and art. 22 of BOR in which sexual orientation is within the phrase "other status".

Section 118F

12. Section 118M of the Crimes Ordinance abolished the offence of buggery at common law. However, s. 118F(1) criminalises homosexual buggery committed otherwise than in private. It provides:

"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."

Section 118F(2) is a supplementary provision. It prescribes two situations in which an act shall not be treated as done in private. The first situation provided for in subsection (2)(a) is when more than two persons take part or are present. However, this subsection was held to be unconstitutional by Hartmann J in Leung v Secretary for Justice[1] [2005] 3 HKLRD 657 at para. 99. The

Government had so conceded before the judge. The second situation prescribed in subsection (2)(b) is where the act is done:

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

"Bathhouse" is defined by s. 118(F)(3) to mean:

"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."

Legislative history

13. In April 1983, the Law Reform Commission ("the Commission") published its Report on laws governing homosexual conduct. Its main recommendations included the decriminalisation of homosexual acts performed in private by consenting adult males and the enactment of measures to protect men and boys from sexual abuse and exploitation.

14. Some seven years later, in 1991, the Crimes (Amendment) Ordinance was enacted and came into force on 12 July 1991. It is significant to note that the Hong Kong Bill of Rights Ordinance came into force shortly before that date on 8 June 1991. As stated in the Explanatory Memorandum to the Bill, the Crimes (Amendment) Ordinance implemented the main recommendations of the Commission's Report.

15. Section 118F was enacted as part of the Crimes (Amendment) Ordinance in 1991 and criminalises only homosexual buggery otherwise than in private. Its provenance was not the Commission's Report. In fact, the Commission had recommended the creation of a new offence of indecent public behaviour which in contrast to s. 118F, would be neutral on sexual orientation. The Commission proposed the new offence in order to increase protection "for all members of the community from any public behaviour of a sexual nature, including homosexual behaviour, which offends the common standard of decency of the community." See paras 11.24 and 12.17 of the Commission's Report.

16. The circumstances in which s. 118F came to be proposed in the Bill and enacted are somewhat puzzling. It can be ascertained from the nature of the provision that its purpose is for the protection of public decency. By enacting this section, the Legislature was protecting the community from outrageous public behaviour. Yet, in introducing the Bill, which included this provision, the Government stated its position in the Legislative Council Brief to be that:

"the existing law to safeguard standards of public decency adequate to ensure that public behaviour by homosexuals likely to cause offence to the public would continue to be an offence."

The existing law which the Brief then described was the common law offence of committing an act outraging public decency[2]. The Brief noted that it covers

both homosexual and heterosexual behaviour in public. See para. 8 of the Legislative Council Brief on the Crimes (Amendment) Bill 1991 issued on 20 March 1991 by the then Security Branch of the Government.

The common law offence

17. It is an offence at common law to commit any act of a lewd, obscene or disgusting nature which outrages public decency. As Lord Simon observed in Knuller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions [1973] AC 435 at 493 G-H and 495D, the offence is concerned with minimum standards of decency and its rationale is that:

> "… reasonable people should be able to venture into public without their sense of decency being outraged".

The maximum penalty for the offence is seven years imprisonment and a fine. Section 101I(1) of the Criminal Procedure Ordinance, Cap. 221.

18. On the authorities in England, the act must have been committed in public in the sense that at least two persons must have been able to see the act in question. R v Mayling [1963] 2 QB 717. There is a further requirement that the offence must have been committed in a place where there exists a real possibility that members of the general public might witness what happens. The place need not necessarily be one of public resort but must be one where the public are able to see what takes place there. R v Walker [1996] 1 Cr. App. R. 111 at 114 C-E. The question whether the common law offence in Hong Kong has the same requirements as those in England does not arise in this appeal. This is not the proper occasion to consider that question and no view is expressed on it.

Principles

19. In general, the law should usually accord identical treatment to comparable situations. As Lord Nicholls observed in Ghaidan v Godin-Mendoza [2004] 2 AC 557 at 566C:

> "Like cases should be treated alike, unlike cases should not to be treated alike."

20. However, the guarantee of equality before the law does not invariably require exact equality. Differences in legal treatment may be justified for good reason. In order for differential treatment to be justified, it must be shown that:

(1) The difference in treatment must pursue a legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established.

(2) The difference in treatment must be rationally connected to the legitimate aim.

(3) The difference in treatment must be no more than is necessary to accomplish the legitimate aim.

The above test will be referred to as "the justification test". In the present case, the Court has had the benefit of submissions on its appropriate formulation. There is no material difference between the justification test and the test stated in R v Man Wai Keung (No. 2) [1992] 2 HKCLR 207 at 217 which was used by the Court in So Wai Lun v HKSAR (2006) 9 HKCFAR 530 at para. 20.

21. The burden is on the Government to satisfy the court that the justification test is satisfied. Where one is concerned with differential treatment based on grounds such as race, sex or sexual orientation, the court will scrutinize with intensity whether the difference in treatment is justified. See Ghaidan v Godin-Mendoza at 568G (Lord Nicholls).

22. In requiring differential treatment to be justified, the view has been expressed that the difference in treatment in question is an infringement of the constitutional right to equality but that the infringement may be constitutionally justified. See the Court of Appeal's judgment in the present case at 208B-C (Ma CJHC) and in Leung v Secretary for Justice [2006] 4 HKLRD 211 at 234G-H. This approach is not appropriate. Where the difference in treatment satisfies the justification test, the correct approach is to regard the difference in treatment as not constituting discrimination and not infringing the constitutional right to equality. Unlike some other constitutional rights, such as the right of peaceful assembly, it is not a question of infringement of the right which may be constitutionally justified.

Difference in treatment

23. Section 118F(1) in criminalising only homosexual buggery otherwise than in private plainly gives rise to differential treatment on the ground of sexual orientation which requires to be justified. This is rightly accepted by McCoy SC for the appellant.

24. All persons, whatever their sexual orientation, are subject to the common law offence of committing an act outraging public decency. Irrespective of sexual orientation, a person may be exposed to criminal liability for this offence for committing in the required circumstances a sexual act of a lewd, obscene or disgusting nature which outrages public decency. But homosexuals alone are subject to the statutory offence in s. 118F(1) for committing buggery otherwise than in private. In contrast, heterosexuals are not subject to any criminal liability comparable to that prescribed in s. 118F(1) in relation to the same or comparable conduct, namely, vaginal intercourse or buggery otherwise than in private. Thus, as a result of s. 118F(1), a dividing line is drawn on the basis of sexual orientation between homosexuals on the one hand and heterosexuals on the other in relation to the same or comparable conduct. The point that the common law offence has a higher maximum penalty than the statutory offence in s. 118F(1) cannot affect the matter.

Justification

25. As s. 118F(1) gives rise to differential treatment on the ground of sexual orientation, justification for the difference in treatment is required. The justification test must now be applied. The first stage of that test is to consider whether the differential treatment pursues a legitimate aim. For this purpose, a genuine need for the difference in treatment must be made out.

26. Mr McCoy SC for the appellant submits that there is a genuine need for the differential treatment. The appellant's case is put in this way. The offence in s. 118F(1) is a specific form of the common law offence of committing an act outraging public decency. The specific offence punishes homosexual buggery otherwise than in private per se and obviates such difficulties as there may be in proving the common law offence. In enacting it, the Legislature must be taken to have considered that there was a genuine need for such a specific offence as part of the package to reform the law relating to homosexual conduct.

27. The appellant's submission does not address the critical question. What must be established is a genuine need for the differential treatment. That need cannot be established from the mere act of legislative enactment. It must be identified and made out. In the present case, no genuine need for the difference in treatment has been shown. That being so, it has not been established that the differential treatment in question pursues any legitimate aim. The matter fails at the first stage of the justification test.

28. In enacting a package of measures to reform the law governing homosexual conduct, the Legislature was entitled to decide whether it is necessary to enact a specific criminal offence to protect the community against sexual conduct in public which outrages public decency. But in legislating for such a specific offence, it cannot do so in a discriminatory way. Section 118F(1) is a discriminatory law. It only criminalises homosexual buggery otherwise than in private but does not criminalise heterosexuals for the same or comparable conduct when there is no genuine need for the differential treatment.

29. Homosexuals constitute a minority in the community. The provision has the effect of targeting them and is constitutionally invalid. The courts have the duty of enforcing the constitutional guarantee of equality before the law and of ensuring protection against discriminatory law.

30. Accordingly, s. 118F(1) is discriminatory and infringes the right to equality. It is unconstitutional. The answer to the first certified question is in the affirmative.

The proper order

31. Mr Justice Ribeiro PJ's judgment deals with the second certified question as to the proper order to be made when the charge against the defendant is found to be unconstitutional and I agree with his judgment.

Disposal

32. The appeal is dismissed. In accordance with the appellant's undertaking, an order is made that the 2nd respondent's costs be paid by the appellant.

Mr Justice Bokhary PJ:

Equality

33. Human rights are aptly named, being basic to and inherent in humankind. They consist of what were referred to in the Barcelona Traction Case (Second Phase), ICJ Rep. (1970) 3 at p.32 as "the principles and rules concerning the basic rights of the human person". And such rights, as Judge Tanaka explained in the South West Africa Cases (Second Phase), ICJ Rep. (1966) 5 at p.297, "have always existed with the human being … independently of, and before, the State". So they are not for the State to make. The State makes law. Of the many and varied purposes for which law is made, none is more important than that of declaring, protecting and realising the full potential of human rights. And there is no better way to secure these rights than ensuring that they are enjoyed by everyone in equal measure. History teaches us that, for so many violations of human rights have sprung from discrimination, and struggles for social justice have so often been based on claims to equal treatment.

34. I see that in his contribution to The Rights of Peoples (ed. James Crawford) (1988), Prof. Garth Nettheim observes (at p.123) that "non-discrimination … has recognition in international law as, perhaps, the primary human right". Dr W A McKean, at pp 185-186 of his article "The Meaning of Discrimination in International and Municipal Law" (1970) 44 BYIL 177, puts forward the formula "arbitrary, invidious or unjustified distinctions, unwanted by those made subject to them" as the definition of discrimination accepted in the international sphere. That definition is, he says at p.186, "more advanced and sophisticated than that adopted in most municipal legal systems". In the field of human rights, municipal law has often walked in the footsteps of international law – and may in some jurisdictions have caught up with or even overtaken it.

35. Prejudice can be a very insidious thing. And discrimination is sometimes practised unwittingly. Coping with it requires a strong, straightforward and easily understood law. The entrenched protection of such a law is conferred by our constitution on everyone in Hong Kong. By art.25, the Basic Law guarantees in unlimited terms that "[a]ll Hong Kong residents shall be equal before the law". And by art.41, it extends this guarantee to all persons in Hong Kong even if they are not Hong Kong residents. These provisions set no limit on the matters in respect of which they guarantee equality before the law. And this Court has always recognised that fundamental rights and freedoms are to be interpreted generously.

36. Guaranteed in unlimited terms and interpreted generously, equality before the law inevitably amounts to an absolute right not to be discriminated against. So any departure from identical treatment is liable to scrutiny. And the ultimate test of whether any such departure offends against equality before the law is whether the departure amounts to discrimination against any person or category

of persons : in short, whether it is discriminatory. If it is discriminatory, it will offend against equality before the law. It will so offend whether discrimination is its objective or merely its effect.

37. Within the ultimate test of whether the departure from identical treatment is discriminatory, it is possible and useful to identify various factors by reference to which any such departure can be examined with a view to determining whether it is non-discriminatory and therefore compatible with equality before the law. My earliest attempt to identify such factors was made in a case decided under the equality before the courts clause of art.10 of the Bill of Rights. It was the case of R v. Man Wai-keung (No.2) [1992] 2 HKCLR 207 where I said this (at p.217) :

"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 recognise 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."

That was relied upon by both courts below in the present case and by Hartmann J in Leung v. Secretary for Justice [2005] 3 HKLRD 657 at p.689 A - E (where he rightly described equality before the law as "the constitutional protection against discrimination"). And it was cited in So Wai Lun v. HKSAR (2006) 9 HKCFAR 530 at p.539 D - G by Mr Justice Chan PJ and I in our joint judgment agreed to by the other members of the Court.

38. Of the Man Wai-keung factors, rationality and proportionality have long been well established legal concepts, informed by a large body of case law and academic opinion. They are of general application. But the "genuine need for some difference of treatment" factor is a concept specific to equality before the law. It is the first line of defence against discrimination. And it is the first step toward pluralism and respect for otherness. These are matters on which we must all guard against prejudice in ourselves. So I took the view in the early years of the Bill of Rights – and remain of the view – that it is preferable on such matters that the courts openly acknowledge that they are proceeding on the basis of that which is sensible and fair-minded in people. But the first Man Wai-keung factor could, I daresay, be expressed simply in terms of the sensible and fair-minded view being that there is a genuine need for some difference of treatment. What would be plainly unacceptable is for the courts to proceed on some unarticulated standard when deciding the question of genuine need.

39. In further explanation of why I prefer an express reference to that which is sensible and fair-minded in people, I would stress that these qualities are, after all, the life-force of human rights in action. So restrictions on fundamental rights and freedoms need to be, as Lord Nicholls of Birkenhead said in R (Prolife

Alliance) v. British Broadcasting Corp [2004] 1 AC 185 at p.224 C, "examined rigorously by all concerned, not least the courts". In his contribution to The Hong Kong Bill of Rights : A Comparative Approach (eds Johannes Chan and Yash Ghai) (1993) Prof. Rajeev Dhavan, dealing with the post-emergency period in India, says (at p.465) that "the people have recast the chapter of human rights through judges". Tellingly Prof. Christopher Eisgruber concludes his book Constitutional Self-Government (2001) by referring (at p.211) to the United States Supreme Court's role of "speaking about justice on behalf of the American people".

40. When speaking about justice on people's behalf, a court should have regard to their sense of fairness. And I see no reason why the court should not openly acknowledge such regard. The United States Supreme Court famously made such an acknowledgment in Hirabayashi v. United States 320 US 81 (1943), saying (at p.100) that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Their Honours immediately went on to identify that as the "reason" why legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. There is much to be said for making the legal process as visibly participatory as practicable. In particular, the administration of constitutional justice is strengthened and enhanced when seen to be carried out according to the good in people.

41. Various expressions have been used by judges when invoking the good in people as a standard. In the constitutional case of Snyder v. Massachusetts 291 US 97 (1934), for example, Cardozo J spoke (at p.105) of "the traditions and conscience of our people" and (at p.122) of what is "acceptable to the thought of reasonable men". Another example is to be found in the common law case of Davis Contractors v. Fareham Urban District Council [1956] AC 696. There Lord Radcliffe said (at p.728) that " the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself". Habits of speech change, and it is no reflection on those judges that nowadays we should speak instead of the reasonable "person". This we learn from the phraseology selected by Mason J (as he then was) in the equity case of Commercial Bank of Australia v. Amadio (1983) 151 CLR 447 at p.467.

42. There are various ways in which to describe what would justify a departure from identical treatment. One would be to say that anything put forward for that purpose must be reasonable and objective. By "objective" I mean free from bias whether conscious or unconscious.

43. Turning to the circumstances of the present case, they are as follows. The prosecution's allegation against these respondents, both adult men, was that they had, as they subsequently admitted to the police, committed buggery with each other in a car parked in a dark and isolated spot at night. They were charged with homosexual buggery committed otherwise than in private, contrary to s.118F(1) of the Crimes Ordinance, Cap.200, which provides that "[a]

man who commits buggery with another man otherwise other in private shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 5 years." I have no hesitation in agreeing with the courts below that s.118F(1) discriminates against homosexual men and is unconstitutional by reason of such discrimination. That is my answer to the first certified question.

44. My reasons for that answer are these. Section 118F(1) has the effect of targeting a group defined by sexual orientation, namely homosexual men. Approached realistically, it has that effect even though it makes no mention of homosexuality. Indeed, it would have that effect even if it were to use the word "person" rather than the word "man". The relevant principle is to be found in the advisory opinion of the Permanent Court of International Justice in German Settlers in Poland PCIJ, Series B, No.6, 1923, p.5. This principle is succinctly put by Judge Schwebel in his book Justice in International Law (1994). Citing that advisory opinion, he says (at p.149) that "discrimination in fact is debarred even if discrimination in form is absent".

45. By its effect, s.118F(1) departs from identical treatment. And it does so in a particularly serious way since it is a penal law of some severity. But there is simply no demonstrable genuine need for this departure. Such non-discriminatory objective as can be attributed to this subsection is, at least is general, catered for by the common law offence of outraging public decency, which s.101I of the Criminal Procedure Ordinance, Cap.221, makes punishable by up to 7 years' imprisonment. This common law offence does not have the effect of targeting any group. The present appeal is not an occasion for identifying the full definition of this common law offence. Suffice it to say that, on the English cases, it would appear that this common law offence is committed when there is done, in a place where there is a real possibility of members of the public witnessing it, any act of a lewd, obscene or disgusting nature that outrages public decency. Given the existence of this common law offence and the maximum penalty for it, the alleged prevalence of homosexual buggery in public does not begin to give rise to a demonstrable genuine need for a provision like s.118F(1). So one cannot begin to justify this subsection.

46. Mr Gerard McCoy SC for the Secretary for Justice queries the adequacy of the common law offence of outraging public decency. There was, he says, no evidence of there having been any onlooker or potential onlooker to what the respondents did in the car. And he says that the absence of any onlooker or potential onlooker meant that the respondents probably could not have been prosecuted to conviction for outraging public decency. So, he argues, there is a need for a law like s.118F(1). But there is a fatal weakness in this argument of Mr McCoy's. It attaches importance to punishing persons who engage in sexual activities in public rather than to protecting persons who are outraged by the sight of such activities. Such an argument does not provide justification for a law that has the effect of targeting a particular group.

47. If law enforcement agencies and prosecuting authorities believe that the protection of the public calls for more than what the common law offence of

outraging public decency provides, their proper course is to try to persuade the executive to introduce non-discriminatory legislation for the purpose. And if the executive saw fit to do that, the legislature could then consider the perceived problem in all its aspects – remembering always that law is a problem-solver while discrimination is a problem and never a solution.

48. On the first certified question, I agree with the Chief Justice that s.118F(1) of the Crimes Ordinance is unconstitutional, and regard my reasoning as in harmony with his.

49. Before parting with the question of equality, I would underline the fact that the present case concerns discrimination in the form of an unjustified departure from identical treatment. So the focus is on what it takes to justify a departure from identical treatment. But there can be cases in which the complaint is of discrimination in the form of a failure to accord different treatment in circumstances calling for it or in which affirmative action is involved. Such cases may raise other considerations as to what is called for by equality before the law. That is what I had in mind when I said in Man Wai-keung's case that in certain circumstances a departure from literal equality would be a legitimate course and, indeed, the only legitimate course. As the Permanent Court of International Justice said in its advisory opinion in Minority Schools in Albania PCIJ, Series A/B, No.64, 1935, p.4 at p.19, "[e]quality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations". In her contribution to Human Rights Protection : Methods and Effectiveness (ed. Frances Butler) (2002), Dame Rosalyn Higgins underlines the recognition in that case of the linkage between special needs and equality in fact. And she says (at p.166) that it is "not fanciful … to see in that linkage both the precursor of more contemporary notions of affirmative action and the response to suggestions that special protections themselves constitute a form of discrimination".

Order to be made on charge alleging offence declared unconstitutional at trial

50. That leaves the second certified question. What order should the trial court make where it is persuaded that the offence charged is unconstitutional and has so declared?

51. In the present case, the magistrate ordered that the information be dismissed, and the Court of Appeal held that he was right to make that form of order. Under the second certified question, the appellant originally contended that where a trial court holds that an offence charged is unconstitutional, it should quash that charge and discharge the accused in relation thereto. And the respondents had originally contended that the appropriate course is for the trial court, having declared an offence unconstitutional, to decline jurisdiction to proceed further on any charge alleging that offence, so declining jurisdiction on the basis that such charge alleges an offence unknown to the law. During the argument however, both sides came to accept that – subject to the possibility of an amendment to charge a constitutional offence – the appropriate course is to

dismiss the information or so much of it as charges an unconstitutional offence. In my view, the parties were right to accept that.

52. My reasons for taking that view are those expressed by Mr Justice Ribeiro PJ. All that I would add is a word about the reference to "nullity" made by Litton JA (as he then was) in Commissioner for Labour v. Jetex HVAC Equipments Ltd [1995] 2 HKLR 24 at p.32. I think that it was no more than the obiter precaution of declining to rule out the theoretical possibility of some extraordinary mishap generating a purported information that was not by any stretch of the imagination really an information at all.

Result

53. For the foregoing reasons, I concur in the result stated by the Chief Justice.

Mr Justice Chan PJ:

54. I agree with the judgment of the Chief Justice and that of Mr Justice Ribeiro PJ.

Mr Justice Ribeiro PJ:

55. I agree with the reasoning and judgment of the Chief Justice.

56. I address the second question arising on this appeal which was certified in the following terms:

"What is the proper order to be made when the charge against the defendant is found to be unconstitutional?"

In context, it concerns the approach to be adopted where a finding of unconstitutionality is made by a magistrate.

The approach adopted below

57. Having heard submissions from counsel, the magistrate, Mr John T Glass, held that section 118F(1) of the Crimes Ordinance, Cap 200, under which the defendants were charged was unconstitutional and that he was consequently bound to dismiss the charges.[3] In the Court of Appeal,[4] both parties submitted that that was the wrong course to adopt. Mr Gerard McCoy SC submitted for the Government that section 19 of the Magistrates Ordinance, Cap 227 ("the Ordinance") required the magistrate to hear the entirety of the prosecution's case before he could properly dismiss it on a point of law. Mr Philip Dykes SC, appearing for the 1st respondent,[5] contended that the magistrate should simply have declined jurisdiction to avoid giving an unconstitutional provision any semblance of validity.

58. Their arguments were rejected by the Court of Appeal. Tang JA commented that summary trials are not designed with such niceties in mind and held that the magistrate had made the correct order, stating:

"...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."[6]

59. Ma CJHC also rejected the parties' procedural arguments but he drew attention to section 27 of the Ordinance ("section 27") as providing a possible basis for dealing with an information charging an unconstitutional offence. However, as the Court had not heard argument on that section, his Lordship left open the question of its applicability.

The parties' approach before the Court

60. Mr McCoy SC[7] and Mr Dykes SC[8] continue to represent their respective clients before this Court. Mr Stanley Ma appears for the 2nd respondent and again adopts the submissions made by Mr Dykes.

61. In the Government's printed case, it was submitted that where the offence charged is found to be unconstitutional, the magistrate should declare the relevant legislation unconstitutional, quash the charge as one unknown to law and discharge the defendant, it being contended that power to make such orders should be implied as necessary to the exercise of a magistrate's jurisdiction. Objection was taken to the magistrate's approach in that his dismissal of the charges was said to amount to an acquittal of the defendants, precluding their prosecution on any other charges on the ground of autrefois acquit. In their joint printed case, the respondents continued to submit that the only appropriate course was to decline jurisdiction.

62. Those arguments do not require to be examined in detail. The parties accepted in the course of argument that section 27 is capable of supplying the framework for dealing with findings of unconstitutionality. In my judgment, section 27 is indeed engaged. A number of incidental issues bearing on its application arise and it is desirable that they should be dealt with in this judgment.

Operating section 27

63. Section 27 is in the following terms:

"(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) a variance between the complaint, information or summons and the evidence adduced in support of it,

he shall, subject to subsection (2)-

(i) amend the complaint, information or summons if he is satisfied that no injustice would be caused by that amendment; or

(ii) dismiss the complaint, information or summons.

(2) The adjudicating magistrate shall amend the complaint, information or summons where-

(a) the defect or variance mentioned in subsection (1) is not material; or

(b) any injustice which might otherwise be caused by an amendment would be cured by an order as to costs, an adjournment or leave to recall and further examine witnesses or call other witnesses.

(3) Following an amendment to a complaint, information or summons, the adjudicating magistrate shall-

(a) read and explain the amended complaint, information or summons to the defendant;

(b) give leave to the parties to call or recall and further examine such witnesses as may be reasonably required by a party having regard to the nature of the amendment;

(c) grant such adjournment as may be reasonably necessary to enable the parties to call or recall witnesses and to prepare their cases;

(d) if he thinks fit, make an order that the complainant or informant shall pay to the defendant such costs, not exceeding $5000, as may be occasioned by the amendment; and

(e) give judgment upon the substantial merits and facts of the case as proved before him, having regard to the offence charged in the complaint, information or summons as amended:

Provided that, if the amendment is made after the case for the complainant or informant is closed, no further evidence may be called by the complainant or informant other than evidence that would, apart from this section, be admissible in rebuttal.

(4) In this section, 'amend' includes the substitution of another offence in place of that alleged in the complaint, information or summons."

64. Where an information charges a defendant with an offence which is held to be unconstitutional, there is plainly a "defect in the substance ... of the information" so that section 27 is engaged. Leaving aside for the moment what

should happen if the prosecution should wish at that point to challenge such determination, the scheme of section 27(1) requires the magistrate next to consider, subject to subsection (2), either amending the information or dismissing it. Subsection (2), which is given precedence, prescribes in mandatory terms that the magistrate should amend the information, removing the option of its dismissal, if an amendment can be made without causing injustice or where any potential injustice would be cured by the procedural measures referred to in section 27(2)(b).

65. In the context of a finding of unconstitutionality, it is important to note that "amendment" is given a very wide meaning by section 27(4) and includes "the substitution of another offence in place of that alleged in the ... information". It would therefore in principle be open to the magistrate to amend the information by substituting an offence which raises no constitutional difficulties in place of the unconstitutional offence, provided that this causes no injustice and that the section 27(3) procedures are then followed. If this can be done, the substitution relates back to the time when the information was laid and if it would not have been time-barred at that stage, the substituted charge would not be treated as time-barred even if the substitution occurred well after expiry of an otherwise applicable time-limit, so long as the substituted offence arises out of the same (or substantially the same) facts as the offence originally charged.[9]

66. Section 27 envisages a magistrate acting of his own motion, and this may be appropriate where an unproblematical alternative charge is plainly available. However, in practice, whether another offence can be substituted is likely to depend on whether the prosecution considers such a charge viable. If no suitable alternative offence can be found, or if the evidence is insufficient to support a suggested charge, amendment (assumed in the present context to take the form of substituting the offence charged) would not be a genuine option. In such cases, and in cases where a proposed amendment cannot be made without injustice, section 27(1) requires the magistrate to dismiss the information.

67. The magistrate did not apply section 27 in deciding to dismiss the charges. He evidently took the view (as did Tang JA) that since the charge could not be made out given the unconstitutionality of the offence, it ought simply to be dismissed. The question of amendment pursuant to section 27 was not addressed.

Appealing an unconstitutionality ruling

68. A decision that a statutory provision is unconstitutional is of the gravest import and generally calls for examination by the higher courts. It is therefore important to consider the correct procedural approach where a challenge to constitutionality is made in the magistrates' courts.

69. If the challenge fails, no particular problems arise. If the defendant is convicted of the offence as charged, the challenge to constitutionality can be renewed on appeal or, where appropriate, on a judicial review. However, if the challenge to constitutionality succeeds, the position is more complicated. As

section 27 is engaged, the magistrate would be expected to follow the procedures prescribed by that section: considering whether an amendment can be made without injustice, and so forth. But if that course is followed without interruption and the trial proceeds on the basis of a substituted offence (especially to the point of an acquittal), difficulties may lie in the way of any challenge to the ruling that the offence originally charged is unconstitutional. Moreover, if that ruling is held on appeal to have been wrong, the opportunity of proceeding against the defendant on the original charge is likely to have been lost.

70. In my view, where the prosecution wishes to question a determination of unconstitutionality, the magistrate should generally, before proceeding to consider possible amendment as prescribed by section 27, accede to an application to state a case pursuant to section 105 of the Ordinance in respect of that determination, adjourning the proceedings pending the outcome of such appeal. Section 105 materially states as follows:

"Within 14 clear days after the hearing and determination by a magistrate of any complaint, information, charge or other proceeding which he has power to determine in a summary way, either party thereto or any person aggrieved thereby who desires to question by way of appeal any conviction, order, determination or other proceeding as aforesaid on the ground that it is erroneous in point of law, or that it is in excess of jurisdiction, may apply in writing to the magistrate to state and sign a case setting forth the facts and the grounds on which the conviction, order or determination was granted and the grounds on which the proceeding is questioned, for the opinion of a judge ..."

71. Adoption of this procedure enables the question of constitutionality to be examined at the highest levels of court while preserving the position in the magistrates' court. If the magistrate's decision is overturned, the appellate tribunal may remit the case for trial de novo on the original charge before another magistrate. And if the magistrate's ruling is affirmed, the appellate court may either remit the matter to the trial magistrate to consider possible amendment or it may itself[10] effect an amendment pursuant to section 27 and then remit the matter for trial de novo on the substituted charge. As is pointed out in HKSAR v Tse So-so,[11] a judgment of this Court handed down on the same day as the present judgment, this approach to amendment by an appellate court was followed (although not in relation to a constitutional challenge) in Fai Ma Trading Co Ltd v L S Lai (Industry Officer)[12] and (in the context of an incomplete review under section 104 of the Ordinance) in Poon Chau Cheong v Secretary for Justice.[13]

72. In coming to the conclusion that an appeal by way of case stated may be brought upon the magistrate ruling that the offence is unconstitutional, I bear in mind the well-established principle, referred to by Mr McCoy, that such an appeal is not available to challenge interlocutory decisions, catering only for final determinations by the magistrate. After an extensive review of the authorities, Fuad VP, giving the judgment of the Court of Appeal in R v Yeung Wai Hung,[14] concluded that:

"... upon the true construction of s 105 of the Ordinance (and there is no power elsewhere) a magistrate has no jurisdiction to state a case until there has been a final disposal of the case."

73. That decision was endorsed by this Court in Yeung Siu Keung v HKSAR,[15] where Chief Justice Li stated:

"As with appeals using the case stated procedure under section 105, an appeal under section 113 must relate to a final decision on all matters in issue between the parties."

74. One can readily understand the concerns that underlie the requirement of finality. As Pickering J put it in Newton v Walker:

"... it is not the intention of the subsection to permit appeals upon interlocutory matters arising in the magistrates' courts. Were it otherwise, appeals would proliferate like mushrooms at dawn to the impediment of the disposal of the work of the criminal courts." [16]

Nothing said in this judgment is intended to disturb that well-settled principle.

75. In my view, where a magistrate determines that the offence charged is unconstitutional, that determination is not merely interlocutory. It is the end of the case in respect of the offence charged so far as the magistrate is concerned. It is a final determination for the purposes of an appeal by way of case stated. The issue of constitutionality to be referred to the appellate court is qualitatively different from the sorts of interlocutory appeals that have attracted strictures against misuse of the case stated procedure. Examples mentioned in Yeung Siu Keung v HKSAR include appeals against rejection of a duplicity submission, against a ruling on admissibility of evidence and against the construction of a statute adopted in the course of a trial.[17]

76. It is accordingly my view that an appeal by way of case stated is available to challenge a magistrate's ruling of unconstitutionality before reconstitution of the information pursuant to section 27, and that this is consistent with the principles precluding appeals from interlocutory magisterial decisions.

Section 27 and "nullity"

77. A possible argument against the applicability of section 27 in the present context arises on the basis of the suggestion in certain cases that a defect in an information may be so fundamental as to render it a nullity which is incapable of being cured by amendment, leaving the court with no alternative but to dismiss the information. If that suggestion is correct, an information charging an unconstitutional offence might be regarded as so fundamentally defective as to amount to a nullity, precluding amendment under section 27.

78. In AG v Wong Lau trading as Kin Keung Construction & Engineering Co,[18] Stock J (as he then was) sought in the context of section 27 to distil from English authorities (referred to below) the propositions inter alia that:

"1. A distinction is to be drawn between informations that are defective and those which are nullities.

2. An information will be a nullity if

(i) the statutory provision creating the offence has been repealed and not re-enacted; or

(ii) the statement and particulars of offence cannot be seen fairly to relate to, or be intended to charge, a known and subsisting criminal offence; or

(iii) in some other way, it is so defective that it cannot be cured. ...

12. Informations which are a nullity cannot be amended."

79. That decision was followed in R v Yeung Lee Transportation & Engineering Limited.[19] And in Jetex HVAC Equipments Ltd v Commissioner for Labour,[20] Litton JA accepted the hypothetical proposition that "if the information were a nullity there is nothing to amend; section 27(1) of the Magistrates Ordinance cannot in those circumstances bite at all." It is however the case that none of the informations in these three cases were held to be nullities.

80. In formulating his categories of "nullity", Stock J cites a number of English cases,[21] which, it is true, do refer to certain indictments as containing defects which render them "nullities".[22] However, those authorities must be approached with great care. None of them was dealing with any enactment resembling our section 27, that is, a provision imposing a duty to amend as discussed above and conferring a power to amend which expressly includes substitution of the offence charged. And in none of them was the court concerned with the question whether the trial or appellate court was precluded from amending the relevant indictment or charge on the ground that it was so defective that it had to be treated as a nullity leaving nothing to amend.

81. Instead, in many if not all of them, any constraint on amendment was the constraint, recognized in the English case-law, against an appellate court amending the charge after the trial court had recorded a conviction, it being acknowledged that the defect could have been, but was not, cured by amendment prior to conviction below.[23] Plainly, in such cases, it was not the seriousness of the defect, but the unwillingness of appellate courts to re-cast a defective charge after conviction, that prevented amendment. As noted above, appellate courts are not so constrained in Hong Kong in the section 27 context, they having adopted the practice of ordering a trial de novo on the amended charge where the power to amend is exercised on appeal.[24] Given that, on English the authorities, the defective charge could not be cured by amendment on appeal, the point arising in some of the abovementioned cases was whether

the defect was so serious as to render the indictment a nullity so as to exclude application of the proviso.[25] The issues addressed in those cases were, in other words, quite different from those before this Court and arose in a very different statutory environment.

82. Given the overall scheme of section 27 and the great width of the power of amendment it confers, it is hard to conceive of a defect in an information which cannot in principle be amended, particularly by substitution of the offence charged.

(a) Stock J gives as his first example of nullity, a case where the statutory provision creating the offence charged has been repealed and not re-enacted.[26] However, if section 27(4) is kept in view, in such a case the question is whether there exists an alternative offence under a valid enactment or at common law which would be disclosed on the evidence to be called and which could be substituted without injustice for the defective charge. Of course in any particular case, this may not be possible. But defects of this nature are clearly in principle capable of being cured so that the proposition that they result in a nullity cannot be accepted.

(b) The same applies to Stock J's second example, involving a case where "the statement and particulars of offence cannot be seen fairly to relate to, or be intended to charge, a known and subsisting criminal offence."[27] If the offence charged is not known to law, the curability of the information must depend, in the section 27 context, on whether a valid offence can be substituted without injustice and pursued on the available evidence. There is again no reason in principle why a defect of this particular type should brand the information a nullity.

83. Indeed, it is hard to see what role there is at all for the notion of "nullity" in section 27. That provision creates a self-contained scheme which requires a defective information or one which is at variance with the evidence adduced to be dealt with either by amendment or by dismissal. It prescribes amendment in mandatory terms if this can be achieved without injustice. If not, section 27 itself stipulates that the information must be dismissed. It is hard to see what purpose would be served by injecting the notion of "nullity" into that scheme. To the extent that the three cases referred to support the view that informations may be so defective as to constitute nullities incapable of being amended pursuant to section 27 (and only to such extent) they are, in my respectful view, wrongly decided and should not be followed.

Autrefois acquit

84. As noted above, one of the prosecution's concerns with regard to the order made by the magistrate was that it might result in a plea of autrefois acquit in the event that an alternative offence was sought to be charged.

85. The application of section 27 to a determination of unconstitutionality largely meets that concern and certainly does not aggravate it.

(a) If (say, after confirmation of the unconstitutionality on appeal) the section 27 procedure is followed and the defendant is tried for a constitutionally valid offence substituted by amendment, he will have been tried on the substantial merits on the basis of an alternative offence without being allowed to raise a plea of autrefois acquit.

(b) If, on the other hand, no amendment is made (for instance, because no amendment can be made without injustice) and the information is dismissed pursuant to section 27, it does not follow merely from the fact of such dismissal that a plea of autrefois acquit would necessarily avail the defendant if, due to later developments or otherwise, the prosecution subsequently felt able to charge him with a different, constitutionally valid, offence. Whether at that stage, a plea of autrefois acquit or an objection on the ground of oppression and abuse of process might succeed would depend on the legal principles governing such objections.

Section 27 and the "adjudicating magistrate"

86. As noted in Tse So-so, section 27 deals specifically with the powers of the "adjudicating magistrate", meaning the magistrate seised of the substantive trial, to deal with defects in the information. The foregoing discussion has proceeded on the footing that a constitutional objection is taken before the magistrate at the trial. However, as held in Tse So-so,magistrates other than the trial magistrate have power to amend an information outside the confines of section 27. It follows that if the prosecution should wish to avoid a debate on the constitutionality of a particular offence charged, it could seek to amend the information in advance of the trial without relying on section 27, to charge a constitutionally uncontroversial offence. Whether such an amendment would be permitted would obviously depend on general principles and the usual discretionary considerations.

Disposal of the present case

87. As this Court has upheld the determination that the offence charged is unconstitutional, it could in principle exercise the magistrate's power under section 27 to consider amending the information by substituting, for instance, the charge of outraging public decency at common law.[28] If satisfied that such an amendment could be made without injustice, this Court could in principle make the amendment and remit the amended information for trial de novo before the same or a different magistrate. If not satisfied that such an amendment can be made without injustice, it could simply uphold the dismissal of the charge.

88. However, in the present case, these considerations do not arise since, in obtaining leave to appeal, the Government undertook that it would not seek remittal of the case and would not bring any charge in relation to the conduct alleged in this case. Accordingly, I would simply order that the appeal be dismissed with the order as to costs referred to in the Chief Justice's judgment.

Sir Anthony Mason NPJ:

89. I agree with the judgment of the Chief Justice and that of Mr Justice Ribeiro PJ.

Chief Justice Li:

90. The Court unanimously dismisses the appeal and makes an order that the 2nd respondent's costs be paid by the appellant.

(Andrew Li)
Chief Justice (Kemal Bokhary)
Permanent Judge (Patrick Chan)
Permanent Judge

(R.A.V. Ribeiro)
Permanent Judge (Sir Anthony Mason)
Non-Permanent Judge

Mr Gerard McCoy SC and Ms Annie Leung (instructed by the Department of Justice) and Ms Sally Yam (of that Department) for the appellant

Mr Philip Dykes SC and Ms Wing Kay Po (instructed by Messrs Tang Tso & Lau and assigned by the Legal Aid Department) for the 1st respondent

Mr Stanley Ma (instructed by Messrs Tang Tso & Lau) for the 2nd respondent

[1] Hartmann J held the following provisions relating to homosexual conduct in Part XII of the Crimes Ordinance to be unconstitutional: (i) Section 118H to the extent that it applies to a man aged 16 or over and under 21; (ii) sections 118F(2)(a) and 118J(2)(a) and (iii) section 118C to the extent that it applies to a man aged 16 or over and under 21. The conclusions in (i) and (ii) were not appealed. The conclusion in (iii) was affirmed by the Court of Appeal in Leung v Secretary for Justice [2006] 4 HKLRD 211.

[2] Although not referred to in the Brief, the existing law also included the statutory offence of indecency in public provided for in s. 148 of the Crimes Ordinance which was enacted in 1978.

[3] Case Stated, §44.

[4] [2006] 4 HKLRD 196. Pang J had directed that the prosecution's appeal by way of case stated should be argued before the Court of Appeal.

[5] His submissions being adopted by Mr Stanley Ma, instructed for the 2nd respondent.

[6] Judgment §36.

[7] Appearing with Ms Annie Leung and Ms Sally Yam.

[8] Appearing with Ms Wing Kay Po.

[9] Poon Chau Cheong v Secretary for Justice (2000) 3 HKCFAR 121 at 131 and 132.

[10] Exercising the powers of the magistrate as provided for by section 119(1)(d) of the Ordinance, powers which are in turn available to this Court by virtue of section 17(2) of the Hong Kong Court of Final Appeal Ordinance, Cap 484.

[11] FACC 1/2007.

[12] [1989] 1 HKLR 582.

[13] (2000) 3 HKCFAR 121.

[14] [1990] 2 HKC 86.

[15] (2006) 9 HKCFAR 144 at 153.

[16] [1975] HKLR 317 at 321-322.

[17] These being examples mentioned in Streames v Copping [1985] 1 QB 920.

[18] [1993] 1 HKCLR 257 at 268.

[19] [1994] 2 HKC 556 (Keith J).

[20] [1995] 2 HKLR 24.

[21] R v McVitie [1960] 2 QB 483; R v Nelson (1977) 65 Cr App R 119 ; R v Molyneux (1981) 72 Cr App R 111 ; R v McLaughlin (1983) 76 Cr App R 42; R v Ayres [1984] 1 AC 447; and R v Williams (1991) 92 Cr App R 158.

[22] R v Ayres [1984] 1 AC 447 at 461.

[23] R v Nelson (1977) 65 Cr App R 119 at 122. See also Meek v Powell [1952] 1 KB 164.

[24] Fai Ma Trading Co Ltd v L S Lai (Industry Officer) [1989] 1 HKLR 582; and Poon Chau Cheong v Secretary for Justice (2000) 3 HKCFAR 121.

[25] R v McVitie [1960] 2 QB 483; R v Molyneux (1981) 72 Cr App R 111 ; R v Ayres [1984] 1 AC 447 at 461.

[26] Evidently taken from R v McVitie [1960] 2 QB 483 at 495.

[27] Evidently derived from R v Ayres [1984] 1 AC 447 at 461.

[28] See footnote 10 above.