REPORTABLE (at Parts I, II, III, IV at p 23 line 22 – p 37 penultimate line, Parts V and VI, as well as the separate judgments of McNALLY, EBRAHIM, MUCHECHETERE and SANDURA JJA at pp 75-87)

Judgment No. S.C. 41/2000
Crim. Appeal No. 12/99

CANAAN SODINDO BANANA v THE STATE

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA, EBRAHIM JA, MUCHECHETERE JA & SANDURA JA
HARARE, MARCH 6 & 7, & MAY 29, 2000

J C Andersen SC, for the appellant

P Muziri, with him *A Nhemadire*, for the respondent

GUBBAY CJ:

I. INTRODUCTION

With the advent of independence on 18 April 1980, the appellant was appointed the country's non-executive President. He remained in that office until the end of 1987. He is an acclaimed academic, author and former minister of the Methodist Church, and was an honorary professor and lecturer in religious studies, classics and philosophy at the University of Zimbabwe. In 1989 the appellant served as a member of the United Nations' Commission of eminent churchmen mandated to investigate multinational activities in South Africa. And in 1996 he was named as the Organisation of African Unity's special envoy to mediate an end to the civil wars raging in Liberia and Sierra Leone.

On 24 February 1997 Jefta Dube, a former police inspector who had served as the appellant's aide-de-camp, was convicted by the High Court of having murdered a police constable. After a finding of extenuating circumstances was made, Dube was sentenced to undergo ten years' imprisonment with labour. The court held that it could not reject as false the uncontroverted claim that Dube had been traumatised as a consequence of being the victim of repeated homosexual abuse by the appellant, at State House, during the years 1983 to 1986.

The next day the Commissioner of Police publicly announced that the allegations of sodomy were to be the subject of an extensive investigation. In the event, on 7 July 1997, the appellant was indicted for trial to the High Court on two counts of sodomy, three counts of attempted sodomy and six counts of indecent assault. The offences were alleged to have been committed during the period extending from January 1984 to December 1996.

The appellant pleaded not guilty to all the charges. At the conclusion of the trial, which lasted several weeks and at which the appellant was defended with consummate skill and tenacity, he was convicted on two counts of sodomy (counts 1 and 2), seven counts of indecent assault (counts 4 to 8, 10 and 11), one count of common assault (count 9) and one count of committing an unnatural offence (count 3). He was sentenced to an effective one year's imprisonment with labour, with a period of four years' imprisonment with labour conditionally suspended for three years; and a further four years' imprisonment with labour suspended on condition that on or before 30 June 1999, he paid the Registrar of the High Court the sum of $500 000, to be transmitted in equal shares to Jefta Dube and to the deceased estate of

Jefta Dube's victim. The judgment on conviction is reported, in part, in 1988 (2) ZLR 533 (H); and, on sentence, in 1999 (1) ZLR 50 (H).

II. THE APPELLANT'S CONTENTIONS WITH RESPECT TO CONVICTION

As a matter of generality and as applicable to all or some of the counts, the contentions advanced on the appellant's behalf were these:

"(a) The court *a quo* should not have convicted the appellant on any of the counts unless it was satisfied in the first instance that the evidence of the complainant was satisfactory. If not it should have acquitted. If it was it should have been satisfied that it was corroborated. It should also have considered whether it was able to reject the evidence of the appellant and his witnesses as false beyond a reasonable possibility.

(b) The court erred in convicting on the counts where it found that the evidence of the complainants was not satisfactory in material respects.

(c) The court erred in failing to find that the evidence of the remaining complainants was not satisfactory in material respects.

(d) The court erred in finding that the evidence of the complainants was corroborated and, more particularly, by similar fact evidence.

(e) To the extent that there were similar facts the court erred in finding that they were of a striking and unusual nature, or that they were consistent on all counts, or that there was no risk that they were the product of collusion, rumour or media publicity.

(f) The court misdirected itself in failing to take into account the lack of an immediate and spontaneous complaint on each count, of cogent evidence as to the precise terms of the complaint and the inconsistencies between the initial complaints and reports, subsequent statements to the police and the evidence given.

(g) The court failed to make a proper assessment of the evidence of the appellant and his witnesses on its merits and erred in rejecting it as false beyond a reasonable possibility."

III. THE PRINCIPLES OF LAW TO BE APPLIED

Arising from the contentions raised, it is convenient at the outset to consider the apposite principles of law, and then to apply them to those counts to which they are relevant.

(a) The approach to complainants in sexual cases

There is a well-established rule in Roman-Dutch jurisdictions that judicial officers are required to warn themselves of the danger of convicting on the uncorroborated evidence of certain categories of witnesses who are potentially suspect. One such category concerns complainants in sexual cases.

In a long line of cases in this country, of which *S v Mupfudza* 1982 (1) ZLR 271 (S) is the landmark, the so-called two-stage test has been applied. The first question to be asked by the court is: "Is the complainant credible?". If the answer is in the affirmative, the next question is: "Is there corroboration of or support for the evidence of the complainant?". In other words, the court must not only believe the complainant, it must in addition be satisfied, by an application of the cautionary rule, whether it might still not have been deceived by a plausible witness. It therefore must seek corroboration or evidence tending to exclude the danger of false incrimination. See also *S v Chitiyo* 1989 (2) ZLR 144 (S) at 145 E-F; *S v Chigova* 1992 (2) ZLR 206 (S) at 219 D-F and 220 C-E; *S v Makanyanga* 1996 (2) ZLR 331 (H) at 241 A-C; *S v Zaranyika* 1997 (1) ZLR 539 (H) at 555 B-C.

However, in *S v D & Anor* 1992 (1) SA 513 (Nm) FRANK J (with whom STRYDOM JP agreed), in the Namibia High Court, took the opportunity to re-examine the need for the rule in sexual cases. He came to the conclusion that the

cautionary rule in such cases has no rational basis for its existence. He held that while a trial court must consider the nature and circumstances of the particular offence, "in the end only one test applies, namely, was the accused's guilt proved beyond reasonable doubt, and the test must be the same whether the crime is theft or rape" (see at 517 A-B).

This decision received the imprimatur of the South African Supreme Court of Appeal in *S v Jackson* 1998 (1) SACR 470 (SCA). In the course of a well reasoned judgment OLIVIER JA, with the concurrence of MAHOMED CJ and three other JUDGES OF APPEAL) said at 476 e-f:

> "In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule."

He commended as particularly important the eighth guideline formulated by LORD TAYLOR CJ in *R v Makanjuola, R v Easton* [1995] 3 All ER 730 (A) at 733 c-d, which reads:

> "In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. *There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel*."

Prior to the decision in the *Jackson* case *supra* it had long been accepted that criminal cases of a sexual nature fell into a special category. It was said

that there was an "inherent danger" in relying on the unconfirmed testimony of a complainant in such a case. This belief resulted in the courts adopting a fixed cautionary rule of practice.

In *S v M* 1999 (2) SACR 548 (SCA) the Supreme Court of Appeal reiterated that the application of the cautionary rule to sexual cases was based on irrational and outdated perceptions. It again pointed out that although the evidence in such cases might call for a cautionary approach this was not a general rule. The State was simply obliged to prove the accused's guilt beyond a reasonable doubt. And this approach applied to all cases in which an act of a sexual nature was an element (see at 555 a-b).

Recently, in *S v K* 2000 (4) BCLR 405 (NmS) the Supreme Court of Namibia followed the decision in *S v Jackson supra*. It held that the cautionary rule had outlived its usefulness. There were no convincing reasons for its continued application. It exemplified a rule of practice that placed an additional burden on victims in sexual cases which could lead to grave injustice to the victims involved (see at 418H-419D).

It is my opinion that the time has now come for our courts to move away from the application of the two-pronged test in sexual cases and proceed in conformity with the approach advocated in South Africa. In so holding I have not overlooked the well-researched judgment of GILLESPIE J in *S v Magaya* 1997 (2) ZLR 139 (H). But having regard to the abrogation of the obligatory nature of the rule in such countries as Canada, the United Kingdom, New Zealand and Australia, as well

as by the State of California (see Chaskalson *et al*, *Constitutional Law of South Africa* at 14-62; Hatchard, 1993 *Journal of African Law* 97 at 98; (1983) 4 *Canadian Journal of Family Law* 173), I respectfully endorse the view that in sexual cases the cautionary rule of practice is not warranted. Yet I would emphasise that this does not mean that the nature and circumstances of the alleged sexual offence need not be considered carefully.

(b) The single witness situation

It is, of course, permissible in terms of s 269 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] for a court to convict a person on the single evidence of a competent and credible witness. The test formulated by DE VILLIERS JP in *R v Mokoena* 1932 OPD 79 at 80 was that the evidence of such a single witness must be found to be "clear and satisfactory in every material respect".

In *The South African Law of Evidence* 4 ed at 573 the celebrated authors, Hoffmann and Zeffertt, rightly point out that *Mokoena's* case concerned the situation of a single witness claiming to have identified the accused by the light of a pocket torch as he ran past in the dark. Accordingly, they contend that the remarks of DE VILIERS JP should be related to the context in which they were made.

Certainly, in purporting to lay down a general rule the dictum of the learned JUDGE PRESIDENT has been criticised as unhelpful and tending to obscure the ultimate purpose of the court's inquiry, which is whether the guilt of the accused has been proved beyond a reasonable doubt. See *R v Abdoorham* 1954 (3) SA 163

(N) at 165; *R v Mokoena* 1956 (3) SA 81 (A) at 85. In *S v Sauls & Ors* 1981 (3) SA 172 (A) at 180 E-G, DIEMONT JA said:

> "There is no rule of thumb or formula to apply when it comes to a consideration of the credibility of the single witness.
>
> The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. … It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

In Zimbabwe much the same approach has been adopted. In *S v Nyati* 1977 (2) ZLR 315 (A) at 318 E-G, LEWIS JP warned that the test in *R v Mokoena supra* is not to be regarded as an inflexible rule of thumb. There is no magic formula which determines when a conviction is warranted upon the testimony of a single witness. His evidence must be approached with caution and the merits thereof weighed against any factors which militate against its credibility. In essence a commonsense approach must be applied. If the court is convinced beyond a reasonable doubt that the sole witness has spoken the truth, it must convict, notwithstanding that he was in some respects unsatisfactory. See also *S v Nathoo Supermarket (Pvt) Ltd* 1987 (2) ZLR 136 (S) at 138 D-F.

Where the evidence of the single witness is corroborated in any way which tends to indicate that the whole story was not concocted, the caution enjoined may be overcome and acceptance facilitated. But corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution.

(c) Complaints made in sexual cases

Evidence that a complainant in an alleged sexual offence made a complaint soon after its occurrence, and the terms of that complaint, are admissible to show the consistency of the complainant's evidence and the absence of consent. The complaint serves to rebut any suspicion that the complainant has fabricated the allegation.

The requirements for admissibility of a complaint are –

(1) It must have been made voluntarily and not as a result of questions of a leading and inducing or intimidating nature. See *R v Petros* 1967 RLR 35 (GD) at 39 G-H.

(2) It must have been made without undue delay and at the earliest opportunity, in all the circumstances, to the first person to whom the complainant could reasonably be expected to make it. See *R v C* 1955 (4) SA 40 (N) at 40 G-H; *S v Makanyanga supra* at 242G-243C.

(d) Similar fact evidence

The learned trial judge dealt with the general rule applicable to the admission of similar fact evidence in some detail at 537B-539F of the reported judgment. It is clear that in this jurisdiction the test that has always been applied, as in this case, is that formulated in *Boardman v Director of Public Prosecutions* [1974] 3 All ER 857 (HL) at 897 g-h, namely, that the similar facts must be of such an unusual nature or striking similarity that it would be an affront to commonsense to assume that the similarity to the offence charged was explicable on the basis of coincidence. See *S v Meager* 1977 (2) ZLR 327 (A) at 332 F-G; *S v Ngara* 1987 (1)

ZLR 91 (S) at 100D; *S v Mupah* 1989 (1) ZLR 279 (S) at 284B; *S v Mutsinziri* 1997 (1) ZLR 6 (H) at 23 F-G.

The former Appellate Division of South Africa in *S v D* 1991 (2) SACR 543 (A) at 546 G-H applied the guide of striking similarity in evaluating the admission of similar fact evidence. It accepted that the basic principle must be that the admission of similar fact evidence is exceptional and requires a strong degree of probative force. See also *S v M & Ors* 1995 (1) SACR 667 (BH) at 692 f-g.

However, in a recent treatment of the subject in *R v P* [1991] 3 All ER 337 (HL) LORD MACKAY OF CLASHFERN LC explained that the law did not require "striking similarity" as an indispensable element of admissibility and that it was unwarranted to restrict the admissibility principle in a manner which gives decisive effect to one particular way of describing probative significance. Thus the test in every case must be not whether the events sought to be proved by the prosecution are strikingly similar to the offence charged, but whether their probative contribution is such as to outweigh the prejudice to the accused. The learned LORD CHANCELLOR stated the principle at 346 d-j:

> "As this matter has been left in *Boardman v DPP* I am of opinion that it is not appropriate to single out 'striking similarity' as an essential element in every case in allowing evidence of an offence against one victim to be heard in connection with an allegation against another. Obviously, in cases where the identity of the offender is in issue, evidence of a character sufficiently special reasonably to identify the perpetrator is required and the discussion which follows in LORD SALMON'S speech in the passage which I have quoted indicates that he had that type of case in mind.
>
> From all that was said by the House in *Boardman v DPP* I would deduce the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it

> is prejudicial to the accused in tending to show that he was guilty of another crime. Such probative force may be derived from striking similarities in the evidence about the manner in which the crime was committed and the authorities provide illustrations of that, of which *R v Straffen* [1952] 2 All ER 657, [1952] QB 911 and *R v Smith* (1915) 84 LJKB 2153, [1914-15] All ER Rep 262 provide notable examples. But restricting the circumstances in which there is sufficient probative force to overcome prejudice of evidence relating to another crime to cases in which there is some striking similarity between them is to restrict the operation of the principle in a way which gives too much effect to a particular manner of stating it, and is not justified in principle. Hume in his work *Commentaries on the Law of Scotland Respecting Crimes* (4th edn, 1844) vol 2, p 384, said long ago:
>
> > '… the aptitude and coherence of the several circumstances often as fully confirm the truth of the story, as if all the witnesses were deponing to the same facts.'
>
> Once the principle is recognised, that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises demonstrates that there is no single manner in which this can be achieved. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree."

And continued at 348 a-b:

> "… the judge must first decide whether there is material upon which the jury would be entitled to conclude that the evidence of one victim, about what occurred to that victim, is so related to the evidence given by another victim, about what happened to that other victim, that the evidence of the first victim provides strong enough support for the evidence of the second victim to make it just to admit it, notwithstanding the prejudicial effect of admitting the evidence."

The significance of this re-statement of the principle is that it focuses attention on the concept that admissibility turns on probative weight which, like the question of corroboration, is a matter of logic and commonsense, and not of legal doctrine. Whether, of course, the evidence has sufficient probative value to outweigh its prejudicial effect depends on the facts of each case and is necessarily a matter of degree and value judgment.

By emphasising that "striking similarity" was not to be regarded as a prerequisite to the admissibility of similar fact evidence, the House of Lords appears to have eased the task of the prosecution in cases where the accused's alleged behaviour on the different occasions in question bears significant points of relationship, yet does not possess the virtually identical features which the rule in the *Boardman* case required. See also *R v H* [1995] 2 All ER 865 (HL) at 869e-870e; *R v Christov* [1996] 2 All ER 927 (HL) at 931f-932g.

The time has now come for this Court to follow the lead taken by that august body, the House of Lords. That is the course I propose to adopt in this appeal.

IV. THE CONVICTIONS

In determining whether the State succeeded in proving each individual offence regard will be paid to the principles of law referred to where such happen to be applicable.

(a) Count 1 – Edward Ngwenya:

The charge alleged that during the period extending from 11 August 1995 to 31 December 1996 the appellant had sexual intercourse per anum with a male person, Edward Ngwenya, and thus committed the crime of sodomy.

The case for the State comprised the evidence of the complainant, that of his sister Oliter Ngwenya and of certain documentary exhibits. The appellant testified in his own defence and called as his witnesses his driver,

Chamunorwa Nhongo, his aide-de-camp Assistant Inspector Edwin Mwendayi, his brother Alfred Banana and his nephew David Banana.

The complainant's evidence was to the following effect -

On a day in April 1995 he encountered the appellant in the street near the Bulawayo Sun Hotel. He recognised the appellant as the former President of Zimbabwe. They exchanged greetings and the appellant invited him for lunch at Morgan's Restaurant. He accepted the invitation. During the course of the meal the appellant enquired about his family background, the church he attended, his communal home area and other details of his life. After finishing the meal the appellant invited him to come to the hotel at 7.00 pm, saying that he would wait for him in the foyer. He again accepted the invitation.

The complainant said that he duly met the appellant in the foyer of the hotel at the appointed hour and was taken to the appellant's room, which was room 416. They had a meal together in the room. He told the appellant that he was employed by the National Railways of Zimbabwe as a contract worker. The appellant promised to find him other employment, and that he would accompany the appellant on trips outside the country. The appellant even promised to buy him a motor vehicle. He spent the night with the appellant in the hotel room but sexual intercourse did not take place. The appellant handed him his personal card which gave his residential address in Harare, the home and University of Zimbabwe telephone numbers and a facsimile number. He, in turn, provided the appellant with the telephone number at his workplace.

After this initial encounter nothing happened between the parties until the complainant visited the appellant in Harare. This was on 11 August 1995 at the appellant's request. He travelled from Bulawayo by train and, by arrangement, the appellant met him at the railway station. The appellant drove him to his residence. After taking a bath he accompanied the appellant to Chikurubi Prison as the appellant wished to visit his son. From Chikurubi Prison the appellant showed him his office at the University and from there he was taken to a shopping centre said to be in Borrowdale. These places were new to the complainant. After the trip to the University and the shopping centre they returned to the appellant's residence. The appellant said his wife was in South Africa. It was evening time. They watched television and had a meal.

When it was time to retire the appellant suggested that they should sleep in his bedroom and that he (the complainant) should undress save for his underpants. This he did. They then proceeded to do "press-ups" on the bed. The appellant first came on top of him, grasped his hands and told him to raise and lower his arms so as to lift up the appellant's body. He did as instructed. When he became tired, they changed position so that he was on top of the appellant. The press-ups continued for a short time until the appellant started to fondle his private parts. What happened thereafter was that he penetrated the appellant per anum.

Early the next morning the appellant gave him $400 and drove him to the Mbare Msika terminus. There he boarded a bus and returned to Bulawayo.

The complainant testified that subsequent to his visit to Harare, he met the appellant on numerous occasions at the Bulawayo Sun Hotel, always after hours. The appellant would either telephone him or send a written message to advise him that he would be, or was, in Bulawayo. He produced a number of these messages. Exhibit 11(a), written on University of Zimbabwe notepaper, reads:

> "Bulawayo Sun, 8/3/96
>
> Dear Earnest,
>
> Please meet me at the Bulawayo Sun on Sunday 10/03/96 at 5.00 pm.
>
> Best wishes.
>
> C.S. Banana."

Exhibit 11(b) was written in Ndebele on a Bulawayo Sun Hotel letterhead and dated 22 March 1996. It is to this effect:

> "Dear Earnest,
>
> I am here. If you can manage to come, do come today at 8.00 pm Friday.
>
> Yours.
>
> C.B."

Exhibit 11(c), headed Bulawayo Sun, Saturday 01/06/96, reads:

> "Dear Earnest,
>
> I am at the above Hotel Rm 316.
>
> You can meet me as from 7.00 pm today.
>
> Your Uncle."

And on 25 April 1996 the appellant sent the following telegram to the complainant from Mount Pleasant to his address, 2289 Nkulumane, Bulawayo:

> "Please meet me at Bulawayo Sun on Thursday 25/4/96 at 7 pm. Uncle Professor."

The complainant went on to state that on most occasions when he arrived at the hotel the appellant would be waiting for him in the foyer. They would go to the appellant's room. Food would be ordered; they would watch television and then usually after the 8.00 pm news they would retire to the bed. Sexual intercourse per anum would occur with the appellant as the passive party. It would be preceded by press-ups, first with the appellant on top of him and then with a reversal of positions. He did not consent to such acts, but submitted through fear.

The complainant said that the appellant never obtained employment for him. The appellant always told him he was looking for a job for him. It was only when the allegations against the appellant were published in the newspaper that the complainant told his mother about his association with the appellant. He showed his mother the copy of the *Financial Gazette* of 8 May 1997. He then reported his involvement with the appellant to the police.

The complainant's sister Oliter said that on two occasions messages were delivered by motor vehicle to the house in Nkulumane, for her brother; that on receiving the messages the complainant left the house and returned the following morning. She opened the front door for him.

The appellant in evidence admitted that in about April 1995 he met the complainant in the street near to the Bulawayo Sun Hotel. He was with his aide-de-camp. It was the complainant who approached him. The complainant said he had a problem he would like to discuss with him. He told the complainant to come to the hotel at 7.00 pm. He did not invite the complainant to join him for lunch. He had lunch with his aide-de-camp.

It was the aide-de-camp who brought the complainant to his room that evening. He spent about thirty minutes with the complainant, who told him that he was on contract work with the National Railways and was looking for permanent employment. The appellant said he would try and assist him. He gave the complainant his business card. Later that evening he was visited at his room in the hotel by his brother Alfred, who is employed as a supervisor by Edgars Stores. He asked Alfred if he could do anything to assist the complainant. They dined together.

On 11 August 1995, Heroes Day, the complainant arrived at his residence in Mount Pleasant. This was totally unexpected. The complainant said that he wanted to follow up the matter of employment which they had discussed in Bulawayo. At the house were his nephews Gqiza and David. His wife was away. He told the complainant that he had not been able to obtain a firm offer of employment.

The appellant was at the time about to leave for Chikurubi Prison to visit his son. He mentioned this to the complainant who asked to accompany him. They proceeded there in a motor vehicle driven by the appellant's chauffeur Nhongo.

The appellant's aide also accompanied them. After making the visit the complainant was dropped off in Rezende Street near to the Post Office. The appellant gave him $100 for bus fare. The next day the appellant travelled to Gokwe. He left at 5.30 am.

The appellant said that subsequent to the complainant's Harare visit, he met him in Bulawayo on about three occasions. He had sent messages to the complainant. The purpose of the meetings was purely to follow up the situation of employment. The complainant was always brought to the hotel room by the aide and the meetings lasted about fifteen minutes. Physical intimacy never took place. Nor did the complainant spend the night in his hotel room or dine with him. He was not able to obtain employment for the complainant.

Nhongo, the appellant's driver, recalled the Heroes holiday of 1995 and the complainant accompanying the appellant and his aide to Chikurubi Prison. He said that after they left the Prison the complainant was dropped off along Julius Nyerere Way at about noon. Early the following morning at about 5.30 am he drove the appellant to Gokwe.

David Banana said that in 1995 he was living at the appellant's home in Mount Pleasant. He recalled meeting the complainant. He was brought into the kitchen by the appellant. It was about 10.30 am. They were having breakfast at the time. The appellant introduced the complainant and said that they would be going to Chikurubi Prison. He never saw the complainant again. The appellant returned at about lunchtime. The appellant packed a bag and left that afternoon with his driver

and aide. He was not aware when the appellant returned, for the next morning he left for his home in Bulawayo.

Assistant Inspector Mwendayi testified that in April 1995 he happened to be walking with the appellant from the Bulawayo Sun Hotel towards Ramjees Store. The complainant greeted the appellant. He walked on a short distance while the complainant and the appellant conversed. After about five minutes they parted. The appellant came to him and they entered Morgan's Restaurant where they had lunch.

He again saw the complainant that evening in the foyer of the hotel. He took him to the appellant's room and returned to the foyer. After thirty to forty-five minutes the complainant came down to the foyer and left the hotel. Later that evening the appellant's brother arrived at the hotel. He took him to the appellant's room.

He next saw the complainant on Heroes holiday at the appellant's Mount Pleasant residence. The complainant was at the house when he came on duty at 8.30 am. He accompanied the appellant and the complainant to Chikurubi Prison. On leaving the Prison they drove via the city. Dropping the complainant off near the main Post Office along Julius Nyerere Way, they proceeded to Mount Pleasant. The next morning at about 5.30 am they left for Gokwe.

The following year he escorted the complainant on about three occasions to the appellant's room in the Bulawayo Sun Hotel. He would wait for the

complainant in the foyer and remain there until the complainant left the hotel. Only then did he depart.

Alfred Banana's evidence was to the effect that the complainant was sent to him by the appellant who had asked whether he could secure employment for the complainant. No vacancies were available however. He told the complainant that he would keep in touch with the appellant in case the situation changed.

This witness said that the appellant would contact him when visiting Bulawayo. He would see the appellant on most occasions during such visits. Often, he would go to the hotel room where the appellant was staying; on other occasions the appellant would come to his home. These meetings occurred in the evening. On one occasion when he came to the hotel the appellant's aide escorted him to the room; on other occasions he went up to the appellant's room himself after the receptionist telephoned the appellant that he had a visitor.

This then is a review of the evidence led on the first count. Mr *Andersen*, for the appellant, argued that the complainant's evidence was such that he should not have been held by the trial court to be a satisfactory witness. Certainly his evidence had to be regarded with caution. In the first place, the complainant was not truthful in claiming that he had only indulged in the sexual acts with the appellant through fear; that he had been forced into homosexual activity by the appellant. Second, the probability was that his motive in reporting the matter to the police was the prospect of making money out of what had transpired between himself and the appellant. Third, there was the evidence of the appellant's witnesses which

contradicted the complainant. In particular that of the aide, who said that on the first occasion (i.e. April 1995) and on others he escorted the complainant to the appellant's hotel room and was present in the foyer when he left the hotel.

The trial court also disbelieved the complainant's evidence that he, as opposed to the appellant, was the active partner in the sexual affair. It appears to have based such a finding on a predisposition on the appellant's part. This was not justified.

Nonetheless the trial court was satisfied that it could safely accept the complainant's evidence that sexual intercourse per anum with the appellant had taken place, albeit that it was consensual and not, as he claimed, induced by fear of the appellant.

I do not regard this count as being based on the testimony of a single witness. I find that the complainant's evidence was corroborated by that of his sister. She said that on two occasions when written messages were delivered to the house for the complainant, he left that evening only to return the following morning. Secondly, the tenor of those messages produced as exhibits, sent by a former President and a very important personality, were not consistent with invitations to the complainant to come to the hotel merely to discuss his employment problem. Thirdly, if the dates of the visits as per the messages, namely 10 March 1996, 22 March 1996, 1 June 1996 and 25 April 1996, are compared to the appellant's accounts at the hotel for those days it will be seen that charges for room service were incurred; though in some

cases the charge was moderate. How would the complainant know that on those occasions the appellant had ordered room service had he not been present?

Even if the complainant's evidence was to be viewed as that of a single uncorroborated witness, the strict test laid down in *R v Mokoena supra* was not the one to apply, but rather that of weighing the merits and demerits of the complainant's evidence and then deciding, with the application of commonsense, whether, despite it being in some respects unsatisfactory, it was essentially trustworthy. This, in effect, was the approach adopted by the trial court. It reasoned as follows:

> "In brief the court finds the complainant credible in respect of all the three encounters or groups of encounters with the accused. Firstly, when the complainant says he met the accused for the first time in the street in Bulawayo, had lunch with the accused shortly thereafter and visited him at his hotel room later that evening and spent the night there, the court believes him. It is common cause the accused and the complainant met. The accused denies they had lunch together. The accused has a strong motive to deny having had lunch with the complainant. The nature of his defence demands that he distances himself as much as he can from the complainant. On the other hand, the complainant has nothing to gain by alleging that he had lunch with the accused when he never had. The fact that Ngwenya was invited to the accused's hotel room, which is common cause, tends to lend more weight to Ngwenya's version that he had lunch with the accused. Given the subsequent letters to Ngwenya and the visit to Harare, Ngwenya is in all probability telling the truth when he says he had lunch with the accused. Why did the accused invite Ngwenya to his room that evening? There is no way the accused could have found a job for him between the time of their meeting for the first time and then. Indeed the evidence suggests at that point in time Ngwenya had not as yet communicated to the accused his need for a job.
>
> Ngwenya says he spent the night in the accused's room but nothing happened that night. If Ngwenya was fabricating and is falsely implicating the accused why would he then say nothing happened on this occasion when the two spent the night together?
>
> Secondly, as regards the visit to Harare the accused would have the court believe Ngwenya showed up at his door uninvited and unexpectedly. It is highly improbable that Ngwenya, having met the accused only once or twice in April of 1995 for a very short time, would take the trouble and risk of travelling all the way to Harare without any prior arrangement with the accused. What would have happened if he found the accused away from

> home or Harare, especially as he appears to have had no return fare to Bulawayo? If Ngwenya had showed up unexpectedly as suggested by the accused one would have expected the accused to be annoyed with Ngwenya for taking the accused for granted. The accused's reaction was the opposite. His conduct suggests he was pleased to see Ngwenya. He took him to Chikurubi and gave him some money. Again on the question of money why would the complainant insist he was given $400.00 when he was given $100.00? If anything it is the accused who has a motive to lie about the amount of money. An admission to having given the complainant a considerable sum of money would lead to the question of why it was done.
>
> Thirdly, as I have just said, the numerous invitations to the accused's hotel room is (are) more consistent with the complainant's evidence than that of the accused's explanation."

It is correct, as Mr *Andersen* submitted, that the judgment of the trial court does not detail the reasons for the rejection of the evidence of the appellant's chauffeur and especially his aide. But the approach was that where such evidence was directly in conflict with that of the complainant, there was no room left for it to be true. This was because the court was satisfied beyond all reasonable doubt as to the essential credibility of the complainant's version. It destroyed any reasonable possibility of truth in a version that differed from it.

In the result, the factual finding of the trial court cannot be disturbed.

Now to be decided is whether the criminalisation of consensual sexual intercourse per anum is in conformity with the protections to which persons are entitled to be afforded under the Constitution of Zimbabwe.

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; and
>
> (b) …
>
> (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; or
>
> (b) …
>
> (3) …
>
> (4) …
>
> (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 –
>
> (a) …
>
> (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." (Emphasis added).

The questions that arise are whether the common law 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. And if so, whether the derogation in subs (5)(b) of s 23, which permits such law to take account of physiological differences between persons of a different gender, has been shown not to be reasonably justifiable in a democratic society.

The common law crime of sodomy is defined as "unlawful intentional sexual relations per anum between two human males". See Hunt's *South African Criminal Law and Procedure* Vol III, 3 ed at 248; Snyman, *Criminal Law* 3 ed at 340-341. A helpful historical analysis is to be found in *S v K* 1997 (9) BCLR 1283 (C) at 1287D-1289D (paras 11-21).

The definition of sodomy clearly criminalises such sexual conduct between males whether committed with or without consent and in public or in private. *In casu* it is only necessary to determine whether the constitutional protection afforded against discrimination on the ground of gender has decriminalised the offence to the extent that it takes place in private between consenting male adults. That is the narrow issue. But see the remarks of ACKERMANN J in *National Coalition for Gay and Lesbian Equality & Anor v Minister of Justice & Ors* 1998 (12) BCLR 1517 (CC) at 1548 E-H (para 66); Hunt *op cit* at 250 (6); and Snyman *op cit* at 341.

I do not believe that it is any longer open to doubt that various forms of sexual conduct which have been held to constitute an offence if committed by a male person with another male person, are not regarded as criminal if committed by a male person with a female person. It is not an unnatural offence where a female masturbates a male; or allows him to obtain sexual gratification by friction between her legs (as in the *metsha* custom) or performs oral sex with a man, see *R v K & F* 1932 EDL 71 at 73-74; or, even more significantly, permits penetration into her anus, see *R v N* 1961 (3)SA 147 (T) at 148, *R v H* 1962 (1) SA 278 (SR) at 279 E-G, *R v M* 1969 (1) SA 328 (R) at 330 F-G, Strydom *op cit* at 341.

Yet the position is different if such acts are performed by a male person upon another male person. See *R v Gough and Narroway* 1926 CPD 159 at 163; *R v Curtis* 1926 CPD 385 at 386; *R v Taylor* 1927 CPD 16 at 19; *S v V* 1967 (2) SA 17 (E) at 18 B-C; *S v M* 1977 (2) SA 327 (Tk) at 357 G-H.

Furthermore, consensual sexual acts between women do not constitute an offence. See *S v H* 1995 (1) SA 120 (C) at 127 D-E; *S v K supra* at 1289 C-D (para 21); the *Gay and Lesbian Equality* case *supra* at 1530 D-E (para 14). Women may thus do what men may not do, for today only male-male sexual acts are the subject of criminal inhibition. Clearly the only distinction that makes such acts criminal is the participants' gender or sex. See generally, Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights* (1993) SALJ 450 at 453 *in fine*-454.

In his comprehensive and forceful judgment in the *Gay and Lesbian Equality* case *supra* ACKERMANN J neatly summed up the extent of the discrimination at 1528 G-H (para 11):

> '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; not did it proscribe intimate sexual acts in private between consenting adult women."

Article 26 of the *International Covenant on Civil and Political Rights*, which has been ratified by this country and is the most widely accepted agreement on human rights apart from the *Universal Declaration of Human Rights*, provides, *inter*

alia, that the law shall guarantee to all persons protection against discrimination on any ground including race, colour and sex. In *Toonen v Australia* (Communication No. 488/1992) the majority of the Human Rights Committee found that Tasmania's law criminalising homosexual activity violates article 17 of the *Covenant* (unlawful interference with privacy); and that it was unnecessary to consider whether in addition there had been a violation of article 26. One of the members, however, a Mr Wennergren, in an individual opinion, preferred to base his reasoning on the latter article. He wrote:

> "Firstly, these provisions of the Tasmanian Criminal Code prohibit sexual intercourse between men and between women, thereby making a distinction between heterosexuals and homosexuals. Secondly, they criminalise other sexual contacts between consenting men without at the same time criminalising such contacts between women. These provisions therefore set aside the principle of equality before the law. It should be emphasised that it is the criminalisation as such that constitutes discrimination of which individuals may claim to be victims, and thus violates article 26, notwithstanding the fact that the law has not been enforced over a considerable period of time. The designated behaviour nonetheless remains a criminal offence."

These observations, with which I respectfully agree, pertinently demarcate the reach and effect of the common law offence of sodomy in relation to s 23 of the Constitution.

R v M (1995) 30 CRR (Id) 112 is a judgment of the Ontario Court of Appeal. In that case the accused was charged with contravening s 159 of the Canadian Criminal Code which prohibited anal intercourse unless engaged in in private "between husband and wife or any two persons each of whom is eighteen years of age or more, both of whom consent to the act". It was alleged that the accused had engaged in acts of anal intercourse with his fiancée's niece who was

under eighteen years at the time – the age of consent for other sexual activity in Canada, including vaginal intercourse, being fourteen years. ABELLA JA held that s 159 was a discriminatory provision which infringed the guarantee of equality contained in s 15 of the Canadian Charter of Rights and Freedoms. The two other members of the court held that s 159 infringed s 15 of the Charter because it imposed a burden based on age.

The judgment of ABELLA JA is significant because the learned judge addressed the issue on the basis of the right to equality (the antithesis of discrimination) and not on the right to privacy. It therefore affords some support for the view that a law which subjects acts of anal intercourse occurring between consenting male adults to criminal sanction should be held to be unconstitutional on the ground that it discriminates against gender.

In the court below the learned JUDGE PRESIDENT, while seemingly recognising the argument that criminalising sexual intimacy between consenting male adults constitutes discrimination, nonetheless came to the conclusion that s 23 did not afford protection. At 543 A-D of the reported judgment he reasoned as follows:

> "Does the Constitution seek through its provision to protect such a right? I am not aware of any provision in the Constitution that creates such a right or seeks to protect an already existing right of a homosexual to penetrate another *per anum*. I am not here addressing myself to the desirability or otherwise of creating such a right. I will probably address that issue when I come to the question of an appropriate sentence.
>
> The framers of the Constitution were aware that in terms of common law consensual sodomy between males was an offence. If it were their intention to alter that position one would have expected them to use more explicit language, as indeed is the case in the South African Constitution. Section 8(2) of the Constitution of the Republic of South Africa Act 200 of 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'. (emphasis is mine).
>
> It is quite clear from that the South African provision against discrimination is intended to strike down any law that outlaws homosexual activity. The Zimbabwean Constitution, s 23 in particular, contains no similar wording on that point."

Although not cited, the learned JUDGE PRESIDENT relied on the approach of the United States Supreme Court in *Bowers, Attorney-General of Georgia v Hardwick et al* 478 US 186 (1986) at 196-197, in which a majority of five to four (see JUSTICE BLACKMUN'S stinging dissent at 199-214) was unpersuaded that the sodomy laws of some twenty-four States and the District of Columbia should be invalidated. But that case is distinguishable. The unconstitutionality of Georgia's sodomy laws was based upon the right to privacy, which is not specifically mentioned in the Constitution of the United States. A gender discrimination argument could not be advanced because the Georgia statute was gender neutral; anal sex was prohibited for homosexuals as well as heterosexuals.

In any event the judgment has been the subject of trenchant and sustained criticism. See Tribe, *American Constitutional Law* 2 ed at 1424 *et seq.*; Grey, (1997) *University of Colorado Law Review* at 373; (1986-1987) Vol 100 *Harvard Law Review* 210 at 213-220. Recently, and somewhat surprisingly, in *Romer v Evans* 517 US 620 (1996) the same court struck down an amendment to the Colorado State Constitution which prohibited public measures designed to protect persons based on their sexual orientation.

Accordingly I hold firmly to the view that the common law offence of sodomy, committed in private between consenting adult males, discriminates in itself between such persons on the ground of gender.

Since the law of sodomy takes due account of physiological differences between the male and female genders, the consequential question is whether that law has been shown not to be reasonably justifiable in a democratic society. If it has been it will be in contravention of s 23(1)(a) of the Constitution.

From a procedural aspect the burden of proof is on the challenger to establish that the impugned enactment goes further than is reasonably justified in a democratic society, and not upon the State to show that it does not. See *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S) at 382 *in fine* – 383A, 1984 (2) SA 778 (ZS) at 783H. In effect the court will consider three criteria in determining whether or not the limitation upon the protection is permissible in the sense of not being shown to be arbitrary or excessive. These criteria were identified in *Nyambirai v National Social Security Authority & Anor* 1995 (2) ZLR 1 (S) at 13 D-F, 1995 (9) BCLR 1221 (ZS) at 1231 H-J, and are whether –

(1) the legislative objective which the limitation is designed to promote is sufficiently important to justify overriding the fundamental right concerned;

(2) the measures designed or framed to meet the legislative objective are rationally connected to it and are not arbitrary, unfair or based on irrational considerations;

(3) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

I shall deal with each in turn.

As to whether the legislative objective insofar as it criminalises consensual sodomy between adult males is sufficiently important to justify overriding the fundamental right to be protected against gender discrimination

The first step is to identify the objective of the criminal law. This is not difficult. It must be to discourage conduct regarded as tending to promote sexual licence – conduct considered to be immoral, shameful and reprehensible and against the order of nature.

Undoubtedly there are some acts which are so repugnant to and in conflict with human dignity as to amount to a perversion of the natural order. Bestiality is an obvious example. But can it be said that to criminalise consensual anal intercourse between consenting males, in private, is so important an objective as to outweigh the protection against gender discrimination?

In seeking to find the answer it is helpful to take account of the legal position in other countries. In this connection I can do no better than to refer to the careful survey of the jurisprudence of other open and democratic societies undertaken

by ACKERMANN J in the *Gay and Lesbian Equality* case *supra* at 1540F-1544F (paras 40-51), the result of which the learned judge summed up at 1544 G-H (para 52) in these words:

> "(It) shows that in 1967 a process of change commenced in Western democracies in legal attitudes towards sexual orientation. This process has culminated, in many jurisdictions, in the decriminalisation of sodomy in private between consenting adults. By 1996 sodomy in private between consenting adults had been decriminalised in the United Kingdom and Ireland, throughout most of Western Europe, Australia (with the exception of Tasmania), New Zealand and Canada."

See also the similar historical examination in both *S v M* 1990 (2) SACR 509 (E) at 514 c-f, and *S v K supra* 1291I-1294A (at paras 32-40).

I would merely add, for the sake of emphasis, that the European Court of Human Rights in *Dudgeon v United Kingdom* (1981) 4 EHRR 149 at 167 (para 60) strongly underscored the change in judicial and social attitudes:

> "As compared with the era when (the) legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic laws of the member States."

See also *Norris v Ireland* (1989) 13 EHRR 186; and *Modinos v Cyprus* (1993) 16 EHRR 485 which also considered the existence of penal provisions in the law of the country in question insofar as they related to sexual acts committed in private by consenting adults.

In South Africa the new constitutional dispensation was preceded by a softening of attitudes towards deviations from the heterosexual norm which was reflected both in academic writing and in the judgments of the courts.

It may well be that the majority of the people, who have normal heterosexual relationships, find acts of sodomy morally unacceptable. This does not mean, however, that today in our pluralistic society that moral values alone can justify making an activity criminal. If it could one immediately has to ask: "By whose moral values is the State guided?".

As Professor R Dworken, in his work *Taking Rights Seriously* at 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 challenge 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 views, 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."

I am thus not persuaded that in a democratic society such as ours it is reasonably justifiable to make an activity criminal because a segment, maybe a majority, of the citizenry consider it to be unacceptable.

The courts cannot be dictated to by public opinion. It cannot replace in them the duty to interpret the Constitution and to enforce its mandates. Otherwise there would be no need for constitutional adjudication. Those who are entitled to claim the protection of rights include social activists and the marginalised members of society.

As to whether the measures designed to meet the legislative objective are rationally connected to it

In considering whether or not the criminal sanction attaching to consensual anal intercourse in private between male persons is rationally connected to the objective which it is allegedly designed to achieve, the conclusion I reach is that it is not.

It is irrational in my view to criminalise anal sexual intercourse between consenting male adults yet to recognise that it is not an offence for a woman to permit a man to engage with her in anal sexual intercourse. It is not rational to criminalise the one sexual activity but not the other. If both forms of sexual deviation are to be regarded as immoral and against the order of nature, by what logic is the discrimination against the male gender justified? Why should the female gender alone be given the protection of the Constitution?

Likewise, consensual unnatural sexual acts between women are not the subject of criminal sanction. Yet men may not do what women are permitted to do. Unnatural sexual acts engaged in by them are criminalised. Where is there a rational connection between the objective of discriminating on the basis of gender, anal sexual

intercourse or unnatural sexual acts committed by men but not such activity committed between women and men or women and women? In short, the law of consensual sodomy is arbitrary and unfair and is based on irrational considerations.

As to whether the means used to impair the right or freedom are more than is necessary to accomplish the objective

The impact of discriminatory criminal sanctions on homosexuals is undoubtedly very severe. It tends to increase the already existing societal prejudices on their lives.

As observed by Cameron *op cit* at 455:

> "Even when these provisions are not enforced, they reduce gay men … to what one author has referred to as 'unapprehended felons', thus entrenching stigma and encouraging discrimination in employment and insurance and in judicial decisions about custody and other matters bearing on orientation."

Much the same sentiment was expressed by CORY J in *Vriend v Alberta* (1998) 50 CRR (2d) 1 (Can. SC) at 42-43:

> "Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.
>
> Even if the discrimination is experienced at the hands of private individuals, it is the state that denies protection from that discrimination. Thus the adverse effects are particularly invidious. This was recognised in the following statement from *Egan* (at pp 139-40 CRR, pp 594-95 SCR):

> 'The law confers a significant benefit by providing state recognition of the legitimacy of a particular status. The denial of that recognition may have a serious detrimental effect upon the sense of self-worth and dignity of members of a group because it stigmatises them … . Such legislation would clearly infringe s 15(1) because its provisions would indicate that the excluded groups were inferior and less deserving of benefits.'
>
> This reasoning applies *a fortiori* in a case such as this where the denial of recognition involves something as fundamental as the right to be free from discrimination."

See also *Norris v Republic of Ireland supra* at 192 (para 21).

In the *Gay and Lesbian Equality* case *supra* at 1535 F-H (para 26), ACKERMANN J summed up the impact which the common law offence of sodomy has on gay men as follows:

> "(a) The discrimination is on a specified ground. Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, person-hood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate.
>
> (b) The nature of the power and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society.
>
> (c) The discrimination has, for the reasons already mentioned, gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity."

I would quote two further passages from this landmark judgment at 1539 E-H (paras 36-37). They read:

> "The criminalisation of sodomy in private between consenting males is a severe limitation of a gay man's right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation. It is at the same time a severe limitation of the gay man's rights to privacy, dignity and freedom. The harm caused by the

> provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.
>
> Against this must be considered whether the limitation has any purpose and, if so, its importance. No valid purpose has been suggested. The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose. There is accordingly nothing, in the proportionality enquiry, to weigh against the extent of the limitation and its harmful impact on gays. It would therefore seem that there is no justification for the limitation."

With much respect I endorse all these observations. See also the remarks of the same learned judge in the second *Gay and Lesbian Equality* case 2000 (1) BCLR 39 (CC) at 62H-64E (paras 41-42).

In my view, the criminalisation of anal sexual intercourse between consenting adult males in private, if indeed it has any discernable objective other than the enforcement of private moral opinions of a section of the community (which I do not regard as valid), is far outweighed by the harmful and prejudicial impact it has on gay men. Moreover, depriving such persons of the right to choose for themselves how to conduct their intimate relationships poses a greater threat to the fabric of society as a whole than tolerance and understanding of non-conformity could ever do.

I conclude therefore that the retention of the crime of consensual sodomy in our law is not reasonably justifiable in a democratic society. Accordingly I would allow the appeal on count 1 and set aside the conviction of sodomy.

(b) Counts 2 and 3 – Jefta Dube:

The appellant was convicted on count 2 of having sodomised the complainant on various occasions during the period extending from January 1985 to December 1986. On count three the charge was attempted sodomy. The appellant was convicted of committing an unnatural offence upon the complainant on various occasions during the period 1983 to 1986; the commission of an unnatural offence being a competent verdict on the charge laid. Embraced in this conviction are (i) an incident alleged to have occurred in December 1983; (ii) an incident alleged to have occurred in June 1984; (iii) numerous acts of intra-crural sexual intercourse in which the appellant was alleged to have placed his penis in between the complainant's thighs.

It is convenient to deal with the incidents in chronological sequence. First as to the State's case.

The complainant commenced his duties as aide-de-camp to the appellant on 16 December 1983. During his first week he was invited by the appellant to dine at State House at 6 pm. It was for the Saturday. He accepted the invitation with excitement. At the appointed time he proceeded to the appellant's office where he found the appellant seated behind his desk. They had a general discussion about life and religion and played a card game known as "Crazy 8". After a while they joined the appellant's family in the dining-room where dinner was served. Present at the table were the appellant's wife, daughter and two sons. The complainant partook of sadza and soup. Rice was also served. After the meal he and the appellant went back to the office. He was offered a drink and poured himself a whisky. In fact he drank several glasses of whisky. The appellant then invited him

to dance. The complainant said that he did not know how to dance, but the appellant was insistent. He said he would teach the complainant to dance. Ballroom music, that was pre-set, was switched on. The appellant held the complainant around the waist with one hand while the other hand rested on the complainant's shoulder. While dancing in this manner the appellant tightened his grip around the complainant's waist and pulled the latter's body close to his own. The complainant then felt the appellant's erect penis pressing against him. The appellant went for the complainant's mouth with his tongue. The complainant felt terrified. He broke away from the appellant and announced his departure. The appellant tried to persuade him to spend the night but the complainant explained that he was expecting a visit from a young brother. This was not true but an excuse to get away. As the complainant was leaving the office the appellant patted him on the buttocks, remarking that his buttocks were food for the chefs.

The complainant walked to his quarters. He was very upset. In his room he broke down and cried because the person who had abused him was the President with a lot of power. He felt trapped as he was working for the President. He decided to seek consolation from his aunt, Mrs Mleya, who lived in Mabelreign. He went to her home that evening and told her of the incident, save for mentioning the dinner. She said that nothing could be done because he had been abused by the President. The complainant spent the night at Mrs Mleya's house.

The next incident which the trial court held fell within count 3 occurred in June 1984. The appellant called the complainant to his office and informed him that he was expecting a visitor and that the complainant was to wait up

until the visitor arrived. While they waited they played cards. The complainant was offered a drink. He chose a soft drink. After a while the appellant asked him to leave the office as he wished to make a private telephone call. He told the complainant to leave his drink behind since he would not be out of the room for long. After ten minutes the complainant was summoned back to the appellant's office. They continued playing cards. Soon the complainant began to feel dizzy and tired. He observed the appellant come over to him and commence to fondle his body. The complainant tried to break away but did not have the strength to do so. The appellant started to kiss him. He unfastened the zip of the complainant's trousers, lowered them and removed his underpants. The complainant then lost consciousness. His next recollection was the appellant waking him up. He was lying underneath a duvet on the floor of the appellant's office. It was dawn. The appellant told him to leave. He felt some slimy stuff around the area of the anus, between his thighs and on his scrotum. The appellant remarked that he had dished for himself some food for adults and that there were many ways of killing a cat. This the complainant took to mean that the appellant had sexually abused him. He put on his clothes and went home. He made no spontaneous report of the incident. He kept it to himself for fear that to reveal it would cause people to "minimize my manhood".

The intra-crural acts performed upon him by the appellant were said by the complainant to have occurred between 1985 and 1986.

Some time in 1985 the complainant requested to be allowed to play football under the Black Mambas. He thought that by doing so he would be relieved for good of his duties at State House. The appellant agreed to the transfer but

imposed certain conditions. One of the conditions was that the complainant would continue to report for duty and was to report to the appellant what he did over the weekends and his whereabouts. During this period the complainant said he was sodomised by the appellant. In his own words:

> "I still recall that each time I had a weekend not on duty the accused person would request to see me on whenever I did not have any soccer match. Due to fear I would go to visit the accused person taking into consideration that I had informed the Commissioner, Mr Nguruve, about my plight and that he was in no position to help me at all. I would visit the accused person whenever he invited me to do. I could say this was from the year 1985 up until 1986 when I left. Each time the accused person invited me I would go to his office and the accused person would sodomize me."

It is clear from the complainant's evidence that he used the word "sodomize" to include intra-crural acts. He said: "The accused person would place his penis in between my legs. At times I will be bending, at times I would be lying on the floor, at times I would be holding onto a chair … . He would place it (his penis) in between my legs and at times he would place it within my anus". At the close of cross examination it was put to the complainant: "As appears from the notes and your statement you never ever alleged penetration, always that your thighs were closed and that penetration was between your thighs, not your anus". To which he answered: "I said that sometimes I was in fact penetrated through my anus but on most of the occasions it was between my thighs".

Mrs Mleya's evidence was to the effect that on a certain Friday evening in December 1983 the complainant came to her house and started crying. She took him into the lounge so that he could explain to her what had transpired. The story he narrated was what had occurred to him at State House earlier that evening, save that no mention was made of him having dined with the appellant and the family.

Mrs Mleya's advice was that the complainant should report the incident to his seniors at work. He said he would try to do so. The complainant slept that night at her house.

Mrs Mleya went on to testify that after a long lapse of time and sometime during 1984, the complainant came to the house and said to her: "Aunt it eventually happened". She asked what had happened, and the complainant started to cry. He said: "Aunt can you imagine me being sodomised by another man?". He then narrated to her what the appellant had done to him on the evening in June, saying that it was on that occasion that he had been invited to dinner. This piece of evidence was admitted to rebut the defence allegation of fabrication on the complainant's part. On the same basis statements made by the complainant to Commissioners Nguruve and Mukurazhizha and Senior Assistant Commissioner Chiutare were admissible.

Nguruve testified that between 1983 and 1985 (according to the complainant the occasion would have been during February 1985) the complainant was brought to his office at Police General Headquarters. He said that he wanted a transfer from State House where he was an aide-de-camp to the appellant. On being asked the reason, the complainant responded that it was "because the President was asking to have sex with him". No detail was given – in particular there was no mention of the June 1984 incident – but Nguruve made it clear that he had little time to devote to the complainant. He had told him to be very brief. He saw the complainant for less than four minutes.

Mukurazhizha informed the court that not long before 19 May 1986 Chief Staff Officer (Personnel) Chademana advised him that the complainant wished to see Acting Prime Minister Muzenda. He asked Chademana to bring the complainant to his office. When the complainant was in the office he asked him what the problem was. The complainant said that on numerous occasions he had been subjected to various acts of sodomy by the President (the appellant). He was seeking a transfer from State House to a station of his own choice in the Midlands. He did not want the matter investigated. Mukurazhizha asked the complainant to submit an application for transfer stating his reasons. He was instructed to put down as much detail as he could.

The complainant duly addressed an application for a transfer to the Commissioner of Police on 19 May 1986. It particularised the incident which he alleged occurred in December 1983. It made no reference to the second incident in June 1984, but falsely alleged that in December 1984, when he and two other aides were with the appellant in Bulawayo, the latter "during the night … would attack us luring us to homosexualism", with the result that he had run away from State House and slept at Ross Camp. The application went on to state:

> "On arrival from the trip the attacks subsided such that I felt no longer vulnerable. The President resumed his attacks recently such that I feel my life is in danger until the President meets his end. I therefore request for a transfer so that I cannot be vulnerable to this scandal."

In April 1986 the complainant informed Acting Prime Minister Muzenda that he was being sodomised by the appellant. And during the same year he informed Chief Staff Officer Chademana of the first incident. He made no mention of the alleged incident in June 1984 or of any other sexual abuse by the appellant.

During the early part of July 1986 the complainant was transferred from State House to Gweru Central Police Station. And on 15 July 1986 in a long letter to the Commissioner of Police he made no specific allegation of being subjected to any sexual abuse by the appellant.

On 24 February 1997 the complainant was convicted of the murder of a fellow police officer on the night of 25 September 1995. At his trial he alleged that he had shot the deceased for having referred to him as "Banana's wife".

On 20 March 1997 the complainant, who was then serving a ten year prison sentence at Chikurubi Prison, was taken by Chief Superintendent Khumalo to State House for the purpose of indications. During the course of making the same he referred to the fact that on the first occasion he had been invited to dinner. He referred in detail to the incident in June 1984 and to the intra-crural acts which he said he was subjected to. The indication made was that he would close his legs and the appellant would insert his penis below the scrotum between his legs, make sexual movements and ejaculate. No mention was made of penetration per anum.

The appellant in evidence adamantly denied that any form of intimacy had taken place between himself and the complainant. It was "absolute nonsense" to suggest it had. He never invited the complainant to dinner. His wife confirmed that on no occasion did an aide-de-camp ever have dinner with the family. It was against protocol for such an officer to dine with the President.

The trial court was alive to certain features which, in its view, tended to dent the complainant's credibility. It cited the following criticisms:

(a) his evidence contained conflicts within itself;

(b) his evidence contradicted in certain respects previous evidence given by him at the criminal trial;

(c) his evidence conflicted with previous statements made to various people; and such previous statements did not contain the same detail as the evidence given as a witness;

(d) he had a motive to give false evidence at the criminal trial and that motive persisted at the trial of the appellant;

(e) he may have had the motive to testify falsely so as to bolster the civil claim for damages he had instituted against the appellant.

Nonetheless the court was satisfied that the complainant had not falsely incriminated the appellant.

Mr *Andersen* drew this Court's attention to further unsatisfactory aspects in the complainant's version. The complainant stated that no further incident occurred, other than requests not complied with for him to visit the appellant, between the incident in December 1983 and that in June 1984; and not thereafter until subsequent to his return from Bulawayo in December 1984. In contradiction elsewhere in his evidence the complainant alleged that incidents occurred in the

grounds of State House between December 1983 and June 1984 when the appellant would pat him on the buttocks, grab him and put his arms around him from behind.

Moreover, in total contradiction, the charge alleged sodomy and attempted sodomy in 1984 and only attempted sodomy in 1985 and 1986. There was also the false allegation made in the defence outline at the criminal trial that the complainant had been forced to submit to oral sex. He could not have understood the term to mean talking about sex. And the further false allegation that the appellant, while in Bulawayo in December 1984, actually attacked and attempted to sodomise him and two other aides.

In its evaluation of the evidence of the complainant the trial court said this:

> "It is not an easy task to assess the evidence of Jefta Dube. He is a single witness in a case of a sexual nature where there is no evidence *aliunde* to prove the actual commission of the offence. In cases of this type … medical evidence of penetration normally provides such corroboration. Nor could it be said that Dube's evidence was good in every respect. He abused alcohol and drugs. He is serving a ten year gaol sentence for murder committed after a heavy drinking spree and he is known to have breached instructions on at least one occasion in Bulawayo by staying out all night. He was found to have lied at his murder trial and was proved to have made inconsistent statements in respect of this trial, which he found difficult(y) in explaining in cross-examination.
>
> However the court must look at Dube's credibility in the context of the trial as a whole before deciding whether, even if credible, there is sufficient evidence on which to found a conviction. Dube's shortcomings do not mean that everything he says is a lie nor further that he cannot be the victim of a sexual assault."

I agree with the finding of the trial court that the State proved that the complainant was indecently assaulted by the appellant on or about 16 December 1983,

very shortly after he had taken up duty as an aide-de-camp. Despite the contrary evidence of Mrs Banana, I do not perceive of any reason why the complainant would invent an invitation to dinner. A Presidential invitation to dinner to an aide-de-camp is not an ordinary occurrence – and one not likely to be fabricated. A complaint was made to Mrs Mleya at the earliest opportunity. She was the person to whom the complainant could reasonably be expected to make it. True, there was a difference as to whether the complainant came to the house on a Saturday evening or on a Friday evening as maintained by Mrs Mleya. But I do not consider that this discrepancy points to a fabrication of the making of the complaint by the two of them. A careful reading of Mrs Mleya's evidence satisfies me that the trial court was justified in its assessment of her as a credible witness. Accordingly, her evidence went to the consistency of the complainant's story.

I have already expressed the view that the better approach in sexual cases is not to insist on the application of the cautionary rule, but simply to be satisfied, as with proof of other offences, whether the guilt of the accused has been established beyond a reasonable doubt.

With regard to this incident, however, the complainant's evidence received corroboration. Mrs Mleya stated that on the evening he came to complain of the occurrence the complainant was in a distressed state. He broke down crying. She had to calm him down.

Furthermore, impressive corroboration of the incident is, in my view, provided by the evidence of other complainants as to what the appellant had done to

them. In this regard the approach as to the admissibility of their evidence is not to require striking similarity as an indispensable element but rather, as suggested in *R v P supra*, to ask whether their probative contribution is such as to outweigh the prejudice to the appellant. There is, in my opinion, no possibility whatsoever of the complainants, to whom I am about to refer, having colluded together to falsely incriminate the appellant.

In count 5 Fortune Masawi was employed as a security guard at State House. He was invited to the appellant's office. When there the appellant started playing ballroom dance music on a radio cassette. Masawi was invited to dance. He said he could not dance and the appellant offered to teach him. They danced facing each other. The appellant's penis became erect. He attempted to kiss Masawi, but the latter broke away.

In count 6 Kembo Kaitano, a gardener, was picked up in the street by the appellant and taken to his office at the University. He was offered a drink. He was invited to dance. When he responded he could not dance, the appellant offered to teach him. Ballroom dance music from a radio cassette was switched on and the dancing commenced. The appellant's penis became erect and he made sexual advances, kissing Kaitano on the mouth. Kaitano broke away.

In count 7 Robert Gwatidzo was attached to the appellant as a security guard. He was invited to the appellant's office. On arrival he was told to remove his grenade launcher and bandoleer. The appellant switched on music on a radio cassette and invited Gwatidzo to dance. They danced facing one another. As the dancing

progressed the appellant's grip became tighter and tighter. His penis became erect and he rubbed it against Gwatidzo's body and attempted to kiss him. Gwatidzo broke away and shouted for help.

In count 9 Lovemore Dhundu, one of the appellant's aides, was invited to the appellant's office. He was offered a drink. The appellant put on some music and invited him to dance. As they danced the appellant gripped him very tightly and advanced to kiss him. Dhundu broke away and left the office.

In count 10 Christopher Ndonya, an aide-de-camp, was invited to the appellant's office. He was offered a drink and then invited to play a game of cards. After that the appellant switched on some music and invited him to dance. During the dance the appellant held Ndonya very close to his body. He started to breathe fast and his penis became erect. Ndonya pushed the appellant away and left the office.

In count 11 Ignatius Gota was a security officer. He was called to the appellant's office and offered a drink. Music was played and he was invited to dance. When he indicated that he could not dance, the appellant offered to teach him. As the dance progressed the appellant's grip became tighter and tighter and he pushed himself closer to Gota. Gota felt the appellant's erect penis. The appellant became very excitable and wanted to kiss Gota, who pushed him away and left.

Very different considerations apply to the second incident. There was no spontaneous report of it from the complainant. He did not mention it to Mrs Mleya until some considerable time later, nor to any of his superiors at State

House to whom he could reasonably be expected to make it. He made no mention of the incident to Nguruve. It would have taken no time at all to have spoken of it. Again when he complained to Mukurazhizha in early May 1986 not one word was said about what had been done to him in June 1984. To Chademana he only referred to the first incident. In his written application for a transfer dated 19 May 1986 he detailed the first incident, made no reference to the second and falsely alleged that he and two other aides had been subjected to homosexual attacks while in Bulawayo. In April 1986 he informed the then Acting Prime Minister Muzenda that the appellant was sodomising him – no details were given. Finally, on 15 July 1986 in a long letter to the Commissioner of Police, written at a time when he had been transferred to Gweru, he made no specific allegation of having been subjected to any sexual abuse by the appellant.

Quite apart from the failure of the complainant to reveal the second incident when provided with the opportunity to do so (apart from to Mrs Mleya), his evidence of its occurrence stood without corroboration. Accepting as I do that corroboration was not essential, it must not be overlooked that the complainant in many respects was a thoroughly unsatisfactory and mendacious witness. In my view, it was unsafe to conclude that the second incident testified to by the complainant had been proved to have occurred beyond a reasonable doubt.

The trial court found that the State had proved the commission by the appellant of intra-crural acts as well as actual penetration per anum which occurred between early 1985 and July 1986.

I shall consider at the outset whether, assuming the complainant's evidence to be true, acts of sodomy were perpetrated upon him or merely intra-crural acts. It is apparent from a reading of the evidence that the complainant believed that the latter acts amounted to sodomy. In other words to constitute the offence of sodomy, penetration per anum was not necessary.

The following passage in the complainant's evidence-in-chief bears this out:

> "I still recall that each time I had a weekend not on duty the accused person would request to see me or whenever I do not have any soccer match. Due to fear I would go to visit the accused person taking into consideration that I had informed the Commissioner Mr Nguruve about my plight and that he was in no position to help me at all. I would visit the accused person whenever he invited me to, I could say this was from the year 1985 up until 1986 when I left. Each time the accused person invited me I would go to his office and the accused person would sodomise me."

I have already cited other passages from the complainant's evidence in which he described what occurred. True he did add that at times the appellant would put his penis into his anus. Significantly, although during the period 1985 to mid 1986 he complained about the appellant's actions and used the word "sodomy", he never specifically said that he was referring to sexual intercourse per anum. To Nguruve he complained that "the President was asking to have sex with him". To Mukurazhizha he said that on numerous occasions he had been subjected by the appellant "to <u>various acts</u> of sodomy" (emphasis added). In 1986 he advised the Acting Prime Minister that he was being sodomised, but gave no details. In his defence outline filed for the purposes of the criminal trial it was claimed that "he was forced to submit himself to <u>homosexual practices</u> including oral sex through threats and blackmail by ex-President Banana" (emphasis added).

It was put to the complainant in cross-examination that in no statement to the police had he suggested that there was any semen in the region of his anus, to which the reply was that he had told the police that. When challenged that he was lying, the complainant answered:

> "Well, when I say that around my back, my backside, I am not saying that I am positive that it was right in the anus or what, but I am saying that I felt that the whole of my back area was wet. And further to that when I was sodomised that was not done when I was conscious. I was asleep. I did not feel it." (emphasis added).

I am satisfied that it would be unsafe even on an acceptance of the complainant's evidence to find, as held by the trial court, that the State had proved that the appellant had subjected the complainant to sexual intercourse per anum. At best no more than intra-crural conduct was established.

There can be little doubt that subsequent to January 1985 the complainant revealed a high degree of persistence and determination to leave State House. He reported having been sexually abused by the appellant to senior members of the police force, to an Acting Prime Minister and to an Acting President. The fact that he went to such lengths to obtain a transfer from State House was cogent evidence that something was happening to him there of which he strongly disapproved.

In my view, the trial court made two very telling points against the appellant's protestations of innocence. The passages in the judgment read:

> "The detention of Dube at State House in Bulawayo was the only disciplinary action taken against Dube of any severity. However, whatever action was taken in Harare was of a relatively minor nature and in point of fact the punishment detailed in the memorandum, Exhibit 3, signed by Chademana is consistent with the accused wanting to keep Dube at State House as much as possible even when he was meant to be off-duty. The whole tenor of Exhibit 3 smacks of the accused jealously wanting to keep a close eye on Dube as if Dube was his wife or girlfriend. One would have expected the accused, if he believed Dube was guilty of what is alleged in Exhibit 3, to have instructed the head of close security to have Dube fired or transferred from State House as a security risk. According to Exhibit 3 the accused was alleging that Dube had a drinking problem. What Head of State in his right mind would entrust his safety (to) a drunken aide-de-camp with a firearm? This simply does not make sense. According to Exhibit 3, the accused was alleging that Dube brought prostitutes into State House which made him a security risk. The accused also alleges in the same document that Dube was unreliable in reporting for duty on time. What is so incredible about these charges against Dube is that he was not fired. In the court's opinion these were trumped up charges designed to maintain the accused's hold on Dube for some ulterior motive. If the accused believed in the truthfulness of these charges he would have had Dube fired or transferred. The accused's action in this regard is more consistent with Dube's version of events that he was being kept at State House for purposes other than his official duties.
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> On the undisputed evidence of Dube on how the accused recruited Dube the accused shows or reveals an unusual interest in Dube. One does not expect a Head of State to recruit his own aide-de-camp in that manner. The accused sent personal emissaries to recruit Dube. The accused personally interviewed Dube prior to the bogus official interview for the job of an aide-de-camp. During this preview the accused promised Dube all sorts of advantages if he were to become one of the accused's aides-de-camp."

I am in agreement with the trial court that the probabilities overwhelmingly favour the complainant's evidence that between January 1985 and mid 1986 he was sexually abused by the appellant on numerous occasions. But such sexual abuse fell short of penetration per anum. It amounted to inter-femoral sex. See *R v Gough and Narroway* 1926 CPD 159.

In the result, I would alter the conviction on count 2 to guilty of committing unnatural sexual offences on the complainant on various occasions during

the period alleged; and on count 3, to guilty of committing an indecent assault on the complainant on or about 16 December 1983.

(c) Count 4 – Patrick Gunda:

On this count the appellant was charged with attempted sodomy but convicted of indecent assault, the offence being committed in December 1983.

The complainant was employed as a cleaner at State House. He also worked as a waiter after finishing cleaning. On a morning when the complainant was cleaning the appellant's study at State House, the appellant locked the door and led the complainant to one of the guestrooms. The appellant unlocked the guestroom door and the complainant entered. The appellant followed, locking the door behind him. He then advanced towards the complainant, who backed away until he fell on the bed. The appellant grabbed hold of the complainant and lay on top of him. He started to fondle him; he lowered the zip of the complainant's trousers and fondled his penis. The appellant then opened his own zip, produced his penis and inserted it between the complainant's legs. He went through the motions of sexual intercourse and ejaculated between the complainant's legs. When he had finished the appellant unlocked the guestroom door. He ordered the complainant not to tell anyone about what had occurred.

The complainant did not heed the instruction. He went to his quarters and changed his clothes which had been soiled with semen. He then reported the incident to his superior, Enos Saunyama, who did not believe him.

About a week later the appellant again approached the complainant when he was cleaning the study. He asked the complainant to sit on a sofa and sat down beside him. The appellant started to caress the complainant. He placed his hand underneath the complainant's shirt. He then lowered the zip of the complainant's trousers and fondled his penis. He kissed the complainant on the mouth and lay on top of him. he produced his penis and inserted it just between the complainant's thighs and started going through the motions of sexual intercourse. He ejaculated. After finishing he gave the complainant a book he had authored entitled "*The Woman of my Imagination*". The complainant again complained to Saunyama.

Almost a month later the appellant accosted the complainant in his study. The complainant ran away before the appellant could do anything to him. He went to his quarters. After a short time he was called by the controller, Cephas Chinhengo, to his office. He was informed that the appellant had missed some money in the office. The complainant was suspected of having stolen it, but no amount was specified. He was referred to the security staff. The complainant denied the charge as false and said that it had been made by the appellant because he had run away when the appellant had advanced upon him. No charge of theft was brought against the complainant.

The following day he was transferred to the laundry department and thereafter an appointment was made for him to see Minister Mnangagwa. He was questioned by the Minister and instructed to put his complaint in writing. This he did, stating that he had been sodomised by the appellant several times in the office.

Saunyama testified that the complainant had reported that the appellant had used him like a woman. He did not believe the complainant and rejected the allegation. It was only when the complainant reported the second incident that he began to believe him.

Chinhengo recalled that early one morning the appellant complained about money having gone missing and that he suspected the complainant to have stolen it. Chinhengo then called the complainant to his office. The complainant told him that the charge was a fabrication and that he was being accused because that morning he had refused the appellant's sexual advances. The complainant told him that he had previously been sodomised in one of the guest bedrooms and also in the office.

The appellant denied any sexual molestation of the complainant. He suggested that such incidents could not possibly have occurred at 8.00 am, the hour suggested by the complainant, as he always received briefings from the senior officers at State House at that hour. He denied giving the complainant a book, and said that money did go missing and he reported this to his secretary, Mr Sileya.

The trial court believed the complainant. The relevant passage of the judgment reads:

> "The complainant is a simple general hand educated up to Standard 1. The allegation he is making is not only of an unusual nature but was made against a Head of State. He reports these events to the unsupportive Saunyama. He persists in making such report(s) to Saunyama, his Head of Department, who is unsympathetic. When the complainant complained to Saunyama for the first time he told the complainant to resign. Why would such a simple general hand persist with such reports after being told to resign unless they were true?

> The complainant made these reports not only to Saunyama but also to Chinhengo and members of the security staff at State House. Surely the complainant appreciated that by making these reports to these people the accused, a sitting Head of State, could get to know of the allegations he is making against him. Even a simple general hand like the complainant would appreciate the possible dire consequences that would follow if such allegations were to be false. The suggestion that the complainant made these allegations to afford himself a defence to the allegation of theft simply does not hold water. The first and second report(s) to Saunyama were made before the allegation of theft.
>
> …
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> The complainant's story is unusual in its details. He was led to the guestroom where he was abused by the accused simply advancing towards him as he retreated and fell on the bed. He was fondled and finally indecently assaulted. This sounds like an original story, which he told because it happened. To suggest that the accused fabricated a story that is unusual in order to make it credible is simply untenable. The complainant struck the court as simply devoid of that kind of cunning."

It found that the complaints had been made to Saunyama immediately after each incident.

With regard to the criticism that the two incidents could not have occurred at the time indicated by the complainant, the trial court said this:

> "Defence counsel made issue of the fact that the complainant at one stage in his evidence alleged that the incidents took place between 8 am and 9 am. It was suggested that at that time the accused would be attending briefings and could not have committed the offence at that time or at all. The complainant also said the incidents took place early in the morning while he was sweeping the accused's office. It is virtually common cause that it was one of the complainant's chores to clean the accused's office. This he would obviously do before the accused and other staff commenced work. This is the time the incidents occurred, before office hours. The uncontroverted evidence of the complainant was that he doubled as a waiter and served the accused at the breakfast table after cleaning the accused's office. Breakfast, one would expect, was served before 8 o'clock, after which time the accused would go to his office. The complainant was giving evidence of events that occurred more than ten years ago and confusion regarding the precise time some of these incidents took place is to be expected. It is unrealistic to expect witnesses to remember minute details as to the precise time incidents like these occurred more than ten years afterwards. In the result the court is satisfied that the

> events took place early in the morning because offices would naturally have to be swept before office hours. The complainant's explanation that this happened very early in the morning while he swept the accused's office clears the confusion about the offences having occurred between 8 am and 9 am. In my view, the accused's contention that the events could not have taken place because he was attending morning briefings at the time the alleged events took place has no substance."

In my view, the finding by the trial court that the complainant was a credible witness cannot be gainsaid. It does not brook interference by this Court. It was after all very much in accord with the probabilities.

(d) Count 8 - Christopher Machingauta:

On this count the appellant was charged with and convicted of indecent assault. At the relevant time the complainant was a member of the Air Force on attachment to State House as an aide-de-camp. He assumed duty at State House at 0800 hours on 1 December 1985, after having been interviewed for the position by the appellant and others. While waiting in the duty room he received a message that the appellant wanted to see him at 1400 hours that afternoon. The appointment was subsequently moved to 1800 hours.

At 1800 hours the complainant, who had been off duty since noon and had spent his free time in town, was back at State House for his appointment. He waited a while as the appellant was said to be busy with a little boy. When eventually called to the appellant's office he noticed that the appellant was sweating and breathing heavily. He offered the complainant a drink. The complainant accepted a coca cola. The appellant then briefed the complainant on the nature of his duties, after which he invited him for a walk in the State House grounds. When in the vicinity of the swimming pool the appellant proceeded to go in and out of the two

change-rooms. He then approached the complainant, saying that he could lift him. He grabbed the complainant by part of his upper body intending to lift him up. The complainant pushed his elbows between the appellant's hands and released himself from the grip. He told the appellant not to do that. The appellant, however, persisted and approached the complainant and took hold of him for the second time. The complainant again released the appellant's grip upon him by using the same method. The appellant made a third approach. He was salivating and showing signs of excitement on his face. As he attempted to take hold of the complainant for the third time, the complainant seized his hand, twisted it and knocked the appellant on the knees. He then threw a flurry of blows to the appellant's head with the intention of causing "spatial disorientation" so that he could escape. Fearing that he might be in grave danger if the appellant chased after him, he held him by the back of his trousers and slid him into the swimming pool. With that the complainant "tiptoed" briskly back to the aide's office without looking back. He collected his friend and proceeded into town and then to Manyame Airbase where he drew a pistol and a rifle. He came back into town where he spent the night at a friend's place.

The next morning the complainant went to Air Force Headquarters. He went to the office of Wing Commander Tsomondo and explained to him what had happened at State House. He was then taken to Wing Commander Tazaruwa's office. He informed the Wing Commander, who was in charge of personnel, that he no longer wished to serve at State House and explained the occurrence of the previous evening. Tazaruwa accompanied him to Air Commodore Shiri and from there he was taken before Air Marshal Tungamirayi. He gave his story to both of them but concealed that he had put the appellant into the swimming pool. When it was

explained to him that he would have to return to State House pending finalisation of withdrawal procedures, the complainant would have none of it. He approached Dr Chabudapasi of the Air Force and told him that he wanted to be admitted into hospital while the procedures for his withdrawal were being completed. The doctor refused to admit him as he was not sick. The complainant then telephoned State House and advised Superintendent Pritchard that he was not reporting for duty as he was not feeling well. The complainant never returned to State House and was transferred shortly thereafter.

Doctor Chabudapasi confirmed that the complainant asked to be admitted to hospital so that he would not have to report for duty. He refused the request as the complainant was looking quite healthy. The complainant had given as the reason that the appellant had made sexual advances upon him.

Tazarurwa also confirmed that the complainant made a report to him and that he took him to Shiri. Shiri spoke of the report the complainant made to him. He said that the complainant appeared to be in a state of shock – he was panicking. He wanted some form of protection from his superiors. The complainant made no mention, however, of having put the appellant in the swimming pool. Shiri took the complainant to Tungamirayi.

The trial court was impressed by the complainant as a witness, despite certain contradictions which emerged between his evidence and his statement to the police.

The appellant denied *in toto* the incident recounted by the complainant. He said he did not recall even seeing the complainant prior to him entering the witness-box to testify.

I have no doubt that the trial court was correct in finding that the incident did occur and that the appellant's denial was patently false. The complainant's evidence was supported by the events which followed the encounter with the appellant. He made reports to Air Force personnel. He appeared to Shiri to be in a state of shock and panic. When told he had to return to State House he attempted to get hospitalised. He had also secured a rifle and a pistol from the armoury. What caused the complainant to act as he did? I agree with the opinion of the trial court that it was because he had struck the Head of State about the head and put him into the swimming pool. He was afraid of what would happen if he were to return to State House. He thought he might be shot on sight or face immediate arrest. It is also of significance that the complainant only worked at State House for four hours. His sudden dislike for State House, after being pleased at having been appointed the appellant's aide-de-camp, was only explicable as a result of the appellant's behaviour.

The trial court found that the appellant's actions amounted to an indecent assault. I do not agree. There is no doubt that the complainant believed, with justification, that this was what was in the appellant's mind. But such an intention was not translated into action. All that the appellant succeeded in doing was twice to take hold of the upper part of the complainant's body in order to lift him up, and to attempt to do so for a third time. However, that there were signs of

excitement on his face and he salivated amounted to clear evidence of an intent to commit an indecent act, which was thwarted by the physical resistance shown by the complainant.

In the circumstances, it seems to me that the appellant ought to have been convicted of assault with intent to commit an indecent act.

(e) Count 5 – Fortune Masawi; Count 6 – Kembo Kaitano; Count 7 – Robert Gwatidzo; Count 9 – Lovemore Dhundu; Count 10 – Christopher Ndonya; and Count 11 – Ignatious Gota:

I have already provided a brief account of the evidence given by these complainants in finding that what they testified had been done to them by the appellant, corroborated the evidence of Jefta Dube insofar as the December 1983 incident is concerned. I reiterate that the test of admissibility of the evidence of these complainants *vis-à-vis* one another is not to require striking similarity as an indispensable element. It is whether their probative contribution is such as to outweigh the prejudice of such evidence to the appellant. Thus to be asked is whether the evidence of one complainant, about what occurred to him, is so related to the evidence given by another complainant, about what occurred to him, that the evidence of the first provides strong enough support for the evidence of the second to make it just to admit it, notwithstanding its prejudicial effect. This relationship, from which support is derived, is not confined to striking similarity.

In counts 3, 5, 7, 8, 9, 10 and 11 there was an invitation of low-ranking personnel, security officers and aides to the appellant's office at State House. In

count 6 Kaitano, a gardener, was invited to accompany the appellant, then a former President and a very important figure, to his office at the University. It is highly unusual for a present or former Head of State to invite such persons to his office for the purpose of socialisation; and especially so in the case of a gardener who is a total stranger. In the office dancing took place to music played on a radio cassette. Those complainants who told the appellant they did not know how to dance were told that he would teach them (Dube, Masawi and Kaitano). Again it is highly unusual for a President or former President to seek to dance with such persons as the complainants. Indeed it is strange for a male to dance with another male unless in the course of a lesson or in order to practise, and there is a close relationship between the two. While dancing the appellant's grip became tighter, his penis became erect (Dube, Masawi, Kaitano, Gwatidzo, Ndonya and Gota) and he would kiss or attempt to kiss the complainants (Dube, Masawi, Kaitano, Gwatidzo and Dhundu).

The trial court did not lose sight of the possibility that the complainants Dube and Ndonya might have discussed their experiences involving the appellant, as well as Gwatidzo with Gota, and Machingauta with Dhundu. Yet it was satisfied, and rightly so, that there was no possibility of connivance among the other complainants. The situation was one where the complainants referred to described in fairly similar terms how the appellant had conducted himself with them. To say that such similarity of behaviour was mere coincidence is, as the trial court aptly said, "an affront to commonsense".

I do not propose to deal in any detail with the evidence of the individual complainants on these counts. I would merely indicate the following in respect of each of them –

Fortune Masawi – (Count 5):

The trial court held that he was a credible and truthful witness whose evidence standing alone would justify the conviction of the appellant. I think this was an overgenerous assessment. There were inconsistencies in his evidence and inconsistencies between it and his statement to the police. Furthermore, although he gave somewhat confused evidence as to whether he had reported the incident to his colleague Chabuta, the latter was not called as a witness. The complainant also claimed that he had reported the matter to Minister Mnangagwa, in writing, and had handed over a book and a $10 note, given to him by the appellant. The statement to the Minister, the book and the $10 were not produced. In short, were it not for the corroboration afforded to this complainant's account by the other complainants referred to, I would not have upheld the conviction of indecent assault.

Kembo Kaitano – (Count 6):

His evidence, save for why he had not taken his employer's battery to the garage at Groombridge rather than to the garage at Mount Pleasant Shopping Centre, was entirely convincing. The entire episode he described was denied by the appellant. But for what possible reason would this complainant fabricate it? It was not even he who later came forward to the police. It was his erstwhile employer. One most impressive piece of evidence was that he was able to describe the motor vehicle the appellant was driving on the afternoon in question. It was a red Toyota

Langley. That the appellant owned such a vehicle was admitted. How would the complainant have come by this knowledge? He was also able to describe the locality of the appellant's office in the western side of the University; and he spoke of the office having a refrigerator and a radio. He would hardly have made this up. Finally, he made a report of the matter to his employer, Zvinechimwe Churu, the following morning. True, Churu's recollection of what he was told did not square with the complainant's version in many respects, but what Churu did notice was that the complainant was "shaken by the event".

I am satisfied that the appellant was properly convicted of having indecently assaulted this complainant.

Robert Gwatidzo (Count 7):

Here again but for the corroboration afforded by other complainants – insofar as (1) the invitation to a lowly officer in the State House hierarchy to dance, (2) the dance at which the appellant's grip became tighter as the dance progressed and (3) the erection of the appellant's penis and the rubbing of it against his partner's body – I would not have convicted the appellant on the evidence of this complainant. There were many imperfections in the evidence and Mr *Andersen* addressed a powerful argument in destruction of it. Suffice to state that there were discrepancies between the sworn account and the police statement; that during evidence-in-chief relating to what occurred in the appellant's office the complainant made no mention of threatening to let off his firearm. This emerged in cross-examination (but was referred to in the police statement). There were also serious contradictions between his evidence and the police statement with regard to his presence in Mlingo's room

and the encounter with the appellant. No complaint was made that evening and, other than the word of the complainant, there was no evidence from the State that he reported the incident the following morning.

It was urged that the evidence of Mrs Banana was not fairly considered by the trial court. The complainant testified that, having freed himself from the appellant's grip and having punched him twice on the left shoulder, he shouted out in Shona "mother – mother). This was heard by Mrs Banana who rushed into the office dressed only in a brassiere and petticoat. The complainant left the room with the appellant and his wife conversing in Ndebele. The trial court found that Mrs Banana did not emphatically deny that such an incident ever took place. She was equivocal. I must say that a reading of her evidence is not as positive a denial of her coming upon the scene as I would have expected had the complainant's evidence been false. The point made by the trial court carries weight. It was that a lying witness does not fabricate the type of detail given by the complainant which involves the wrongdoer's wife, who would be likely to give evidence in support of her husband and against that of the complainant. I must confess that this piece of evidence from the complainant has a distinct ring of truth about it. I am also impressed by the reaction of the complainant when it was put to him that the first incident never happened. He answered: "You mean I am conjuring this up? Q. Yes? A. You can't be serious".

Nonetheless, but for the corroboration provided by other complainants I would have given the appellant the benefit of the doubt.

Lovemore Dhundu (Count 9):

The problem with the testimony of this complainant is that it was less incriminating than the application for transfer submitted to the Chief Air Marshal on 3 April 1986. In it he had stated that the appellant had rubbed himself against him and "had started searching for my mouth with the intention of kissing me". Obviously a report was made by the complainant to Tungamirayi for the latter instructed that the complainant submit his grievance in writing. As a result of it the complainant was withdrawn from State House.

The trial court found that the truth of the complainant's account was borne out by the fact of the invitation to the appellant's office, the invitation to dance and the tightening of the appellant's grip as the dancing progressed. It also pointed out that as the complainant did not know Kaitano, Gota, Masawi and Gwatidzo, the similarity of the appellant's behaviour could not be explained on the basis of collaboration. It seems to me that on this reasoning the conviction for common assault - for the appellant's conduct did not reach the stage of indecency - was warranted.

Christopher Ndonya (Count 10):

This complainant did not report the incident involving the appellant to his superiors or to the police. It was an allegation made by Dube that he (Ndonya) was Banana's wife that led the investigating team to him. Otherwise he would have let the matter rest. He therefore had no motive to falsely incriminate the appellant.

The trial court was impressed with the manner in which Ndonya testified. He said that when he released himself from the appellant's grip by pushing

himself away, and told the appellant he was leaving, the appellant did not persist physically. He merely sought to persuade Ndonya to continue with the dancing. Ndonya also said that thereafter the appellant did not victimise him.

The evidence of this witness, even if there were no corroboration for it from the evidence of other complainants, justified the conviction of indecent assault.

Ignatious Gota (Count 11):

The trial court found this complainant to be credible. It did not accept the appellant's bald denial of the incident. For to do so left unexplained how the complainant came by the knowledge that there was a small radio cassette player in the appellant's office. Moreover the appellant did not dispute possession of a walking stick with national flag colours. Such a stick, according to Gota, was used by the appellant to strike him with. He was the only complainant to mention the stick. Where did he obtain the information from unless he had seen and experienced it in the appellant's office? He was also the first complainant to say that the appellant ejaculated. He noticed a wet area on the trousers of the appellant's wet "Tanzanian" suit.

The complainant maintained that he had addressed a letter written in longhand for the attention of the then Minister of State for onward transmission to the Prime Minister. When it was put to him that this was an easy allegation to make in the knowledge that the letter could not be found, he answered: "I know that. Equally I can't make that allegation against such a high profile somebody if nothing of that sort happened". Again it was suggested that he fabricated the incident after

reading the newspapers and talking to his friends. His reply was: "No, I have eighteen years behind me of working with high profile figures. I can't just pick up something which did not occur". These responses have a definite ring of truth about them.

I am satisfied that the trial court was correct in accepting Gota's evidence as credible. He had no motive to lie against the appellant. But quite apart from the inherent worth of his account, corroboration for it existed in the evidence of other complainants. And there was no real risk or possibility that his evidence had been contaminated by collusion with that of another. In the circumstances, the probative weight and significance of the evidence of Fortune Masawi, Kembo Kaitano, Lovemore Dhundu and Christopher Ndonya pointed to its truth. In sum, the appellant was properly convicted of indecent assault on this count.

V. DISPOSITION OF THE APPEAL AGAINST THE CONVICTIONS

In the result, I would uphold the appeal against the conviction on count 1 and set aside the conviction and sentence. I also would alter the conviction on count 2 from guilty of committing sodomy on various occasions to guilty of committing unnatural sexual offences; and on count 3, solely to guilty of committing an indecent assault on or about 16 December 1983. Insofar as Count 8 is concerned, I would uphold the appeal to the extent of substituting the offence of assault with intent to commit an indecent act for guilty of indecent assault. For the rest, I would confirm the convictions.

VI. THE APPEAL AGAINST THE SENTENCES IMPOSED

The alterations of the conviction on count 2 to guilty of the commission of unnatural sexual offences, on count 3 to guilty of one act of indecent assault, and on count 8 to guilty of assault with intent to commit an indecent act, have the effect of leaving this Court at large in the matter of sentence, unfettered by the discretion of the learned JUDGE PRESIDENT.

Notwithstanding that the convictions have been reduced on count 2 from sodomy and an unnatural offence, to the commission of numerous unnatural offences, the criminal actions of the appellant were of a serious nature.

The fact remains that Dube was sexually abused by the appellant on very many occasions over a period of two-and-a-half years. His is a horrifying tale. He was a young man, eager to progress in his career. His appointment as aide-de-camp to the President of his country was an exciting honour. The appellant used his immense superiority of status to beat down all resistance from the young and inexperienced complainant. Nobody could or would intervene to save him. He wept as he confessed the events to his aunt. What could she do? He complained to other very senior officers. Nothing was done. He even went so far as to complain to the Acting Prime Minister. Eventually he was transferred from State House duties.

The effect of all this on Dube’s personality and reputation was traumatising and devastating. Although I have found that anal penetration was not proved, the offences were disturbing and serious. I consider that a sentence of five years' imprisonment with labour is deserved.

The trial court proceeded, generously, to allow the appellant to escape seven of the eight years' imprisonment imposed on count 2 by making payments totalling $500 000.00. The eighth year was to run concurrently with the sentences on the other counts.

The payments of $250 000.00 to be transmitted equally to Dube and to the deceased estate of his victim were not compensation orders made in terms of Part XIX of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Act"). They were conditions upon which four years of the sentence of imprisonment were suspended. As to the distinction, see *S v Gombarume* 1975 (1) RLR 300 (GD) at 301 A-B; *S v Chiwoko & Anor* 1989 (2) ZLR 364 (H) at 365 D-F.

The statutory provision governing the conditions on which a sentence may be suspended are set out in s 358(3) of the Act. It reads as follows:

> "(3) Conditions specified in terms of paragraph (*a*) or (*b*) of subsection (1) may relate to one or more of the following matters –
>
> (a) good conduct;
>
> (b) compensation for damage or pecuniary loss caused by the offence;
>
> Provided that no such condition shall require compensation to be paid in respect of damage or loss that is the subject of an award of compensation in terms of Part XIX;
>
> (c) the rendering of some specified benefit or service to any person injured or aggrieved by the offence;
>
> Provided that no such condition shall be specified unless the person injured or aggrieved by the offence has consented thereto.
>
> (d) the rendering of service for the benefit of the community or a section thereof;
>
> (e) submission to instruction or treatment;

(f) submission to the supervision or control of a probation officer appointed in terms of the Children's Protection and Adoption Act [*Chapter 5:06*] or regulations made under section *three hundred and eighty-nine*, or submission and control of any other suitable person;

(g) compulsory attendance or residence at some specified centre for a specified purpose;

(h) any other matter which the court considers it necessary or desirable to specify having regard to the interests of the offender or of any other person or of the public generally."

These provisions are very wide-ranging and, as is clear from the final paragraph of the subsection, are a matter for the court's discretion. Although that discretion must be judicially exercised, this Court is loath to interfere in a situation in which it has been used imaginatively and creatively.

Subsection (b) of s 358(3) specifically allows the imposition of a condition that there be "compensation for damage or pecuniary loss caused by the offence". The proviso is not relevant. Reading subs (b) with subs (h), it seems to me that, certainly, the first condition imposed is within the parameters of the section.

The second condition is more questionable. The link between the criminal conduct to which Dube was subjected and whatever pecuniary loss was caused to the estate of the deceased victim by his murder at the hands of Dube, is remote and conjectural. Dube's reaction in fatally shooting the deceased was out of all proportion to the taunt the deceased had issued, that he was Banana's wife. I do not consider therefore that any loss sustained through the death of Dube's victim can properly and fairly be regarded as the responsibility of the appellant. For this reason

I would set aside the second condition of the compensatory suspension. It did not accord with the spirit of the section.

It may be said that insofar as the amount awarded is compensatory, there should have been an effort to calculate an appropriate figure – compare *S v Smith* 1997 (1) ZLR 274 (S) at 276. The answer to this, in my view, is that a condition of suspension under s 358 of the Act is not subject to the restraints of a compensation order under Part XIX of the Act. The compensation here is of a symbolic nature.

It may also be said that no attempt was made to ascertain how much compensation the appellant could afford to pay, see *R v Penias & Anor* 1967 RLR 104 (GD) at 105 C-D; or whether he could raise the amount while serving a prison sentence, see *S v Katevera* 1979 RLR 196 (GD) at 198 A-B. The appellant, however, is a person of substance and there was no reason to suppose that he would not be able to raise even as much as $500 000.00.

Thus it is necessary to assess the amount of compensation the appellant should be ordered to pay as a condition for the suspension of two years of the five years' imprisonment with labour to be imposed on this count. Taking into consideration the alteration of the conviction to the lesser commission of numerous unnatural sexual offences, I do not think that the amount to be paid to Dube should be any less than that fixed by the learned JUDGE PRESIDENT.

Finally, since the majority of the Court are of the opinion that consensual sodomy has not been outlawed by the Constitution and remains a crime in this country, the question of sentence on count 1 falls to be determined.

We are convinced that in this modern day imprisonment is not a proper sentence where both parties are willing adults and the act was committed in private. See *S v Roffey* 1991 (2) ZLR 47 (H) at 53 B-D. After careful consideration, and bearing in mind that the appellant is a first offender and that Ngwenya who was equally guilty is not being punished, it is our view that the appellant is deserving of no more than a fairly moderate fine the whole of which is to be suspended.

In the result, I would set aside the sentences imposed by the learned JUDGE PRESIDENT and substitute the following:

"(1) Count 1, a fine of $500 or, in default of payment, one month's imprisonment with labour suspended for three years on condition that the accused is not convicted of sodomy committed during that period for which he is sentenced to a period of imprisonment without the option of a fine.

(2) Counts, 3, 4, 5, 6, 7, 10 and 11 (the indecent assault convictions) to be taken together for the purposes of sentence, two years' imprisonment with labour of which one year is suspended for three years on condition that during that period the accused is not convicted of an offence of which indecent assault is an element for which he is sentenced to a term of imprisonment without the option of a fine.

(3) Count 2 (the commission of numerous unnatural sexual offences committed upon Dube), five years' imprisonment with labour of which period two years is suspended for three years on the same conditions as in para (2) above. A further two years' imprisonment with labour is suspended on condition that on or before 31 August 2000 the accused pays the sum of $250 000.00 to the Registrar of the High Court for transmission to Jefta Dube.

(4) Counts 8 and 9 (the assault convictions) to be taken together for the purposes of sentence, one month's imprisonment with labour.

It is ordered further that the effective sentence of one year's imprisonment with labour on count 2 and the effective sentence of one month's imprisonment with labour on counts 8 and 9 (taken together) are to run concurrently with the effective sentence of one year's imprisonment with labour on counts 3 to 7, 10 and 11 (taken together).”

McNALLY JA: I agree with a great deal of what has been said by the CHIEF JUSTICE, and the area of my dissent is on the question of whether the Constitution of Zimbabwe compels the Court to rule that consensual sodomy is no longer a crime.

In particular I would like to associate myself fully with the findings set out in Part III of the judgment of the CHIEF JUSTICE which deals with –

a. The cautionary rule in sexual cases;

b. The single witness situation;

c. Admissibility of evidence of complaint;

d. Similar fact evidence.

I agree also with the findings of fact in relation to the various counts, and the alterations to the convictions and sentences which flow from those findings of fact.

My main dissenting view relates to count 1. I agree with the factual findings made by the court below and endorsed by the CHIEF JUSTICE. I do not agree that the provisions of the Constitution of Zimbabwe have the effect of decriminalising consensual sexual intercourse per anum between adult males in private. For the sake of brevity I will use the phrase "consensual sodomy" in this sense.

Let me begin by making certain general observations.

There seem to be three ways in which consensual sodomy has moved away from being regarded as criminal. In some countries, such as England and Wales, there was a gradual development of a more tolerant and understanding popular

attitude towards such conduct. After widespread national debate, legislation was passed for the precise purpose of decriminalising the conduct. This was the Sexual Offences Act of 1967.

In other countries, such as South Africa, a new Constitution made provision specifically outlawing discrimination on the grounds of sexual orientation. That Constitution was widely and publicly debated and accepted. The legislation and common law provisions criminalising consensual sodomy clearly fall away in the face of such explicit provision.

The third situation arose in jurisdictions such as Ireland and Northern Ireland, where the majority of the people, and the Courts, were disinclined to decriminalise the offence, but were overruled by a supra-national judicial authority - in their cases the European Court of Human Rights. Thus, for example, the Irish Supreme Court (by a majority) held in *Norris v The Attorney-General* 1984 IR 36 that the laws against consensual sodomy were not inconsistent with the Irish Constitution, and in particular were not invidiously discriminatory nor an invasion of privacy. Then the European Court overturned that decision. And in *Dudgeon v United Kingdom* 1982 (4) EHRR 149 it is apparent that such acts were regarded in Northern Ireland as criminal (though not in recent times prosecuted) until the European Court intervened.

In the United States of America the position of the individual states is not uniform. In *Bowers, Attorney General of Georgia v Hardwick* 478 US 186, 106 S Ct 2841, the Federal Supreme Court, by a 5-4 majority, declined to invalidate the

State of Georgia's sodomy statute on the ground, among others, that "the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy". It appears from the judgment that in 1986 there were twenty-five states in which consensual sodomy was a crime.

I am aware that the judgment has been criticised. I appreciate the intellectual force of that criticism. It does not follow that the judgment is wrong. There are always two points of view upon such basic issues. The fact remains that the present stand of perhaps the most senior court in the western world is that it is not unconstitutional to criminalise consensual sodomy. That stance remains in force, despite the ruling in *Romer v Evans* 517 US 620 (1996), which did not overrule the earlier decision.

Historically, consensual sodomy, along with a number of other sexual activities which were regarded as immoral, were dealt with by the Ecclesiastical Courts. Such immoral activities included adultery and fornication, i.e. sex outside marriage. In 1533 the offences of sodomy and bestiality (collectively called buggery) were brought within the jurisdiction of the secular courts by King Henry VIII. Since then, and in very general terms, there has been a tendency in the western world to reverse that process. Adultery and fornication became sins rather than crimes. For those who drifted away from the churches the concept of sinfulness became less and less meaningful. Consensual sodomy has, in many but not all parts of the western world, joined that drift from crime to sin to acceptable conduct.

It is of some interest to note, courtesy of Milton's *SA Criminal Law and Procedure* Vol 2, 3 ed, p 250-1 that in pre-Christian Rome (and I would add, Greece) such conduct carried no social or moral opprobrium, whereas Hebraic and Germanic laws were strongly disapproving. See also footnote 6 to JUSTICE BLACKMUN'S dissenting judgment in *Bowers v Hardwick supra*.

What then of Zimbabwe?

I would remark first that this case has not, from its very beginning, been treated as a constitutional test case. No evidence was led in the court *a quo* from psychiatrists, psychologists or other experts. No evidence was led to suggest that the customary laws of Zimbabwe are more akin to those of the Romans and Athenians than to the Germanic or Hebraic customs. I cannot therefore speak with authority on the customary law in this respect. I note, however, that Goldin and Gelfand's well known book on *Customary Law* says, at p 264, the following:

> "*Kurara nemumwe murume* (homosexuality) is called *huroyi*. This is considered extremely wicked but is rare."

It seems to me that this is a relevant consideration, from two points of view. From the point of view of law reform, it cannot be said that public opinion has so changed and developed in Zimbabwe that the courts must yield to that new perception and declare the old law obsolete. Mr *Andersen* expressly disavowed any such argument. The CHIEF JUSTICE does not dispute this. His view, if I may presume to paraphrase it, is that the provisions of the Constitution, properly interpreted, compel one to the conclusion that the criminalisation of consensual sodomy is actually contrary to those provisions.

From the point of view of constitutional interpretation, I think we must also be guided by Zimbabwe's conservatism in sexual matters. I have always agreed with the CHIEF JUSTICE'S view of constitutional interpretation, expressed for example in *Smyth v Ushewokunze* 1997 (2) ZLR 544 (S) at 553 B-C, 1998 (2) BCLR 170 (ZS) at 177 I-J that:

> "… what is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as to the letter of the provision; one that takes full account of changing conditions, social norms and values, so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges. The aim must be to be move away from formalism and make human rights provisions a practical reality for the people."

In the particular circumstances of this case, I do 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.

Against that background I turn to consider those provisions of the Declaration of Rights, namely ss 11 and 23, which might be thought to make it necessary for the Court to decriminalise consensual sodomy.

(a) SECTION 11 OF THE CONSTITUTION: THE RIGHT TO PRIVACY

This section was quite significantly altered by the provisions of Act 14 of 1996, which came into effect on 6 December 1996. The section became in effect a preamble, and now says nothing at all about privacy.

Prior to 6 December 1996 the section did contain a passing reference to the fundamental right of every person in Zimbabwe to:

"protection for the privacy of his home".

But, in the context, this provision is clearly a reference to the right, elaborated later in s 17, to protection from arbitrary search or entry. It has nothing whatever to do with whether or not consensual sodomy is a crime.

Count 1, which is the only count relating to consensual sodomy, relates to activities between 11 August 1995 and 31 December 1996. It extends over the currency of both versions of s 11. Neither version is relevant. I note that the privacy question was only faintly argued by Mr *Andersen*. Nor did the CHIEF JUSTICE rely on s 11 in coming to his conclusion. I will not therefore dwell further upon it.

(b) SECTION 23 OF THE CONSTITUTION: PROTECTION FROM DISCRIMINATION

This is the section upon which the CHIEF JUSTICE relied in coming to the conclusion that the criminalisation of consensual sodomy was:

a. discriminatory on the ground of gender;

b. not reasonably justifiable in a democratic society.

I will not set out s 23 in full because it appears in the judgment of the CHIEF JUSTICE.

I make first the obvious point, which was made by the judge *a quo*, that the framers of the South African Constitution found it necessary to include "sexual orientation" as well as "gender" in the list of grounds on the basis of which discrimination is not permitted. Had our Constitution contained those words, there would have been no argument. But it does not.

Discrimination on the basis of gender 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.

It is important to bear in mind that what is forbidden by s 23 is discrimination between men and women. Not between heterosexual men and homosexual men. That latter discrimination is prohibited only by a Constitution which proscribes discrimination on the grounds of sexual orientation, as does the South African Constitution.

The importance of this point is that the real complaint by homosexual men is that they are not allowed to give expression to their sexual desires, whereas

heterosexual men are. Insofar as that is discrimination – and, of course it is – it is not the sort of discrimination which is struck down by s 23.

The Constitution goes on, in s 23(5)(b), to make the obvious qualification that a law may be discriminatory:

> "to the extent that it takes due account of physiological differences between persons of different gender".

Otherwise we might have the ridiculous situation that a rapist could argue "the law against rape is unconstitutional because only men can be rapists". Or a woman could argue "the law against infanticide ([*Chapter 9:12*]) is discriminatory on the ground of gender because only women who have just given birth can be punished under that Act". (I ignore the fact that a woman may technically be found guilty of rape as an accomplice, or a man of infanticide on the same basis).

"Ah" say the proponents of the other view triumphantly, "but we do not penalise men who perform this act with women. Nor do we penalise the women involved as passive partners. That is where the discrimination lies".

I confess that I regard this argument as a kind of "chop-logic", entirely lacking in commonsense and real substance. Of course, it is technically correct. But realistically, and without going into sordid detail, how often does it happen that men penetrate women per anum? How often, if it does happen, is it the result of a drunken mistake? Or an excess of sexual experimentation in an otherwise acceptable relationship? And, most importantly, how can it be proved? I refrain from further analysis. In my view, the law has properly decided that it is unrealistic to try to

penalise such conduct between a man and a woman. I do not accept that that fact should lead us to the conclusion that it is discriminating to penalise it when it is between two men. The real discrimination, as I have said earlier, is against homosexual men in favour of heterosexual men – and that is not discrimination on the ground of gender.

That being so, the penalising of consensual sodomy is not "discrimination" as that word is defined in the Constitution, because it is not discrimination on the grounds of: "race, tribe, place of origin, political opinions, colour, creed or gender". This kind of discrimination is not dealt with in the Constitution. It is thus not outlawed by the Constitution.

But let me assume that I am wrong in this. I must then turn to the question of whether the law penalising consensual sodomy "is not shown to be reasonably justifiable in a democratic society". One may not personally approve of such a law, but does that mean it is not reasonably justifiable in a democratic society? I do not believe so.

Are we to say that twenty-five American states are not democratic societies? And, in any event, democratic states are in various stages of development. Some might say, in various stages of decadence. (I do not propose to become involved in that argument).

I do not believe that it is the function or right of this Court, undemocratically appointed as it is, to seek to modernise the social mores of the State or of society at large. As JUSTICE WHITE said in *Bowers v Hardwick supra*:

> "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognisable roots in the language or design of the Constitution."

To sum up, as far as discrimination is concerned, I would assert:

1. That the real discrimination of which homosexual men complain is the discrimination between them and heterosexual men, which does not fall within the definition of discrimination on the grounds of gender;

2. That the fact that anal penetration of women by men is not criminalised is an insignificant side-issue, an issue more of practicality than of principle;

3. That Zimbabwe is a conservative society on questions of sexual morality and the Court should not strain to interpret provisions in the Constitution which were not designed to put Zimbabwe among the front-runners of liberal democracy in sexual matters.

In my view, the conviction on count 1 should stand.

EBRAHIM JA: I too associate myself fully with Part III of the judgment of the CHIEF JUSTICE which deals with –

a. The cautionary rule in sexual cases;

b. The approach relating to single witnesses;

c. Admissibility of evidence of complaint;

d. Similar fact evidence.

I am in agreement with the findings of fact made in relation to the various counts and the resulting alterations to the convictions and sentences.

I support the conclusion reached by the CHIEF JUSTICE on the Constitutional issue raised by the appellant's counsel.

I do not believe that in determining this matter one should have regard to one's own moral and religious outlook. To my mind, the crucial question to be determined is: What is the law? It is with this question in the forefront of my deliberations that I have carefully considered the views expressed by the CHIEF JUSTICE on the one hand and McNALLY JA on the other, and have come to the conclusion I have, in support of the view expressed so eloquently by the CHIEF JUSTICE.

MUCHECHETERE AND SANDURA JJA: We too agree with the principles set out in Part III of the judgment of the CHIEF JUSTICE and also with the findings of fact in relation to the various counts, and the alterations to the convictions and sentences which flow from those findings of fact.

However, we share the view expressed so persuasively by McNALLY JA, that the provisions of the Constitution of Zimbabwe do not have the effect of decriminalising consensual sexual intercourse per anum between adult males in private.

Kantor & Immerman, appellant's legal practitioners