In The Supreme Court of Bermuda

CIVIL JURISDICTION

2016: No. 199

IN THE MATTER OF THE BERMUDA CONSTITUTION
AND IN THE MATTER OF THE OBSCENE PUBLICATIONS ACT 1973

BETWEEN:-

DWIGHT LAMBERT

Plaintiff

-and-

MINISTER RESPONSIBLE FOR TELECOMMUNICATIONS

Defendant

JUDGMENT

(In Court)

Whether the offences involving obscene articles in sections 3 and 3A of the Obscene Publications Act 1973 are in breach of section 6 (right to a fair hearing; right not to be held guilty of an act which was not an offence when it was committed) or section 9 (right to freedom of expression) of the Constitution because the definition of obscenity in section 2(1) of the Act is too vague for it to be reasonably foreseeable that an article is obscene

Date of hearing: 6th November 2017
Date of judgment: 24th November 2017

The Plaintiff appeared in person
Mr Michael Taylor, Attorney General's Chambers, for the Defendant

Issue

1. The Plaintiff seeks a declaration that the Obscene Publications Act 1973 ("the 1973 Act") is unconstitutional. He does not suggest that the prohibition of obscene material is in principle objectionable, but rather that the definition of obscenity contained in the Act is too vague for it to be reasonably foreseeable whether an article is obscene. He contends that the offences contained in the 1973 Act that involve obscene articles are therefore in breach of the rights to a fair trial and to freedom of expression contained in sections 6 and 9 respectively of the Constitution.

Background

2. In 2007 the Plaintiff was acquitted in the Magistrates' Court of three counts of importing into Bermuda obscene articles, namely pornographic DVDs, contrary to section 3(1)(a) of the 1973 Act. The offence was triable either way. So far as the Plaintiff and the Defendant are aware, that is the only prosecution ever to have been brought under the 1973 Act.

3. Some years later, the Plaintiff brought an action in the Supreme Court alleging negligence and breach of statutory duty under the 1973 Act by: (i) the Defendant in the present action; (ii) the Broadcasting Commissioners ("the Commissioners"); and (iii) the Director of Public Prosecutions ("the DPP"). In an *ex tempore* judgment dated 11th June 2014, which was reported at [2014] Bda LR 60, Kawaley CJ struck out the claims as being obviously unsustainable causes of action. But in his conclusion he expressed sympathy for the Plaintiff:

"*Having said that, I do have considerable sympathy for the Plaintiff's general position. It does appear to me to be the case that the way in which the obscene publications are currently dealt with under the law does leave room for prosecutions to be launched in circumstances of doubt, where clearer and more modern rules enacted through regulations might well reduce the room for such doubt. And the courts should not really be exercising the function of policy-maker. The courts should be deciding prosecutions under the Act where it is clear that prosecutions should be laid.*

34. And it does appear to me, admittedly on the basis of very limited information and a very cursory analysis of the Act and the only regulations that appear to be passed under it, that the Plaintiff's central grievance that the law is not up to date does have some substance to it.

35. Unfortunately, the particular legal route that Plaintiff has sought to channel those grievances through has no merit. And it is for these reasons that the Plaintiff's claim is struck out."

4. The Chief Justice had earlier suggested at para 17 of his judgment that the Plaintiff might have a remedy under the Constitution:

"*So the broad picture, and the question of the way in which the Act interferes with the freedom of expression, which is protected by section 9 of the Constitution, is something that might be explored in the concept of an application for relief under section 15 of the Bermuda Constitution.*"

5. So it was that almost three years later, and ten years after his acquittal, the Plaintiff issued an originating summons in which he sought various heads of relief against all three defendants in the previous action, including a declaration as to whether the 1973 Act was "*void*" as of 2007, the year of his being charged and placed on trial.

6. The defendants applied to strike out the Plaintiff's claims. By an order dated 1st September 2016, I allowed the strike out application save insofar as it related to the Plaintiff's constitutional claim against the Defendant. I also directed that the word "*unconstitutional*" should be substituted for the word "*void*" as more accurately reflecting the primary question which the Court would have to consider on an application under section 15 of the Constitution.

7. This is the judgment on the Plaintiff's application.

The 1973 Act

8. Section 2 of the 1973 Act defines obscenity. As originally enacted, the definition was the same as that in section 1(1) of the Obscene Publications Act 1959 ("the 1959 Act EW") in England and Wales. Namely that an article shall be deemed to be obscene if its effect is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all the circumstances, to read, see or hear the matter contained or embodied in it. Section 2 was repealed and replaced by a new section 2 under the Obscene Publications Amendment Act 1980 ("the 1980 Act"). This was in turn repealed and replaced by another new section 2 under the Obscene Publications Amendment Act 1995. The section was amended by the Criminal Code Amendment Act 2007.

9. Since its repeal and replacement by the 1980 Act, section 2 has adopted a community standards test. The section in its current form provides in material part:

> "*(1) An article shall be deemed to be obscene for the purposes of this Act if its effect, taken as a whole, is to outrage contemporary standards of decency or humanity accepted by the public at large in Bermuda.*
>
> . . . . .
>
> *(3) A thing shall be deemed to be obscene for the purposes of this Act if it is child abusive material or child pornography within the meaning of Part X of the Criminal Code."*

10. "*Article*" is defined in section 1(1) of the 1973 Act:

> " *'article' means any description of article constituting, containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures;*".

11. Section 176A of the Criminal Code provides that, for the purposes of Part X of the Code, "*child*" means a person under the age of sixteen.

12. Section 3 of the 1973 Act provides that any person who: (a) imports an obscene article; (b) publicly publishes an obscene article; (c) has an obscene article for publication for gain; or (d) publishes an obscene article to, or in the presence of, a person under the age of 16 years, commits an offence. Section 3A creates an offence of advertising an obscene article. The definition of obscenity in section 2 applies to all these offences: there is not one definition applicable to articles used privately or intended only for private use by the defendant and another for articles which the defendant makes or intends to make public.

13. Section 4 of the 1973 Act provides that the Commissioners shall keep under review the operation of the 1973 Act with a view to ascertaining whether in their opinion any amendment of the Act is necessary or desirable, having regard in particular to any changes which there may be in the attitudes of persons in Bermuda; report to the Minister any amendment of the Act which they recommend; and advise the Minister on any other matter concerning the operation of the Act which he may refer to them.

14. Section 7 of the 1973 Act provides a defence of public good. Namely, that a person shall not be convicted of an offence under section 3 if it is proved that the importation or publication of the article in question is justified as being for the public good on the ground that it is in the interest of science, literature, art or learning, or of general concern.

15. Whether through legislative oversight or otherwise, section 7 does not state that this defence is available to an offence charged under section 3A. However, a prosecution brought under section 3A for advertising an obscene article in relation to which, had a prosecution been brought under section 3, a defence of public good could plausibly have been raised, might well be challenged as infringing the right to freedom of expression guaranteed by section 9 of the Constitution.

16. Section 8 of the 1973 Act provides that no prosecution in respect of an offence under section 3 or 3A of the Act shall be instituted except by or with the consent of the DPP.

17. Section 10 of the 1973 Act provides that the Minister may make regulations for the purpose of controlling the publication of "*salacious material*" in or through magazines. Their purpose is to regulate the sale of material which is identified as "*salacious*", not identify material the sale of which is prohibited because it is "*obscene*". For if material is prohibited then there is obviously no need to regulate its sale. To date, the only regulations made under this section are the Obscene Publications (Classification and Restrictions as to Sale) Regulations 1981 ("the Regulations"), which impose restrictions on the sale of a number of magazine titles listed in a Schedule to the Regulations. Given that a wide range of salacious material is readily available over the internet, section 10 would appear to have been somewhat overtaken by modern technology.

The Constitution

18. The Plaintiff brings this application under section 15 of the Constitution. This provides that the Court may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the Constitution to the protection of which the person concerned is entitled. The Constitution was established by the Bermuda Constitution Order 1968, which was an Order in Council made under the Bermuda Constitution Act 1967. Thus section 15 of the Constitution is underpinned by section 2 of the Colonial Laws Validity Act 1865, which provides that any colonial law which is repugnant to an order made under the authority of an Act of the UK Parliament shall, to the extent of such repugnancy, be and remain absolutely void and inoperative.

19. The fundamental rights and freedoms protected by the Constitution which are potentially engaged in the present case are to be found in section 6, which guarantees to any person charged with a criminal offence a right to a fair hearing, including at 6(4) that no person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence; and section 9, which provides that, except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, including freedom to receive and impart ideas and information without interference, and freedom from interference with his correspondence. However section 9 contains a proviso that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of that section "*to the extent that the law in question makes provision … that is reasonably required*": (i) in the interests, *inter alia*, of public morality; and (ii) for the purpose of protecting the rights and freedoms of other persons.

20. There are analogous provisions in the European Convention on Human Rights ("the Convention"). While the Convention does not form part of the domestic law of Bermuda it has been extended to this jurisdiction and carries persuasive authority. See British Overseas Territories Law, Ian Hendry and Susan Dickson, Hart Publishing, 2011, at page 173, and Galloway v Roth [2013] Bda LR 86 SC *per* Hellman J at para 12.

21. Article 6 of the Convention guarantees a right to a fair hearing and article 7 provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

22. Article 10 of the Convention, which guarantees freedom of expression, provides that the exercise of this freedom may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society inter alia for the protection of morals of for the protection of the rights of others.

Case law

23. The Court must consider whether the definition of obscenity in section 2(1) of the 1973 Act is sufficiently certain to pass constitutional muster. This question falls to be considered in the context of the principles stated by Lord Bingham in his leading judgment in R v Rimmington [2006] 1 AC 459 HL at para 33, which was a case which concerned the common law offence of causing a public nusiance:

> "*There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done.*"

24. Lord Bingham noted at paras 34 and 35 that the European Court of Human Rights ("ECHR") has repeatedly considered the effect of this article, as also the references in article 8(2) to "*in accordance with the law*" and in article 10(2) to "*prescribed by law*", and that the effect of the ECHR's jurisprudence on this topic has been clear and consistent.

25. In Muller v Switzerland 1991 13 EHRR 212 the ECHR applied its jurisprudence in the context of a complaint that the applicant's conviction for obscenity under article 204(1) of the Swiss Criminal Code breached article 10(2) of the Convention in that it was too vague to qualify as being "*prescribed by law*". That phrase is a cognate of the phrases "*in accordance with the law*" in article 8 of the Convention and "*the law in question makes provision*" in sections 7 and 9 of the Constitution: see Sunday Times v UK (No 1) [1979] 2 EHRR 245 at para 48:

> "*The expression 'prescribed by law' appears in paragraph 2 of Articles 9, 10 and 11 of the Convention, the equivalent in the French text being in each case 'prévues par la loi'. However, when the same French expression appears in Article 8 (2) of the Convention, in Article 1 of Protocol No. 1 and in Article 2 of Protocol No. 4, it is rendered in the English text as 'in accordance with the law' , 'provided for by law' and 'in accordance with law' , respectively. Thus confronted with versions of a law-making treaty which are equally authentic but not exactly the same, the Court must interpret them in a way that reconciles*

them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty."

26. Article 204(1) criminalised *inter alia* the publication of obscene items. The Code did not define obscenity, but the Swiss Federal Court had done so in a number of published decisions. The ECHR held in Muller at para 29:

"*In the applicants' view, the terms of Article 204(1) of the Swiss Criminal Code, in particular the word 'obscene,' were too vague to enable the individual to regulate his conduct and consequently neither the artist nor the organisers of the exhibition could foresee that they would be committing an offence. This view was not shared by the Government and the Commission.*

According to the Court's case law, 'foreseeability' is one of the requirements inherent in the phrase 'prescribed by law' in Article 10(2) of the Convention. A norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The Court has, however, already emphasised the impossibility of attaining absolute precision in the framing of laws, particularly in fields in which the situation changes according to the prevailing views of society. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. Criminal law provisions on obscenity fall within this category.

In the present instance, it is also relevant to note that there were a number of consistent decisions by the Federal Court on the 'publication' of 'obscene' items. These decisions, which were accessible because they had been published and which were followed by the lower courts, supplemented the letter of Article 204(1) of the Criminal Code. The applicants' conviction was therefore 'prescribed by law' within the meaning of Article 10(2) of the Convention."

27. Muller was considered by the Court of Appeal of England and Wales in R v Perrin [2002] EWCA Crim 747, in which the Court dismissed an appeal against conviction for publishing an obscene article contrary to section 2(1) of the 1959 Act EW. The Court rejected the Appellant's submission that, because the statutory definition of obscenity was not sufficiently precise, the offence was not sufficiently "*prescribed by law*".

28. I was referred to the Legal Guidance issued by the Crown Prosecution Service ("CPS") in England and Wales regarding prosecutions under the 1959 Act EW ("the Legal Guidance"). Under the Code for Crown Prosecutors, the CPS will only prosecute an offence when satisfied that it is in the public interest to do so. A public interest test is not the same as a community standards test, but the two are similar. Thus the Legal Guidance for prosecuting offences under the 1959 Act EW is indicative of the contemporary standards of decency and humanity prevalent in that jurisdiction.

29. The Legal Guidance states that it is impossible to define all types of activity which may be suitable for prosecution but sets out a non-exhaustive list of the categories of material most commonly prosecuted. They comprise: sexual acts with an animal; realistic portrayals of rape; sadomasochistic material which goes beyond trifling and transient infliction of injury; torture with instruments; bondage (especially where gags are used with no apparent means of withdrawing consent); dismemberment or graphic mutilation; activities involving perversion or degradation (such as drinking urine, urination or vomiting on to the body, or excretion or use of excreta); and fisting.

30. The Legal Guidance states that unless any of the factors listed above are present the CPS will not normally advise proceedings in respect of material portraying the following: actual consensual sexual intercourse (vaginal or anal); oral sex; masturbation; mild bondage; simulated intercourse or buggery; or fetishes which do not encourage physical abuse.

31. The Legal Guidance lists factors influencing whether a prosecution is required. These include the degree and type of obscenity together with the form in which it is presented. Eg it is suggested that the impact of the printed word will be less than the same activity shown in film or photograph.

32. However, the definition of obscenity in the 1959 Act EW is not limited to material with a sexual content. See Archbold 2018 at para 31-63:

"*Obscenity is not confined to a tendency to depravity and corruption of a sexual nature. It includes material that advocates drug-taking by highlighting the favourable effects of drugs and so providing 'a real danger that those into whose hands the book came might be tempted at any rate to experiment with drugs': John Calder (Publications) Ltd v. Powell [1965] 1 Q.B. 509. It also encompasses material that tends to induce violence. This proposition appears to have been taken for granted in DPP v. A. and B.C. Chewing Gum Ltd [1968] 1 Q.B. 159, DC, and R. v. Calder and Boyars Ltd, ante.*"

33. The Legal Guidance suggests that obscene material of a non-sexual nature may include videos depicting the violent mutilation, torture, death and cannibalism of those involved. It states that when a video of this type is considered it is not just what is depicted but how it is treated that is important. A decision whether to prosecute will take into account, among other factors, how explicit, prolonged and realistic are the scenes in question.

34. Versions of the contemporary standards of decency test for obscenity are to be found in a number of jurisdictions. I was referred to the leading decisions on the topic in the United States and Canada.

35. In the United States, freedom of speech is protected by the First Amendment to the Constitution but obscene material is not. See Roth v United States 354 US 476 (1957) *per* Brennan J, delivering the opinion of the US Supreme Court, at 485. In Miller v California 413 US 15 (1973) the US Supreme Court held by a majority of five to four that the basic guidelines for the trier of fact when deciding whether material was obscene were: (a) whether the average person, applying contemporary standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. A state obscenity law thus limited was consistent with the First Amendment right to freedom of speech. The Miller test is equally applicable to federal legislation. See Smith v United States 431 US 291 (1977) *per* Blackmun J, delivering the opinion of the Court, at 299 – 300.

36. The opinion of the Court in Miller was delivered by Burger CJ. He rejected the concern that this test was too vague and cited with approval the statement of Brennan J for the Court in Roth at 491 – 492:

"*Many decisions have recognized that these terms of obscenity statutes are not precise. [Footnote omitted.] This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards;' all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' United States v. Petrillo, 332 U. S. 1, 332 U. S. 7-8. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark . . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .*"

37. Ironically, Brennan J, who dissented in Miller, had resiled from this position for reasons given in his dissenting opinion in Paris Adult Theatre I v Slaton 413 US 49 (1973) at 83 – 84, a decision of the US Supreme Court which was handed down on the same day as Miller:

"*Of course, the vagueness problem would be largely of our own creation if it stemmed primarily from our failure to reach a consensus on any one standard. But, after 16 years of experimentation and debate, I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments [right to due process of law], on the one hand, and, on the other, the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as 'prurient interest,' 'patent offensiveness,' 'serious literary value,' and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. Although we have assumed that obscenity does exist and that we 'know it when [we] see it,' Jacobellis v. Ohio, supra, at 378 U. S. 197 (STEWART, J., concurring), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.*"

38. As to the requirement in Miller that the sexual conduct concerned must be specifically defined by the applicable state or federal law, Blackmun J stated in Smith at 302 – 303:

> "*State legislation must still define the kinds of conduct that will be regulated by the State. For example, the Iowa law in effect at the time this prosecution was instituted was to the effect that no conduct aimed at adults was regulated. [Footnote omitted.] At the other extreme, a State might seek to regulate all the hard-core pornography that it constitutionally could. The new Iowa law, which will regulate only material 'depicting a sex act involving sadomasochistic abuse, excretory functions, a child, or bestiality,' provides an example of an intermediate approach.*"

39. Turning to Canada, I was referred to the decision of the Supreme Court of Canada in R v Butler [1992] 1 SCR 452, in which the Court considered and upheld as consistent with the Canadian Charter of Rights and Freedoms the definition of obscenity in section 168(3) of the Criminal Code, which provided that any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of crime, horror, cruelty and violence, shall be deemed to be obscene. The Court held that the section infringed section 2(b) of the Charter, which guarantees freedom of expression, but was justified under section 1 of the Charter as a reasonable limit prescribed by law.

40. The judgment of the majority was delivered by Sopinka J. He noted that in deciding whether the exploitation of sex related matters was undue, the courts had developed three tests: (i) a "*Community Standard of Tolerance*" test, versions of which were also espoused by the Australian and New Zealand courts, which was concerned not with what Canadians would not tolerate being exposed to themselves, but with what they would not tolerate other Canadians being exposed to; (ii) a "*Degradation or Dehumanization*" test, which held that material which degraded or dehumanised any of the participants would breach community standards, not because it offended against morals but because it was perceived by public opinion to be harmful to society, particularly to women; and (iii) an "*Artistic Defence*", under

which material which offended community standards would not be considered "*undue*" if it was required for the serious treatment of a theme.

41. Sopinka J held at 495 that the mischief at which the section was aimed was the harm to society resulting from the undue exploitation of sex related matters. He had earlier stated at 485:

> "*The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. The stronger the inference of a risk of harm the lesser the likelihood of tolerance. The inference may be drawn from the material itself or from the material and other evidence. Similarly evidence as to the community standards is desirable but not essential.*
>
> *In making this determination … the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.*"

42. These cases and guidance cannot be simply read across to apply to the definition of obscenity in the 1973 Act as they are all concerned with different definitions of obscenity contained in different legislative instruments. I have nonetheless found them helpful.

Submissions

43. The Plaintiff, who appeared in person and argued his case with great force and clarity, submitted that under the Constitution an act can only be criminalised if a person thinking of committing that act can know with reasonable certainty in advance that to commit it would be unlawful. The definition of obscenity in the 1973 Act was too broad and vague to satisfy

this requirement and there was no body of case law to give it more concrete expression. Neither the Commissioners nor the Regulations had helped to clarify the position.

44. The definition therefore invited prosecutions and convictions motivated by the arbitrary prejudices of law enforcement officers, prosecutors, magistrates and jurors. Its breadth and vagueness would tend to have a chilling effect on the exercise by members of the public of their constitutionally protected right to freedom of expression: if someone might be prosecuted in relation to an article which allegedly outraged community standards but did not know what those standards were then people would be tempted to censor themselves rather than exercising their freedom of expression to the fullest.

45. The Plaintiff further submitted that if a person was convicted of an act that he could not know with reasonable uncertainty was unlawful when he committed it then he would be convicted of an act which did not, at the time it took place, constitute an offence.

46. Michael Taylor, who appeared for the Defendant and whose measured submissions I found most helpful, submitted that the definition was sufficiently certain. The fact that the Plaintiff had been unsuccessfully prosecuted did not make it any less so as there would always be marginal cases. The definition was necessarily open ended because of the nature of the subject matter and to keep pace with changing circumstances. Consequently, a conviction under the 1973 Act would not involve the retrospective criminalisation of the conduct concerned.

47. Mr Taylor reminded the Court that a statute was presumed to be constitutional unless it were shown to be otherwise, and that the burden on a party seeking to prove invalidity is a heavy one. See Grant v The Queen [2007] 1 AC 1 PC *per* Lord Bingham, giving the judgment of the Board, at para 15. The Defendant, he submitted, had failed to discharge that burden.

48. This is not an exhaustive summary of the parties' submissions, but it covers the main points.

Discussion

49. If the Plaintiff's submissions are analysed in terms of the Constitution, he contends that importing and publishing or advertising material the effect of which is to outrage contemporary standards of decency or humanity accepted by the public at large in Bermuda counts as enjoyment of freedom of expression and is therefore protected by section 9(1) of the Constitution. I agree, even where such material cannot be justified as being for the public good. Thus I prefer the approach of the Canadian Supreme Court in Butler to that of the US Supreme Court in Roth. In so finding, I am guided by the principle that when interpreting a Constitution a court should give full recognition and effect to the fundamental rights and freedoms which it enunciates. See Minister of Home Affairs v Fisher [1980] AC 319 PC *per* Lord Wilberforce, giving the judgment of the Board, at 329 E – F.

50. It follows that, in order to comply with the Constitution, any law prohibiting the importation and publication of obscene material must do so on one of the grounds on which interference with the right to freedom of expression is permitted by section 9(2) of the Constitution. For present purposes, the relevant grounds are that "*the law in question makes provision*" that is reasonably required in the interests of public morality or for the purpose of protecting the rights and freedoms of other persons.

51. The Plaintiff submits that the definition of obscenity in section 2(1) of the 1973 Act breaches section 9(1) of the Constitution as it is too vague to qualify as something for which "*the law in question makes provision*". This is the argument which was run unsuccessfully in relation to article 10(2) of the Convention in Muller and Perrin.

52. Alternatively, the Plaintiff's case can be framed more simply in terms of section 6 of the Constitution. If the definition of obscenity in section 2 of the 1973 Act is too vague to give adequate notice to the public of the material which it covers, then any trial for the possession or importation of such material would on the Plaintiff's case be inconsistent with the right to a

fair hearing. Further, if convicted, a person would on the Plaintiff's case be held guilty of an act which did not, at the time it took place, constitute an offence: it would only become an offence when the court, by its guilty verdict, found it to be one.

53. Whether the offences contained in sections 3 and 3A of the 1973 Act offend against sections 6 or 9 of the Constitution therefore depends upon whether obscenity is defined with sufficient precision in section 2 of the 1973 Act. As the ECHR held in Muller, whether an article is likely to be held obscene must be reasonably foreseeable.

54. The definition in section 2(1) of the 1973 Act posits contemporary standards of decency or humanity accepted by the public at large in Bermuda. In order to be accepted by the public at large those standards must be known to the public at large. They must therefore be known to, or at least knowable by, a potential defendant. That, at any rate, is the theory behind the definition. For an article to qualify as obscene, however, it is not enough that it merely breaches these standards: it must "*outrage*" them. Thus the breach must be egregious. Obscenity under the 1973 Act is not concerned with grey areas.

55. I am satisfied that the definition of obscenity in section 2(1) is not so vague as to be meaningless. There are certain categories of material which, it is reasonably foreseeable, would run a real risk of outraging generally accepted contemporary standards of decency or humanity in Bermuda. In relation to sexually explicit material, for example, it is helpful to have regard to the three-fold classification of pornography adopted by the Court in Butler, and extend it to include sexually explicit material generally.

56. The definition covers: (i) portrayals of sex coupled with violence; (ii) portrayals of explicit sex which is degrading or dehumanizing; and (iii) portrayals of sex which is merely explicit. Categories (i) and (ii) include the types of material identified in the Legal Guidance as most commonly prosecuted whereas category (iii) includes the types of material where the CPS would not normally decide to prosecute.

57. Bermuda is not Canada or England and Wales and its community standards do not in all respects coincide with the community standards in those jurisdictions. However, in my judgment its mores are sufficiently similar that sexually explicit material which would give rise to a reasonably foreseeable risk of prosecution and conviction in Canada or England and Wales, ie Butler categories (i) and (ii), would also give rise to a reasonably foreseeable risk of prosecution and conviction in Bermuda. Subject, of course, to the defence of public good in section 7 of the 1973 Act.

58. That leaves category (iii) material. Although I have not seen the pornographic material in relation to which the Plaintiff was prosecuted, the Defendant has supplied descriptions of that material which establish that it fell into category (iii) and that, for purposes of determining whether it was obscene, could fairly be regarded as representative of material in this category. I accept that at the time when the Plaintiff was prosecuted it was uncertain whether the courts would regard it as obscene. The DPP, who would have instituted or consented to the prosecution, must have been satisfied that there was sufficient prospect of a conviction to justify commencing proceedings. However the Court was not satisfied that the material was obscene and the Plaintiff was acquitted.

59. That prosecution should be regarded as a test case. Although a decision of the Magistrates' Court does not bind that Court or the Supreme Court in future cases, if the offences involving obscenity in sections 3 and 3A of the 1973 Act are to qualify as constitutional then the definition of obscenity in section 2(1) of that Act must be applied consistently. Thus the Plaintiff's acquittal is to be taken as having established that category (iii) material is not to be regarded as obscene within the meaning of the 1973 Act. That is except for any child abusive material or child pornography within the meaning of Part X of the Criminal Code, as this is deemed to be obscene by reason of section 2(3) of the 1973 Act.

60. My construction of section 2(1) of the 1973 Act does not rely upon section 15 of the Constitution but is simply a conventional exercise in statutory

interpretation. It is consistent with the principles: (i) that as a penal statute the 1973 Act should be construed narrowly; and (ii) that the constitutional protection of freedom of expression should be construed broadly. However I would not go so far as to say that those principles require the Court to interpret section 2(1) in this way.

Conclusion

61. I find that as at the date of the Plaintiff's prosecution it could not reasonably be foreseen whether the definition of obscenity in section 2(1) of the 1973 Act would cover category (iii) material, including the material in relation to which he was charged. The offences contained in sections 3 and 3A of the 1973 Act were at the time, and to that extent, inconsistent with the right to a fair hearing in section 6 of the Constitution and the right to freedom of expression in section 9 of the Constitution. As the Plaintiff was acquitted there was in his case no breach of the prohibition against retrospective criminalisation in section 6(4) of the Constitution.

62. As stated above, the Plaintiff's acquittal should be taken to establish that section 2(1) of the 1973 Act does not include category (iii) material. By removing this uncertainty, the decision of the Magistrates' Court should be taken as having brought sections 3 and 3A of the 1973 Act fully into compliance with the Constitution, at least as far as obscene material of a sexual nature is concerned. My reasoning on this point is congruent with the observation of the ECHR in Muller that when considering whether a statutory definition of obscenity satisfies the Convention the extent to which it is supplemented by case law may be relevant.

Further points

63. I make five further points. First, the fact that an article falls into category (i) or (ii) is not conclusive as to whether it is obscene. It must be considered in its own right. The following, non-exhaustive, considerations, which are

suggested by the Legal Guidance, may assist magistrates and jurors in making that determination. They include considerations which are presented in the Legal Guidance as relevant to potentially obscene material of a non-sexual nature, but which are in my judgment also relevant to potentially obscene material of a sexual nature.

64. Not only what is shown but how it is shown will be relevant. Articles which are explicit, realistic and – in the case of a film, video or equivalent – prolonged, are more likely to be found obscene than those which are not. The medium in which an article is presented may also be relevant as the impact of an activity described in writing may be less than the impact of the same activity when shown in a photograph, film or video. When an offence is charged under section 3 of the 1973 Act, the defence of public good will trump all these considerations.

65. Second, when deciding whether an article is obscene it is the task of the decision maker, whether magistrate, judge or juror, to give effect to his or her understanding of contemporary standards of decency or humanity accepted by the public at large in Bermuda and not to impose his or her own standards.

66. Third, although I have adopted the categories identified in Butler as a convenient way of describing sexually explicit material, I do so without expressing any value judgments towards the material so described. In particular, I am aware that, from a feminist[1] or a religious conservative perspective, pornography that is sexually explicit might for that reason alone be regarded as degrading and dehumanizing, especially to women. I express no views on that question. By "*pornography*", here and elsewhere in this judgment, I mean material which is produced solely or principally for the purpose of sexual arousal.[2]

[1] Eg Catherine A MacKinnon, Pornography, Civil Rights, and Speech, 20 Harv CR-CLL Rev 1 (1985).

[2] This definition, which reflects ordinary English usage, is based on the definition of pornography in section 63(3) of the Criminal Justice and Immigration Act 2008 in England and Wales: "*An image is 'pornographic' if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal.*"

67. Fourth, this judgment is focused on the definition of obscenity in relation to material of a sexual nature. But, as in England and Wales, obscenity under the 1973 Act is a broader concept. Eg it is reasonably foreseeable that the material identified in the Legal Guidance in relation to extreme videos might be prosecuted under the 1973 Act as outraging contemporary standards of decency or humanity accepted by the public at large in Bermuda.

68. Fifth, the Constitution does not mandate any particular statutory definition of obscenity. What it requires is that any such definition is sufficiently clear that a person should know whether they are at risk of being prosecuted and convicted for an offence in relation to obscene material. Therefore nothing in this judgment should be taken as inhibiting the Minister, acting upon the recommendation of the Commissioners, from amending the 1973 Act: (i) to define obscenity differently; or (ii) to permit the making of regulations which give guidance on interpreting obscenity as currently defined which supplement or supersede the guidance given in this judgment. However any such amendment or regulations should not require the Court to enforce a definition of obscenity which would require the Court to breach the prohibition against discrimination in section 2(2) of the Human Rights Act 1981, eg on grounds of sexual orientation.

Remedy

69. I grant the Plaintiff a declaration pursuant to section 15 of the Constitution that as at the date of his prosecution the offences involving obscenity contained in sections 3 and 3A of the 1973 Act breached the right to a fair hearing in section 6 of the Constitution and the right to freedom of expression in section 9 of the Constitution in that a person thinking of committing an action which was potentially criminalised by either of those sections could not reasonably have foreseen whether the definition of obscenity in section 2(1) of the 1973 Act covered articles portraying sex in a manner which was explicit but was without any additional features which would render the activity portrayed degrading or dehumanizing.

70. I shall hear the parties as to costs.

DATED this 24th day of November, 2017

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Hellman J