THE COURT OF APPEAL OF BELIZE AD 2019

CIVIL APPEAL NO 32 OF 2016

THE ATTORNEY GENERAL Appellant

V

CALEB OROZCO Respondents
THE COMMONWEALTH LAWYERS ASSOCIATION
THE INTERNATIONAL COMMISSION OF JURISTS

BEFORE

The Hon. Mr. Justice Samuel Awich	Justice of Appeal
The Hon. Mr. Justice Murrio Ducille	Justice of Appeal
The Hon. Mr. Justice Lennox Campbell	Justice of Appeal

1. Nigel Hawke, Solicitor General, and Samantha Matute-Tucker, for the appellant.
2. Lisa Shoman SC, and Mr. Westmin James, for the first respondent.
3. Timothy Otty SC, and Leslie Mendez for the first and third respondents.

29th October 2018 and 30th December 2019.

AWICH JA

[1] In this Civil Appeal Case No. 32 of 2016, the Court has reached unanimous decisions and orders that: (1) the appeal is not academic, and cannot be dismissed summarily, alternatively, the Court would hear and decide the appeal because it discloses issues of public interest; (2) the appeal is allowed partly and dismissed partly; (3) parties

shall bear their own costs of the appeal, there was no appeal against the order for costs made in the court below; (4) the Court confirms the declaratory order that, s.53 of the Criminal Code, Cap. 101, contravenes ss.3,6,12,14 and 16 of the Constitution to the extent that it applies to carnal intercourse against the order of nature between persons (and is void to that extent); and (5) the Court sets aside the order adding to s.53 of the Criminal Code, the sentence; " This section shall not apply to consensual sexual acts between adults in private." Two of us, Awich JA and Campbell JA, prepared two separate judgments purely for the purpose of highlighting particular aspects of the reasons for the unanimous decisions and orders. Ducille JA agrees fully with the reasoning and disposition set out in the judgment of Awich JA.

[2] On 10 August, 2016, in the Supreme Court of Belize, in Claim No 668 of 2011, brought by Mr. Caleb Orozco, the learned Chief Justice, Kenneth Benjamin, allowed the claim and made certain orders against the defendant, the Attorney General of Belize. He has appealed, and is now the appellant. Mr. Orozco is now the first respondent. The Commonwealth Lawyers Association is the second respondent, and the International Commission of Jurists is the third respondent. The orders that the Chief Justice made were the following:

> "THE COURT MAKES THE FOLLOWING ORDERS:
>
> 1. A declaration that section 53 of the Belize Criminal Code, Chapter 101 contravenes sections 3,6,12, 14 and 16 of the Belize Constitution to the extent that it applies to carnal intercourse against the order of nature between persons;
> 2. That the following sentence be added to section 53 of the Criminal Code, Chapter 101: "**This section shall not apply to consensual sexual acts between adults in private.**
> 3. That costs shall be paid by the Defendant fit for two Senior Counsel. Such costs shall be assessed by the Registrar unless agreed.
>
> Dated the 26th day of August, 2016
>
> BY ORDER"

[3] The appeal of the Attorney General has been objected to by the respondent Orozsco, supported by the second and third respondents, the so called "interested parties." In view of the preliminary objection to the appeal, we set out in full, the notice of appeal showing all the grounds of appeal and the order sought on appeal. They are the following:

NOTICE OF APPEAL

"1. TAKE NOTICE that THE ATTORNEY GENERAL OF BELIZE (Appellant) being dissatisfied with that part of the decision more particularly stated in paragraph (2) hereof ... in the Judgment of His Lordship the Honourable Chief Justice Mr Justice Kenneth Benjamin, dated 10th day of August, 2016, in Supreme Court Action No. 668 of 2016 and the Order [made] therein on the 26th August, 2016 [10th August 2016], hereby appeals to the Court of Appeal upon the grounds set out in paragraph (3); and will at the hearing of the appeal seek the relief set out in paragraph (4).

AND the Appellant further states that the names and addresses including their own, of persons directly affected by the appeal are set out in paragraph (5).

2. **Judgment Under Appeal**

That part of the judgment of the Honourable Chief Justice Mr Kenneth Benjamin that:

2.1. Section 53 of the Criminal Code of Belize, Chapter 101 contravenes sections 16 and 12 of the Belize Constitution;

3. **GROUNDS OF APPEAL**

3.1 The learned trial judge erred or was misconceived (sic) in law when he found (sic) that section 53 of the Criminal Code of Belize Chapter 101, Laws of Belize contravened section 16 of the Belize Constitution in that it breached the Respondent's right not to be discriminated against on the basis of his 'sexual orientation'.

3.2 The learned trial judge erred in law in holding that sex in section 16(3) of the Belize Constitution is interpreted to extend to 'sexual orientation' and by doing so breached the sacred doctrine of separation of powers as it is only the Legislature who can properly change or amended an entrenched provision of the Constitution.

3.3 The learned trial judge erred and was misconceived (sic) in law in holding that the Respondent's right to Freedom of Expression as enshrined in section 12 of the Constitution was contravened but failed to reason and rationalize how the right was breached in relation to section 53 of the Criminal Code, Chapter 101 Laws of Belize.

3.4. The learned trial judge erred in law when he accepted that, the arguments in relation to section 12 whilst made in written submissions was not properly developed by the Respondent and as a consequence, there was no analysis by the trial judge to properly come to the decision that was arrived at.

3.5 The decision of the learned trial judge has raised [a] matter of grave constitutional importance and it is a matter of public Interest that the issue in relation to section 16(3) be ventilated in order that a pronouncement can be made by the court.

3.6 The decision was against the core constitutional principles.

4. The parts of the decision of the learned trial judge, particularly in relation to sections 16(3) and 12 of the Constitution should be reversed, set aside; and a proper pronouncement ought to be made in relation to those constitutional provisions.

5. The names and addresses of the persons directly affected are set out hereunder:-

..."

[4] The respondent, of course, opposed all the grounds of the appeal, and as a first step, made the preliminary application objecting to the appeal.

[5] The first part of this judgment decides the preliminary objection to the appeal. The hearing of the appeal and this judgment would have been much shorter had the objection been thought through and not pursued. For the proper understanding of the objection we describe the parties and outline the claim first.

The claim.

[6] In his affidavit supporting his claim in the Supreme Court, Mr. Orozco described himself as, a health-educator and health-worker in a non-government organisation; and that he was, "a homosexual man, and president of UNIBAM". In full, UNIBAM is United Belize Advocacy Movement. It is said to be an incorporated charity organisation and a, "human right organisation of men who have sex with men (MSM), lesbians, gays, bisexuals and transgendered people (LGBTQ)".

[7] In short, Mr. Orozco claimed that, the provisions of section 53 of the Criminal Code, Chapter 101, of Laws of Belize, wrongfully provided for a discriminatory law on the basis of sex in breach of his constitutional fundamental rights and freedoms guaranteed under sections 3, 6, 12, 14 and 16 of the Constitution of Belize, Cap. 4, Laws of Belize; it was, "null and void, to the extent that it applied to carnal intercourse between adult persons". His claim was for constitutional relief which included: (1) a court declaration that s.53 of the Criminal Code contravenes the constitutional rights of the applicant-claimant and is null and void to the extent that it applies to carnal intercourse between persons; (2) a court order striking out the words, "with any person" from s.53 of the Criminal Code; and (3) such other declarations and directions that this Court may consider appropriate for the purpose of enforcing the aforementioned declaration and order.

[8] Section 53 of the Criminal Code which the respondent impugned, and the learned Chief Justice held to contravene (to be inconsistent with) ss. 3, 6, 12, 14 and 16 of the Constitution states:

53. Every person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years.

The parties.

[9] For clarity sake, we state here that, the main parties to this appeal are: the Attorney General of Belize, the appellant, and Mr. Caleb Orozco, the first respondent. In addition, we accepted submissions from: (1) The Commonwealth Lawyers Association and (2) The International Commission of Jurists. They were cited in the notice of appeal as, "interested parties". They had been served by the appellant with the judgment and the court orders appealed, the notice of appeal and the record of the appeal. We regarded them also as respondents, according to ***Order I rule 2, of the Court of Appeal Rules, Cap 90*, Laws of Belize.**

[10] We caution, however, that our decision to hear the two parties must not be taken as a precedent that, a person who considers himself as having an interest in an appeal, including a person who had participated in the trial in the court below as, "an interested party", has a right to participate automatically in the appeal that may follow, and shall be joined automatically. He may make an application to appeal or to be joined as a respondent.

[11] ***The Court of Appeal Act, Cap. 90, Laws of Belize***, mentions only the words appellant and respondent, and does not mention the phrase "interested party". The phrase is not formally recognised in the Act.

[12] In ***Order I rule 2 of the Court of Appeal Rules, 1965, SI Cap. 90,*** the following meanings are given:

2.1(1) In these rules, unless it is expressly provided to the contrary or the context otherwise requires:-

...

"appellant" means the party appealing from a judgment, conviction, sentence or order and includes his legal representative;

...

"respondent" means –

(a) in a civil appeal, any party (other than the appellant) directly affected by the appeal;

(b) in a criminal appeal where the Crown is not an appellant, the person who under the Act has the duty of appearing for the Crown or who undertakes the defence of the appeal.

[13] It seems the description 'interested party' has no place in appeal proceedings in Belize. We offer no conclusive opinion, and leave it to be decided in a case where the question may arise. Suffice it to say that, a person who was a party in a trial in the court below, but who has not been cited in the appeal that followed, and a person who was not a party in the trial, should apply to the Court of Appeal for an order to have them joined in the appeal proceedings, if they have interest in the appeal case and wish to participate in the appeal – compare: ***(1) M. A. Holdings Limited and The Queen on the application of George Wimpey UK Ltd. v Tewkesbury Borough Council [2008] EWCA Civ 12,*** and **(2)** ***DK and Others v Bryn Alyn Community (Holdings) Ltd (In Liquidation) and Royal and Sun Alliance Plc [20003] EWCA Civ 783.***

[14] The persons cited in the notice of appeal of the Attorney General as the second, fourth, fifth, sixth and seventh "interested parties" were also served with the notice of appeal, the judgment and the orders appealed, but did not participate in the appeal proceedings. They are not parties in the appeal. No order can be made against them. In fact the Roman Catholic Church of Belize filed its own appeal No 31 of 2016, on 16 September 2016, but has since filed a notice stating that it withdrew the appeal, and again has filed another notice stating that it withdrew, "as an interested party". The fact that these persons were parties in the trial in the Supreme Court did not automatically make them parties to the appeal. In this judgement we have cited, as respondents, only Mr. Caleb Orozco, the Commonwealth Lawyers Association and the International Commission of Jurists.

The preliminary objection.

(i) The application.

[15] Despite the well written submissions by Ms. Shoman SC, learned counsel for the respondent Orozco, and the concerted oral submissions by Mr Westmin James, also learned counsel for the respondent Orozco, and Mr Timothy Otty QC, learned counsel for the second and third respondents (the first and third interested parties in the trial), we are unable to accept that, this appeal was academic by the time it came up for hearing and should be dismissed summarily. Moreover, had we concluded that the appeal was academic, we would have exercised discretion to hear it in order to determine the questions that also raised important matters of public interest and thereby disclosed public purposes in the appeal. There were several good reasons in the public interest for this Court to exercise the discretion; and there was the added feature that, the appeal was a matter in public law.

[16] The objection by the respondents to the appeal was made by notice in writing which stated as follows:

> **"TAKE NOTICE THAT** the Respondent herein named intends, at the hearing of this appeal, to rely upon the following preliminary objection notice whereof is hereby given to you, viz:-
>
> The issue[s] of whether or not the trial judge erred in law in finding:
>
> (a) a breach of the right to (sic) section 16 of the Constitution in that the Respondent was discriminated against on the basis of sexual orientation.
>
> (b) that 'sex' in section 16(3) could be interpreted to include 'sexual orientation' as that is a breach of separation of powers;
>
> (c) that the right to freedom of expression under section 12 of the Constitution was contravened in that he failed to reason and rationalize how the right was breached; and
>
> (d) the decision was against the core constitutional principles,
>
> is academic because [there is] no live issue between the Applicant and the Respondent. Despite the outcome of the Appellants' appeal, the core decision of the trial judge, that is, (i) section 53 of the Criminal Code

contravenes sections 3, (human dignity, privacy, equality), 6 (equal protection before the law) [and] 14 (privacy), of the Constitution and is unconstitutional to the extent that it applies to carnal intercourse against the order of nature between consenting persons and (ii) that the sentence, "This section shall not apply to consensual sexual acts between adults in private, be added to the section", will remain unaffected. Therefore, any decision of the Court of Appeal will serve no practical purpose and will have no practical effect.

AND TAKE NOTICE that the grounds of the said objection are as follows:-

1. The issue in contention in Claim No. 668 of 2010 was whether section 53 of the Criminal Code is inconsistent with the fundamental rights guaranteed to Caleb Orozco by the Constitution in so far as it criminalized carnal intercourse between two consenting males in private.

2. The Honourable Chief Justice Kenneth Benjamin determined that section 53 of the Criminal Code was unconstitutional to the extent that it applies to carnal intercourse against the order of nature between consenting persons and ordered that the sentence, "This section shall not apply to consensual sexual acts between adults in private," be added to the section.

3. The trial judge's decision that section 53 of the Criminal Code contravenes sections 3 (human dignity, privacy, equality), 6 (equal protection before the law) 14 (privacy), of the Constitution is not under appeal by the Attorney General. The order of the Honourable Chief Justice that section 53 was unconstitutional to the extent that it applies to carnal intercourse against the order of nature between consenting persons or his order that the sentence, "This section shall not apply to consensual sexual acts between adults in private," be added to the section is not under appeal.

4. Despite the outcome of the Attorney General's appeal, the core decision of the trial judge that section 53 of the Criminal Code is unconstitutional to the

extent that it applies to carnal intercourse against the order of nature between consenting persons and that the sentence, "This section shall not apply to consensual sexual acts between adults in private," be added to the section will remain unaffected.

5. The main issue under consideration between the parties at the Supreme Court is no longer under consideration in the appeal and as such the appeal is moot and/or hypothetical and/or purely academic.

6. There exists no good reason in the public's interest for the Applicant to pursue the appeal and there is no good reason why the issues arising here should not await a ruling in a case where they are live and practical.

DATED this 31st day of January 2018.

_____

Lisa N Shoman SC
Attorney-at-law for the Applicants/Respondents"

[17] Although it was not expressly requested in the notice of objection that the appeal be summarily dismissed on the ground that it was academic, it was implicit that, based on the objection, the respondent asked for an order dismissing the appeal summarily.

The preliminary objection.

(ii) The submissions for the objection.

[18] In the written submission for the respondent in support of the objection that the appeal was academic, the following was stated at paragraph 5: "The appellant has accepted and has not appealed against; (a) the decision of the learned Chief Justice to uphold the Respondent's challenge to the constitutionality of section 53; or (b) the decision of the learned Chief Justice that section 53 contravened section 3 (human

dignity, privacy, equality), section 6 (equal protection before the law) and section 14 (privacy), of the Constitution; or (c) the decision of the learned Chief Justice to exercise the Court's power to revise the language of the existing law to bring it into conformity with the Constitution by ordering that the sentence set out above be added to section 53."

[19] Pursuant to the written submissions, Mr. James made the following oral submissions. The first commenced with this background:

> "The notice of Appeal of the Attorney General stated that, they [were] only challenging that part of the decision of the learned Chief Justice that section 53 of the Criminal Code breached section 16 [of the Constitution] which [was] the provision on discrimination; and [breached] section 12 [of the Constitution] which [was about] freedom of expression ..."

[20] Mr. James then proceeded to make the first submission as follows:

> "What [was] more important [was] ... that my learned friends have not, and there [was] no appeal before this Honourable Court that, the judge was wrong to find that there was a breach of the right in section 3 which includes equality. They have not challenged the decision of the learned trial judge to find that section 53 was unconstitutional. They have also not challenged the learned Chief Justice's finding that dignity was breached, equality under section 3 - - under section 6 equality before the law; neither have they challenged the ability of the learned Chief Justice to revise section 53 to read that the section does not apply to consensual sexual acts between adults ... So in other words, my learned friends have accepted those aspects of the learned trial judge's decision ... So my learned friends have only challenged that section 16 which is discrimination ... has been breached and mainly, in particular that, the learned Chief Justice found that or interpreted [that] sex within section 16(3) included sexual orientation. The question therefore ... raised in this appeal is really nothing that needs to be answered by this Honourable Court at this point, as they serve no visible practical purpose. And really the

answers that my learned friends are asking before this Honourable Court is really purely academic and is just really about academic curiosity."

[21] Mr. James cited several case precedents for his submission that, an academic appeal such as this, should not be heard, it should be dismissed summarily. Some of the case precedents were: ***Sattie Basdeo v Guyana Sugar Cooperation Limited [2018] CCJ No. 2 24 (AJ); Ya'axche Conservation Trust v Attorney General, Wilber Sabido, Chief Forest Officer and Others [2014] CCJ 14 (AJ); Daniel (Administrator of the Estate) v Attorney General of Trinidad and Tobago [2011] UKPC 31; Regina v Secretary of State for the Home Department, Ex Parte Salem (A.P.) (1999) 1 AC 450***; and ***ZZ v Secretary of State for the Home Department [2017] EWCA Civ 133***.

[22] The second submission was that, an academic appeal might be heard if the decision had a public purpose in, or the issue raised was of public importance or would recur. In this appeal, counsel argued that counsel for the appellant claimed important public purpose, but did not state what the public purpose or purposes were. Mr. James cited several cases in which public purposes were identified by the courts, and several others in which public purposes could not be identified.

[23] The third submission was that, the Chief Justice had power under s. 134 of the Constitution, to "amend" or "read down" s. 53 of the Criminal Code; and that the appellant, "has not appealed that aspect of the learned trial judge's power"; and further that, what was before the Court was only the question whether the Chief Justice erred in interpreting the word sex in s. 16(3) of the Constitution to include sexual orientation. Counsel cited several cases from other jurisdictions to support the interpretation that, the word sex included sexual orientation. He then submitted that, sexual orientation was, "a subset", of the word sex.

[24] Then in connection with the third submission Mr. James submitted that, the question whether the word sex may be interpreted to include sexual orientation, and the questions of equality before the law and freedom of expression should be left to be decided in a case where it would have, "practical effect", and would "matter". In this case,

Mr. James argued, any decision on the questions raised would not affect the appellant or the respondent because the appellant had accepted the decision of the Chief Justice that, the State should not discriminate on the basis of sexual orientation.

[25] The final submission by Mr. James was a hypothetical proposition. Counsel invited the Court to consider, "the same questions raised in the appeal", were Mr. Orozco to appeal. His appeal would be academic, counsel submitted.

[26] Mr. Otty QC, for, the second and third respondents, supported the objection and the submissions by Mr. James that the appeal was academic and should be dismissed summarily. He gave what he described as, "five simple reasons", for his support.

[27] The first reason was that, the Attorney General, by his notice of appeal, "accepted the Chief Justice's findings of breach of each of sections 3, the right to dignity, section 6, the right to equality before the law, and section 14, the right to privacy, enshrined in the Constitution", and further, the Attorney General accepted the decision to read down section 53 of the Criminal Code. For this reason, counsel submitted, the appeal was academic. But in an answer he volunteered to a question from the bench which was put to counsel for the appellant, Mr. Otty stated:

> "Now it is true there is a dispute as to the meaning of section 16 and as to the finding under section 12. But it is an academic dispute because it is not - - to any challenge to the read down of section 53 that the learned Chief Justice has found. And so it is an interesting dispute, but it is an academic dispute, and it is one better debated outside this Court until a real life issue between parties before the Court arises when the Court will be able to scrutinize evidence and weigh all the relevant factors and consider the implications on each side."

[28] The second reason stated by Mr. Otty sought to exclude reliance on a rider to the rule he had given in the first submission that, the Court should not hear an academic appeal. The submission was that, the Attorney General, "failed to identify why a challenge to the findings on sections 12, freedom of expression, and section 16, the discrimination

provision is necessary in the public interest, so that this Court may hear this appeal which is academic". We understood the submission to mean that, the Attorney General failed to demonstrate that, the decisions of this Court on appeal on the questions raised about breach of sections 3, 12,14 and 16of the Constitution would be necessary in the public interest, for instance, by being of practical usefulness to the public.

[29] The third reason was an elaboration of the second. It was a submission that, "where a point [has] become academic, a court should at least exercise considerable caution before proceeding". Mr. Otty then sought to confirm that, the case authorities cited by Mr. James supported the submissions made.

[30] The fourth reason simply complemented the second and third. It was a submission that, the Attorney General did not demonstrate that several claims that the Attorney General contended would be founded on the questions that have arisen under sections 12, 14 and 16 were likely to be brought again, so it was desirable for this Court to decide the questions regarding the sections, notwithstanding that this appeal is academic.

[31] The fifth reason was a repetition of the hypothetical proposition suggested by Mr. James. He had invited the Court to consider the same questions, were Mr. Orozco, the respondent, to appeal.

The preliminary objection.

(iii) The submissions against the objection.

[32] The written submissions by Mr. Hawke, the learned Solicitor General, on behalf of the Attorney General, did not include a submission on the preliminary objection. But Mr. Hawke made extensive oral submissions in answer to the objection, opposing it. He prefaced the submissions with a concession which was somewhat inconsistent with some aspects of the grounds of appeal. The submissions by Mr. Hawke aimed at persuading the Court that, the appeal, although would be limited in scope, was not academic, there were, "life issues", in it between the parties. The submissions further, aimed at

persuading the Court that, in any case, the grounds of appeal were matters in public law, and courts would hear an academic appeal that raised issues in public law.

[33] The first written and oral submission by Mr. Hawke was that, counsel for the respondents-objectors had admitted that, the issues in the grounds of appeal were matters in public law, and appealable, but they turned round and contended that, the issues became academic and should not be allowed to proceed on appeal because there was no longer, "a life issue between the parties".

[34] As a matter of a reminder, we repeat here that, the objectors had submitted that, the appellant did not appeal against the finding of the Chief Justice that, s.53 of the Criminal Code contravenes ss.3 and 6 of the constitution; and did not appeal against the power of the Chief Justice to, "amend" or "read down" s. 53 of the Criminal Code – see paragraph 3 in the second part of the notice of objection.

[35] In answer to this submission by counsel for the objectors, Mr. Hawke submitted that, there were life issues in this appeal in that: the Chief Justice, by interpreting the word sex in s. 16(3) to include sexual orientation, erred and also amended, rather than interpreted the section, contrary to the constitutional provisions authorising the power to amend the Constitution, and contrary to the constitutional principle of separation of powers. At page 55 of the record, it is recorded that Mr. Hawke stated this:

> "The issue is whether the word sex as understood and placed by the framers of the Belizean Constitution could now be expanded by a judge to include sexual orientation. That is the issue in controversy. It's a public law issue, it's a constitutional issue, it's an issue that has significance, going forward for the Nation of Belize. This is a public issue. This is a court saying I am expanding the definition of sex in the Belizean Constitution to include sexual orientation. Shouldn't that be a matter for the elected representatives in the House? Shouldn't the people of Belize have a say as to if and when that term should be included?"

[36] Secondly, counsel submitted that, the Chief Justice erred in reaching the interpretation of the word sex to include sexual orientation because he erroneously applied an international covenant, articles 2 and 26 of the International Covenant on Civil and Political Rights, 1992, which had not been incorporated by legislation into the domestic law of Belize. Counsel explained that, the Chief Justice applied the covenant by applying the judgment of an international tribunal in, ***Toonen v Australia: Communication No. 488/1992, UN Human Rights Committee***.

[37] Thirdly, counsel submitted that, the Chief Justice erred in that he did not restrict his extended interpretation of the word sex to apply only to s. 53 of the Criminal Code. The Chief Justice gave the definition, *"carte blanche"*; the definition could be applied to other matters in unjust ways, counsel argued.

[38] In spite of all these submissions, Mr. Hawke, in answer to repeated inquiry from the bench as to whether he would confirm that, the appellant, the Attorney General, did not appeal the points mentioned by counsel for the respondents, said that the Attorney General appealed only to a very limited extent. At pages 54 to 55 of the record it is recorded as follows:

> "MR. HAWKE: Well again in relation to that I say specifically with your leave My Lords, section 16(3) even if we accept what the respondents are saying, there is a fundamental issue here also in relation to what we understand to be the supreme nature of our Constitution. And the question here is whether there is a fine line between a court interpreting the Constitution on the one hand, and perhaps amending the Constitution. The cumulative effect of this appeal is not - - we are not - - this is a limited appeal. We have not one second said we had a problem with the reading down by the Chief Justice - issue in relation to section 53. What we are concerned with and what has - -
>
> COURT: You have no problem with that?
>
> MR. HAWKE: The reading down of the provision, we didn't appeal on that issue. It's accepted. This is a limited appeal.

COURT: No, no, why didn't you appeal on that?

MR. HAWKE: ... My Lords, so in effect this was not a full appeal. The issue, the problem that we took issue with is whether the learned Chief Justice was correct. Not so much as to his dealing with the notion of sexual orientation. The issue is whether the word sex as understood and placed by the framers of the Belizean Constitution could now be expanded by a judge to include sexual orientation. That is the issue in controversy. It's a public law issue, it's a constitutional issue, it's an issue that has significance, going forward for the Nation of Belize. This is a public issue. This is a court saying I am expanding the definition of sex in the Belizean Constitution to include sexual orientation..."

[39] Then at page 62 of the record there is the following passage in which Mr. Hawke again stated rather ambiguously that, the Attorney General appealed against the interpretation of the word sex in s. 16(3) of the Constitution:

"COURT: The argument we heard before yours was that, you did not appeal the reading down by the Chief Justice.

MR. HAWKE: That is correct, My Lord.

COURT: Yes! And that is the difficulty we have; that you don't appeal, you don't see anything wrong in the Chief Justice including sexual orientation in the word sex, but then you want to come back and say yes, it is not right, it concerns public interest.

MR. HAWKE: Yes, we are saying that is a fundamental constitutional issue that a court should properly address as to whether the learned Chief Justice was correct in doing so, it is a fundamental public law issue.

COURT: So why is it said that you didn't appeal that?

...

MR. HAWKE: My Lord, I could only do my best to answer. The question is when you look at the Constitutional norm in all the other Commonwealth Caribbean Jurisdictions and even the wider Commonwealth what has happened is that the issue of sexual orientation is something that is left for the Parliament or the

Legislature in all the other jurisdictions. I have not found any authority where the court has expanded the definition of sex to include sexual orientation. It's absolutely absent."

The preliminary objection.

(iv) The decision on the objection – the factual basis.

[40] The grounds of objection and the oral submissions by Mr. Otty and Mr. James caused much consternation to us. The grounds at paragraph 3, and the submissions asserted rather too boldly that, the Attorney General, by omission in his grounds of appeal, did not appeal against the decision of the Chief Justice that, "section 53 of the Criminal Code contravenes sections, 3 (human dignity, privacy, equality), 6 (equal protection before the law), and 14 (privacy), of the Constitution"; and did not appeal against the decision to add to section 53 of the Criminal Code, the words: This section shall not apply to consensual sexual acts between adults in private." The consequence, of failing to appeal those two decisions, they argued, was that the judgment of this Court either way on the remainder of the appeal, would not change the interests of the parties as determined by the Chief Justice; the appeal was academic.

[41] The consternation arose from the fact that, at paragraphs 2 and 3 of the notice and grounds of appeal, the Attorney General expressly appealed the decision that s. 53 of the Criminal Code contravenes ss. 12 and 14 of the Constitution, although he did not refer to ss. 3 and 6 of the Constitution. The consternation persisted until we heard the source in the subsequent reply submissions by Mr. Hawke that, the appeal was being pursued only to, "a very limited scope." He added that, the remainder of the appeal included two important appeal points which were not merely academic in consequence, so the appeal was not academic.

[42] The two appeal points that Mr. Hawke said remained in the appeal were these. 1. That the Chief Justice erred in interpreting the word sex in s. 16(3) of the Constitution to include sexual orientation; that was an amendment, not an interpretation, and was the

responsibility of the National Assembly, according to s.69 of the Constitution and the principle of separation of powers. 2. That the Chief Justice erred in deciding that s. 53 of the Criminal Code breached the constitutional fundamental freedom of expression in s. 12 of the Constitution.

[43] Regrettably the concession that, the appeal would be limited in scope was equivocal. It complicated rather than simplified the issues in the appeal; and it extended rather than narrowed the scope and issues by including those introduced by the application objecting to the appeal.

[44] Our decision about the two assertions by Mr. Otty, Ms. Shoman and Mr. James is that, it is not correct that, the Attorney General, either by omission in the notice and grounds of appeal, or because of a concession, did not appeal against the two decisions of the Chief Justice. The Attorney General indeed expressly appealed the entire decision that: "section 53 of the Criminal Code contravenes sections 3, 6, 12, 14 and 16 of the Constitution", The actual court order appealed is: "A declaration that section 53 of the Criminal Code, Chapter 101 contravenes sections 3, 6, 12, 14, and 16 of the Belize Constitution to the extent that it applies to carnal intercourse against the order of nature between persons." Further, the Attorney General expressly appealed the decision to add the words modifying s. 53 of the Criminal Code that were made part of the order of the Court.

[45] Our explanation for our decision is the following. First, the notice of appeal filed on 16 September 2016, stated unequivocally that, the Attorney General was, "***dissatisfied*** with ***that part of the decision*** ... ***stated in paragraph (2)*** thereof, hereby, "***appeals*** to the Court of Appeal ***upon the grounds set out in paragraph (3)***...." The part of the decision in paragraph (2), that the Attorney General was dissatisfied with and appealed against was summed up as:

"That part of the judgment of the Honourable Chief Justice Kenneth Benjamin ***that, section 53 of the Criminal Code of Belize, Chapter 101 contravenes sections 16 and 12 of the Belize Constitution***."

[46] The words that the Chief Justice added to modify s. 53 were part and parcel of the decision of the Chief Justice on s. 53 of the Criminal Code appealed against.

[47] Secondly, the notice of appeal stated at paragraph 3 fives grounds of appeal. They were never withdrawn by any notice. Four of them were practically other ways of stating the first ground that, the Chief Justice erred in holding that, s. 53 of the Criminal Code contravenes the Constitution. The grounds are the following:

"3.1 The learned trial judge erred or was misconceived (sic) in law when he found (sic) that section 53 of the Criminal Code in Belize Chapter 101, Laws of Belize contravened section 16 of the Belize Constitution in that it breached the Respondent's right not to be discriminated against on the basis of his 'sexual orientation'.

3.2 The learned trial judge erred in law in holding that sex in section 16(3) of the Belize Constitution is interpreted to extend to 'sexual orientation' and by doing so breached the sacred doctrine of separation of powers as it is only the Legislature who can properly change or amended an entrenched provision of the Constitution.

3.3 The learned trial Judge erred and was misconceived (sic) in law in holding that the Respondent's right to Freedom of Expression as enshrined in section 12 of the Constitution was contravened but failed to reason and rationalize how the right was breached in relation to section 53 of the Criminal Code, Chapter 101 Laws of Belize.

3.4 The learned trial judge erred in law when he accepted that the arguments in relation to section 12 whilst made in written submission was not properly developed by the Respondent and as a consequence, there was no

analysis by the trial judge to properly come to the decision that was arrived at.

3.5 The decision of the learned trial judge has raised [a] matter of grave constitutional importance and it is a matter of Public Interest that the issue in relation to section 16(3) be ventilated in order that a pronouncement can be made by the court.

3.6 The decision was against the core constitutional principles.

..."

[48] No notice of withdrawal of the whole or part of the appeal, that is, of these grounds of appeal were filed. All the appeal points, if decided in favour of the Attorney General, would have practical desired consequence to the Attorney General; and practical undesired consequence to the respondents. The decision would extinguish the orders made by the Chief Justice. Section 53 of the Criminal Code would continue unmoderated and unaltered as desired by the Attorney General, and not desired by the respondents. The Court would be deciding an appeal about an existing dispute between the parties before the Court (the Attorney General and the respondents Mr. Orozco and two others).

[49] The partial withdrawal of the appeal or concession said to have been made by Mr. Hawke may have been orally made, or if made in writing, a copy of it was not filed and included in the record of appeal, or even sought to be produced in Court. From the submissions by counsel for all the parties, we concluded that, whatever withdrawal or concession might have been made by the Attorney General, it was too uncertain for a conclusion to be drawn by this Court that, the appellant abandoned and excluded his ground of appeal at paragraph 3.1 that, the Chief Justice erred in making the order that: "[s]ection 53 of the Criminal Code of Belize, Chapter 101, contravenes sections 16 and 12 of the Constitution," or that he abandoned any of the six grounds of appeal. The appellant and the respondents were simply not *ad idem* on the withdrawal or concession said to have been made by the appellant. We repeat that, the ground of appeal at paragraph 3.1 remained available for determination, and is not merely academic.

Determination of it one way or the other on appeal, will have practical consequence for the parties before the Court.

[50] The words that were introduced by the Hon. Chief Justice to modify s. 53 of the Criminal Code would, of course, stand or vanish depending on whether or not the Chief Justice's interpretation of the word sex in s.16(3) of the Constitution and its application to s.53 of the Criminal Code is upheld or overruled. The order modifying s.53 of the Criminal Code is ancillary to the order that s.53 contravenes the Constitution.

[51] The above decision that, on the facts, this Court has been unable to identify any ground of appeal that was withdrawn or conceded means that, all the grounds of appeal are available for decision by this Court. Since the objection is based on the belief that, some of the grounds of appeal were withdrawn or conceded, the objection to the appeal on the ground that it is academic is disallowed on the facts. We went further though, and also decided the objection on questions of law. In order to decide the questions of law, we assumed that the Attorney General made the concessions alleged.

The preliminary objection.

(v) The decision on the objection – the law on an academic appeal.

[52] The principle applicable in deciding whether the Court will hear an academic appeal is as follows. It is an important feature of our judicial system that, an appellate court decides disputes between the parties before it, and does not pronounce on abstract or hypothetical questions of law where there is no dispute to be resolved. In general, there must exist between the parties a matter in actual dispute which the appellate court can decide as a life issue. The principle does not lay down an absolute rule that bars the hearing of an academic appeal. An appellate court may hear an appeal which has become academic, if the appeal raises an issue of public interest, such as an issue of statutory interpretation which may arise again, or the appeal discloses some good reason in the public interest to have the issue in the academic appeal decided.

[53] There are numerous cases in which the principle has been restated and applied. From the Caribbean Court of Justice there have been at least two notable judgments: ***Ya'axche Conservation Trust v Wilber Sabido, Attorney General and Another [2014] CCJ 14 (AJ)***, an appeal from Belize; and ***Sattie Basdeo v Guyana Sugar Corporation Limited, Noel Holder and The Attorney General of Guyana [2018] CCJ 24 (AJ)***. These cases adopted the common law principle as stated in several English cases, notable are: ***RWSSHD ex parte Salem [1999] 1 AC 450; Bowman v Fels [2005] 4 All E R 608***; and ***Michael Victor Gawler v Paul Raettig [2007] EWCA Civ 1560***. Also see ***Daniel (Administrator of the Estate) v Attorney General of Trinidad and Tobago [2011] UK PC 31***, an appeal from Trinidad and Tobago to the Privy Council.

[54] Counsel for all the parties accept in their submissions that, this is the principle that this Court should apply when deciding whether the appeal had become academic, and should not be heard. The principle guided us to the conclusion that this appeal is not academic, and cannot be dismissed summarily.

[55] When deciding the question of fact regarding any withdrawal or concession made, we gave reasons for deciding that the grounds of appeal, particularly the ground at paragraph 3.1, were not withdrawn and that the appeal was not merely academic. We now proceed to apply the principle of law to the facts, assuming that the concession was made by the Attorney General.

[56] Regarding the ground of appeal at paragraph 3.2, the complaint about the interpretation of the word sex in s. 16(3) of the Constitution, the appeal point was that, the Chief Justice erred in that, he did more than interpreting a provision in the law; he made an amendment to the Constitution; the Chief Justice had no power to amend the Constitution, given the provisions in the Constitution for amending the Constitution, and given the principle of separation of powers. The respondents contended otherwise. This ground presents a life issue between the parties. The decision on that appeal point would have practical consequence to the parties to the appeal; and it would be in the interest of the public to know the answer, especially as to the question, whether the Chief Justice

merely interpreted s. 16(3) of the Constitution and s. 53 of the Criminal Code, or amended them, contrary to the Constitution and the principle of separation of powers. It would also be a guide to the public as to how far an interpretation of a legislation can go before it is considered to be an amendment. In that sense, the ground of appeal discloses a public purpose.

[57] The above reason also applies to the order of the Chief Justice made at paragraph 2 of the order, adding the words: "[t]his section shall not apply to consensual sexual acts between adults in private." The question is whether this is an exercise in interpretation, or it is an amendment. Could the contents of the order not be conveyed in a declaratory order and left at that, in deference to the principle of separation of powers? The respondents contended that the Chief Justice had the power to add the words to s.53 of the Criminal Code. This point, in our view, is not an academic point, this court shall hear and decide it. Moreover, it is a matter of great importance to the Attorney General, and it raises an important public purpose. We would exercise discretion to hear this appeal on this ground, had we decided that the appeal was academic as between the parties.

[58] The ground of appeal at paragraph 3.3 is also not merely of academic interest. The complaint there is that, the Chief Justice did not give reasons for deciding that on the set of facts stated in s.53 of the Criminal Code, the fundamental freedom of expression would be breached.

[59] In the event the Chief Justice did not give reasons, this Court is required to examine the facts in order to decide whether there was any valid basis for the final decision by the Chief Justice, and whether the decision was correct or erroneous. But this Court does not allow an appeal simply because the reasoning of a trial judge is wrong, if he has made the correct final order. This ground of appeal also presents actual life dispute, namely, whether freedom of expression by the respondent manifests itself through carnal intercourse with other men and would be infringed by s.53 of the Criminal Code. The outcome will affect the interest of the Attorney General and the respondents.

[60] The grounds of appeal at paragraph 3.5 and 3.6 raise the question whether, if the Court were to regard the appeal as academic, the appeal points were nevertheless important constitutional questions, they were matters of public interest, and the Court should hear the appeal. We have already stated our view about that. We would hear this appeal for the reason that, public purposes were disclosed in the ground of appeal at paragraph 3.2. We add that, the primary question in the appeal is whether the interpretation of the word sex includes sexual orientation. The question inherently conveys the interest of the public in knowing whether s.53 of the Criminal Code contravenes the Constitution. For example, the gay and lesbian parts of the public have interests in knowing whether they will no longer continue to live with the threat of being charged under s.53 of the Criminal Code. The christian part of the public also has an interest in knowing whether, "carnal intercourse", between persons of the same gender will be purely a question of morality, excluding criminal law consequences.

[61] The submissions by Mr. Otty, Ms. Shoman and Mr. James contended that, the notice of appeal and the concession made left only two issues to be decided; and that the decisions on the issues would not resolve any life dispute between the parties, so what was left of the appeal was academic. Even assuming that what were left in the appeal were only the two issues identified by Mr. Otty and Mr. James, we concluded that, the remainder of the appeal was not academic.

[62] The two issues said to have remained in the appeal were stated by Mr. James in these words:

> "The notice of Appeal of the Attorney General stated that, they [were] only challenging that part of the decision of the learned Chief Justice that section 53 of the Criminal Code breached section 16 [of the Constitution] which [was] the provision on discrimination; and [breached] section 12 [of the Constitution] which [was about] freedom of expression ..."

[63] Mr. Otty then made this submission pursuant to the assertion by Mr. James:

"Now it is true there is a dispute as to the meaning of section 16 and as to the finding under section 12. But it is an academic dispute because it is not - - to any challenge to the read down of section 53 that the learned Chief Justice has found. And so it is an interesting dispute, but it is an academic dispute, ..."

[64] It is pretty obvious to us that, the challenge to the decision that, s. 53 of the Criminal Code contravenes s. 16 (3) of the Constitution (regarding discrimination because of sex) is a life dispute with practical consequence to the parties to the appeal; it is the very founding dispute in the claim between the parties. If on appeal the Attorney General were to succeed, the practical consequence would be what the Attorney General desired, the entire provisions of s.53 of the Criminal Code would remain provisions penalising among other acts, "carnal intercourse against the order of nature with any person...." The respondent Mr. Orozco would be criminally liable if he engaged in carnal intercourse with another man, should the authorities decide to change the policy of not charging people under s. 53 of the Criminal Code.

[65] It was submitted by Mr. Otty and Mr. James that, the two issues "remaining", discrimination and freedom of expression depended on whether the word sex was correctly interpreted to include sexual orientation; and that the decision on that, would not have any practical consequence because it would not change the decision to read down s.53 of the Criminal Code.

[66] Our view is that, the discrimination identified in s. 53 of the Criminal Code by the Chief Justice depended wholly on whether he was right in applying the word sex in s. 16 (3) of the Constitution to s. 53 of the Criminal Code, with the meaning that included sexual orientation. It is this orientation that is said to lead some people of the same gender to have "carnal intercourse" with one another. The assumption was that, when s. 53 of the Criminal Code was legislated, carnal intercourse with a person of the same gender was regarded by the public as being, "against the order of nature". A decision on appeal as to whether the word sex in s. 16(3) of the Constitution may be applied to s. 53 of the Criminal Code with the meaning that includes sexual orientation, will no doubt have practical

consequence. If the interpretation by the Chief Justice is upheld, then s.53 of the Criminal Code discriminates on the basis of sex (including sexual orientation) and will be void. The respondents will be relieved; Mr. Orozsco and others will no longer live in fear of being arrested and charged under s.53 of the Criminal Code. So, the issue whether the word sex in s.16 (3) of the Constitution may be interpreted to include sexual orientation is a life dispute before this Court between the Attorney General and Mr. Orozco and the two other respondents. The issue is not academic.

[67] The decision of the Chief Justice that, the right to the constitutional fundamental freedom of expression is exercised (among other forms) in carnal intercourse and so this freedom is denied to gay and lesbian people by s. 53 of the Criminal Code criminalising carnal intercourse between one another also has practical undesired consequence to the Attorney General and practical desired consequence to the respondents. If on appeal the decision is reversed, it will have the opposite consequence, it will affect the interest of the respondents adversely.

[68] It was suggested that the appeal was academic because in his grounds of appeal at paragraphs 2 and 3, the Attorney General did not cite ss. 3 and 6 of the Constitution (although he cited ss. 12 and 16). There is no merit in that suggestion. Section 3 of the Constitution identifies what are regarded as fundamental rights and freedoms of the individual, and declares them guaranteed. The section is analogous to a definition section in the Criminal Law. Then ss. 4 to 20, including ss. 6, 12, 14 and 16 variously provide for protection measures, that is, enforcement measures of the rights and freedoms identified in s. 3. These latter sections are analogous to the penal sections in the Criminal Law. Failure to cite the penal section, not the definition section, would be fatal to the criminal case. It is our view that, failure to cite s.3 of the Constitution, the definition section, in the grounds of appeal, when the enforcement sections have been cited, does not deprive the appeal of the particulars of the appeal.

[69] Our overall conclusion on the application objecting to the appeal was that, the appeal of the Attorney General was not academic. Alternatively, we would have granted

a hearing because the appeal presents issues of public interest. We disallowed the objection to the appeal. We proceeded to hear the grounds of appeal.

Determination on the grounds of appeal.

(i) The issues.

[70] We commence the second part of our determination by repeating that, the decision of the Chief Justice appealed against was summed–up in these words: "section 53 of the Criminal Code of Belize, Chapter 101, contravenes section 16 and 12 of the Belize Constitution". It was reduced to the orders appealed in these words:

> "THE COURT MAKES THE FOLLOWING ORDERS:
>
> 1. A declaration that section 53 of the Belize Criminal Code, Chapter 101 contravenes sections 3, 6, 12, 14 and 16 of the Belize Constitution to the extent that it applies to carnal intercourse against the order of nature between persons;
> 2. That the following sentence be added to section 53 of the Criminal Code, Chapter 101: "This section shall not apply to consensual sexual acts between adults in private.
> 3. That costs ..."

[71] Our task is to determine, according to the principles of law applicable, whether the Chief Justice erred in making the first two orders. The order at paragraph 1 is the primary order. The order at paragraph 2 depends on whether the order at paragraph 1 is correct.

[72] We note that, it was properly accepted by the parties that, any law that is inconsistent with a provision of the Constitution of Belize shall be void to the extent that the law is inconsistent. That law, in the words of the grounds of appeal, "contravenes the Constitution". The Constitution is the supreme law of Belize- see ***s.2 of the Constitution, Cap 4, Laws of Belize.*** Therefore the effect of the declaratory order of the Chief Justice that, s.53 of the Criminal Code contravenes ss. 3, 6, 12, 14 and 16 of the Constitution, to

the extent that s.53 applies to, "carnal intercourse against the order of nature with any person," is that it rendered section 53 of the Criminal Code void to that extent.

[73] The consequence of rendering s.53 void to the said extent is that, since the declaratory order was made by the Chief Justice on the 10th August, 2016, it has no longer been punishable under s.53, for adult persons to have, "carnal intercourse against the order of nature." Carnal intercourse with a person of the same gender had been regarded by many people in Belize as being against the order of nature. It may still be so regarded, but it is no longer an offence, and no longer punishable. It was said that, law enforcement agencies did not anymore charge people with an offence under s.53 of the Criminal Code for engaging in same gender sexual intercourse. But if this Court determines that, the Chief Justice erred in making the order at paragraph 1, then same gender sex will revert to being an offence. The order at paragraph 2 is ancillary, it was made to effect the former so, it will fall or stand accordingly.

[74] Sections: 3, 6, 12, 14 and 16 of the Constitution that s.53 of the Criminal Code is said to contravene, that is, to be inconsistent with, are the following:

Protection of Fundamental Rights and Freedoms

3. **Whereas every person in Belize is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinion, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-**

   (a) life, liberty, security of the person, and the protection of the law;

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

   (c) protection of his family life, his personal privacy, the privacy of his home and other property and recognition of his human dignity; and

(d) protection from arbitrary deprivation of property,

the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.

...

6.-(1) All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

...

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

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes reasonable provision-

(a) that is required in the interests of defence, public safety, public order, public morality or public health;

(b) that is required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the administration or the technical operation of telephone, telegraphy, posts, wireless broadcasting, television or other

means of communication, public exhibitions or public entertainments; or

(c) that imposes restrictions on officers in the public service that are required for the proper performance of their functions.

14.-(1) A person shall not be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. The private and family life, the home and the personal correspondence of every person shall be respected.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision of the kind specified in subsection (2) of section 9 of this Constitution.

...

16. - (1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person or authority.

(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision-

(a) for the appropriation of public revenues or other public funds;

(b) with respect to persons who are not citizens of Belize;

(c) for the application, in the case of persons of any such description as is mentioned in subsection (3) of this section (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description; or

(d) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage that, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable.

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it makes provision with respect to standards or qualifications (not being standards or qualifications specifically relating to sex, race, place of origin, political opinions, colour or creed) to be required of any person who is appointed to or to act in any office or employment.

(6) Subsection (2) of this section shall not apply to anything which is expressly or by necessary implication authorized to be done by any such provision of law as is referred to in subsection (4) or subsection (5) of this section.

(7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) of

this section may be subjected to any restriction on the rights and freedoms guaranteed by sections 9, 10, 11, 12 and 13 of this Constitution, being such a restriction as is authorized by section 9(2), paragraph (a), (b) or (h) of section 10 (3), section 11(5), section 12(2) or section 13(2), as the case may be.

(8) Nothing contained in subsection (2) of this section shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.

[75] Section 3 of the Constitution declares what the law regards as fundamental rights. Relevant to this appeal are the fundamental rights: (1) to protection of the law, (2) to personal privacy, and (3) to recognition of one's human dignity. Furthermore, s.3 declares what the law regards as fundamental freedoms. At issue in this appeal is the fundamental freedom of expression.

[76] Further, s.3 declares that, these constitutional fundamental rights and freedoms must be afforded to every person, whatever his race, place of origin, political opinion, colour, creed or sex. The constitutional fundamental rights and freedoms are subject only to limitations that are necessary for respect for the rights and freedoms of others, and for the public interest.

[77] We note again that, it was not at issue that, the constitutional fundamental right to the protection of the law, the constitutional fundamental right to privacy, and the constitutional fundamental right to human dignity include the right not to be discriminated against on the bases of: race, place of origin, political opinion, colour, creed or sex. See for instance a South Africa case, **National Coalition for Gay and Lesbian Equality v Minister of Justice [1999] 15A6,** where it was held that the offence of sodomy was inconsistent with the constitutional fundamental right to human dignity. But it is not a

constitutional fundamental right not to be discriminated against on other bases. That does not mean that such lesser discrimination cannot be a basis for non-constitutional claim.

[78] The respondent Orozco, claimed that, s.53 of the Criminal Code discriminated against him on the basis of sexual orientation, so it discriminated against him on the basis of sex, and therefore contravened ss.3 and 16(3) of the Constitution which declare and afford him the constitutional fundamental right not to be discriminated against on the basis of sex. He claimed further that, s.53 of the Criminal Code denied to him, on the basis of sex, the constitutional fundamental freedom of expression. The other two respondents joined in Mr. Orozco's claim on the ground of their interests in human right matters.

[79] The Chief Justice accepted Mr. Orozco's contention that, the word sex in ss.3 and 16 of the Constitution included the meaning sexual orientation, and so s.53 of the Criminal Code denied Mr. Orozco the constitutional fundamental right not to be discriminated against on the basis of sex, and denied him the constitutional fundamental freedom of expression, and thereby contravened ss.3, 6, 12, 14 and 16 of the Constitution. From that decision the Chief Justice made the two court orders appealed. Did the learned Chief Justice err in the interpretation of the word sex to include sexual orientation? We think not.

Determination on the grounds of appeal.

(ii) The submissions of the appellant.

[80] The submissions by Mr. Hawke, for the appellant, in support of the grounds of appeal, were to a large extent, amplifications of the submissions that he had made earlier in opposing the objection that, this appeal was merely academic and should be dismissed summarily. The submissions are these.

[81] First, Mr. Hawke tacitly admitted the ground of the claim that, sexual intercourse by a person of the same gender with another was regarded as, "*carnal intercourse against the order of nature*," and was punishable under s: 53 of the Criminal Code, although the

authorities were no longer charging gays and lesbians with the offence, and Mr. Orozco had never been charged.

[82] People who engage in such sexual intercourse are commonly referred to as homosexuals, or gays and lesbians. Mr. Hawke submitted that, the word sex in s: 16 (3) of the Constitution meant gender, male or female, and did not include sexual orientation. So, by that submission Mr. Hawke urged us to hold that, the Constitution did not afford the fundamental right not to be discriminated against on the basis of sex to gays and lesbians such as the respondent Orozco. Mr. Hawke cited the House of Lords consolidated appeals, ***McDonald (AP) (Appellant) v Advocate general for Scotland (Respondent); and Pearce(Appellant) v Governing Body of Mayfield School (Respondents) [2003] UKHL34***, and in addition, the first instance judgment in a Trinidad and Tobago appeal case, ***Surratt v Attorney General [2007] UKPC [Claim No. 1526 of 2003]***.

[83] He argued that, several countries in the Caribbean and the Commonwealth of Nations generally, recognized that, the word sex did not include sexual orientation, and so, "expanded," by legislation, the meaning of the word sex to include sexual orientation. Belize had not so far legislated that meaning of the word sex, so in Belize the meaning of the word sex could not be expanded by the courts to include sexual orientation; the Chief Justice erred, counsel submitted.

[84] The second submission was that, the word sex in s. 16(3) was a part of the Constitution, the Chief Justice erred in "expanding" the word sex to include sexual orientation. What he did was to amend the Constitution. The Constitution could only be amended by the procedure prescribed in s. 69 of the Constitution. Moreover, that was the function of Parliament, the National Assembly of Belize. "Should the people of Belize not have the opportunity to amend their Constitution?" Mr. Hawke asked rhetorically. The Chief Justice erred by ignoring s.69 of the Constitution and the principle of separation powers of the State, Mr. Hawke submitted.

[85] The third submission for the appellant was that, the Chief Justice erred in, "expanding" the meaning of the word sex to include sexual orientation, in that he applied an international covenant which had not been adopted by domestic legislation. The covenant was the International Covenant on Civil and Political Rights, ICCPR/C/50/D/488/1992 (the ICCPR). Counsel submitted further that, the Chief Justice also erred by applying the decision of the United Nations Human Rights Committee in ***Toonen v Australia, Communication No. 488/1992***, decided under the covenant. Counsel cited the CCJ appeal case, ***Attorney General and Others v Jeffrey Joseph and Lennox Ricardo Boyce CCJ Appeal 2 of 2005,*** in support of this submission.

[86] The final submission was that, the Chief Justice erred in holding that, s: 53 of the Criminal Code denied the fundamental freedom of expression to homosexuals, without giving reason for his decision.

Determination on the grounds of appeal.

(iii) The submissions of the respondents, by Mr. James.

[87] The submissions by Mr. James and Mr. Otty opposing the grounds of appeal were also to a large extent amplifications of the submissions that they had made for the preliminary objection. Mr. James submissions were the following.

[88] First, he submitted that, over the past two decades there had been several cases decided domestically, regionally and internationally which had established the jurisprudence about discrimination on the basis of sexual orientation. He cited as examples: **Norris v Ireland *(1989) 13EHRR 186,*** from the UK; ***Jason Jones v Attorney General of Trinidad and Tobago, Civil Claim CV2017-720,*** from Trinidad and Tobago; ***Lawrence v Texas 539US558 (2003) and Zarda v Altitude Express, Case 15-3775 decided on 26 Feb. 2018, from the USA;*** *and* ***Toonen v Australia Communications No. 488/1992 (UNO).*** He argued that, decriminalising carnal intercourse by people of the same gender, "goes a long way in recognising equality".

[89] Secondly Mr. James submitted that, the Chief Justice was right, "in using international law to help him interpret the word sex in section 16 of the Constitution; this Court and the CCJ [had] mandated, that is how you are to interpret constitutions."

90] Thirdly, counsel submitted that, s.65 of the Interpretation Act authorised the use of International Law in interpreting the Constitution. Mr. James proceeded to submit that, "constitutions are not, 'normal legislations,' they are based on international law." He cited: **Minister of Home Affairs vs Fisher [1980] AC 319; Attorney General and others vs Jeffery Joseph and Lennox Ricardo Boyce, CCJ Appeal 29 of 2004;** and **Patrick Reyes vs R [2003] UKPC II.**

[91] Fourthly, counsel submitted that, the Constitution is interpreted in a purposive and generous way. He cited several cases including: **Boyce, Fisher, Reyes and Roodal v The State [2003] All ER (D) 290. (P.C.)**

[92] Fifthly, Mr. James submitted that, constitutions are living and speaking instruments. So, "a court may give to a statue a new meaning, a dynamic meaning that seeks to a bridge the gap between law and life's changing reality without changing the statute itself. The statute remains but its meaning changes in order to accommodate ever-changing social realities." He cited **Lewis**.

Determination on the grounds of appeal.

(iv) The submissions of the respondents, by Mr. Otty QC.

[93] At the outset learned counsel Mr. Otty QC urged the Court to accept that, the Chief Justice was entitled and obliged to approach the interpretation of the word "sex" and "freedom of expression" in the Constitution of Belize in the way he did. Mr. Otty submitted that the approach was "conventional" and consistent with, "regional and international approach." He cited cases from courts in Belize, the Privy Council, the Caribbean Court

of Justice, appellate courts in Kenya, Canada, S. Africa, Tanzania, India, Botswana and Hong Kong; and decisions of the United Nations' Humana Rights Committee, to support his submission.

[94] Mr. Otty asked us to note that, "all through most constitutions," including the Belize Constitution, "runs a golden thread that, recognizes: (1) the inherent dignity of all human beings, and (2) the right to equal treatment of every person." It is this that, "informs [the] proper interpretation" of the provisions of the Constitution.

[95] About the question, whether the Chief Justice amended rather than interpreted the Constitution and therefore acted contrary to s.69 of the Constitution and the principle of separation of powers, Mr. Otty submitted that, the Chief Justice performed the task of interpreting, which is specifically allocated by the Constitution to the courts. To illustrate, he referred to paragraphs 53 to 56 of the judgement of the Chief Justice where he stated: *"It needs to be made pellucid that, this claim stands to be decided on the provisions of the Constitution and in this regard the source of the courts remit is firmly grounded in the Constitution itself which reflects the separation of powers. The claimant approached the Court on the basis of alleged violation of stated fundamental rights provisions in part II of the Constitution, and the Court is tasked by section 20 (1) [of the Constitution] to inquire into the same. The Supreme Court is the designated guardian of the rights conferred under the Constitution. It cannot shirk from such responsibility by asserting that any change to legislation is [a] matter best left to the legislature..."*

[96] Mr. Otty submitted further that, the Chief Justice properly interpreted the Constitution as a living instrument in a generous and purposive way. Counsel cited several cases in support. He also stated that, since the decision of the Chief Justice, cases have been decided in some jurisdictions, which "supported" the judgement of the Chief Justice.

[97] About the use of the UN Covenant on Civil and Political Rights, 1976, Mr. Otty submitted that, interpretation of the Constitution is guided by the core values of dignity,

equality and the promotion for respect for international law. He argued that, if the Chief Justice disregarded international law and therefore international obligations of Belize, "he would be acting in disregard of the decision of the CCJ," in cases such as **Boyce** and **Tomlinson**. He argued further that, it was an established principle of the common law that, courts will so far as possible, construe domestic legislations so as to avoid creating a breach of the State's international obligation.

Determination on the grounds of appeal.

(vi) The decisions on the grounds of appeal: general.

[98] From the issues and submissions set out above, it is clear that the success or failure of this appeal depends on the answer to the single question, whether the word sex in ss.3 and 16 of the Constitution may be interpreted to include sexual orientation. From the evidence and submissions by counsel, we understand sexual orientation to mean sexual intercourse orientation.

[99] If sexual orientation which manifests itself, in sexual intercourse between a male and a female and sometimes between people of the same gender, is included in the meaning of the word sex in ss.3 and 16 of the Constitution, then s.53 of the Criminal Code which criminalises, "carnal intercourse between persons [including adults] against the order of nature," is a law which, "makes a provision that is discriminatory... in its effect", on the basis of sex. Section 53 of the Criminal Code would be inconsistent with s.3 and s.16 (1) of the Constitution, and would contravene the Constitution. Section 53 of the Criminal Code would be void to that extent. Further, s.53 of the Criminal Code would also be inconsistent with s.16 (2) which provides that, "...no person shall be treated in a discriminatory manner by any person or authority", on the basis of, among others, sex. It would be void to that extent also.

[100] Section 16(3) defines the word discriminatory as follows:

(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

[101] The Chief Justice decided that, the meaning of the word sex in ss.3 and 16 of the Constitution includes "sexual orientation". He applied cases from the Caribbean Commonwealth, and sought persuasion from cases from other parts of the world in which that meaning had been accepted. He also used the **United Nations International Covenant on Civil and Political Rights 1976,** adopted by **Resolution No. 2200A (xx1) of the United Nations General Assembly** on 16 December 1966.

[102] The facts supporting the claim were not contested in the court below. Our duty as an appellate Court, is to hear the appeal by way of review, and correct errors of law, if any, made by the Chief Justice in his decision that, the meaning of the word sex in ss.3 and 16 of the Constitution includes sexual orientation. From that decision the Chief Justice decided further that, he had, "no difficulty holding that, the claimant had been discriminated against on the basis of his sexual orientation by virtue of section 16(1) and (3), applying the interpretation of sex to embrace 'sexual orientation..."Then he made the final decision that, "section 53 of the Criminal Code contravenes ss. 3, 6, 12, 14 and 16 of the Constitution to the extent that it applies to carnal intercourse against the order of nature between persons, and is void to that extent."

Determination on the grounds of appeal.

(vi) The law applicable.

[103] The law applicable in ascertaining the meaning of the word sex in the provisions of ss. 3 and 16 of the Constitution are, **the Interpretation Act, Cap.1, Laws of Belize**, some of **the canons and principles of statutory interpretation**, and as far as this Court is concerned, **precedent from, the Privy Council until 1 June 2010**, and now from **the Caribbean Court of Justice (appellate jurisdiction side)**, and from **this Court**. Persuasive judgements of other courts and international tribunals may complement.

[104] The most frequently applied canons of interpretation of statute are: (1) the literal rule; (2) the golden rule; (3) the mischief rule; and (4) increasingly the purposive and generous principle or rule. Recent development in many jurisdictions around the world is that, courts tend to use the purposive and generous principle to interpret statutes in cases where questions of fundamental human rights and freedoms arise. That is the principle that tends to widely promote fundamental rights and freedoms.

[105] Where the meaning of a word, a clause or a provision in a statute is plain and straightforward, the court will take that meaning. The other rules of statutory interpretation, are applied when there is ambiguity in a word, a clause or a provision in a statute, in order to resolve the ambiguity.

[106] The Chief Justice stated or otherwise indicated in various parts of his judgment that, he applied the Interpretation Act and the following rules, principles and aid in interpreting the word sex in ss.3 and 16 of the Constitution, namely: (1) precedent; (2) the literal rule; (3) the "liberal and purposive rule", meaning the purposive and generous rule; (4) the constitution as a living instrument principle; and (5) international law as an aid to interpretation. Generally those rules, principles and aid were applicable. The Chief Justice did not apply any inapplicable rule or principle or aid. So, did he err in the way he applied the correct applicable rules or principles or aid, and so he was led to the wrong meaning of the word sex in ss.3 and 16 of the Constitution? We were unable to identify such an error.

[107] He applied the above rules, principles and aid to interpretation to decide whether several constitutional fundamental rights and constitutional fundamental freedoms which were at issue in the claim, were infringed by the provisions of s.53 of the Criminal Code. We are concerned with only two in this appeal, the constitutional fundamental right not to be discriminated against on the basis of sex, and the constitutional fundamental freedom of expression, said to have been denied on the basis of sex.

Determination on the grounds of appeal.

(vii) Applying the law.

[108] The initial approach of the court in interpreting the Constitution or other statutes is to look at the words used and their meaning. In so doing, the court applies the literal rule of interpretation of statute. The rule requires that, a plain and unambiguous word or provision in a legislation must be interpreted according to its natural and ordinary meaning, even if the outcome may be unjust or absurd- see **Duport Steel v Sirs [1980] 1WLR 142 (HL); and Fisher v Bell [1961] 1QB394.** The natural and ordinary meaning of the word sex is: *(1) "gender, the state of being male or female;" or (2) "sexual act"*- see Cambridge Advanced Learners Dictionary. The Oxford Concise Dictionary defines sex as: *(1) "the categories of male or female into which humans and other living things are divided on the basis of their reproductive functions;" or (2) "sexual activity, including specifically, sexual intercourse."*

[109] So, the meaning, "**gender**", the categories of male or female, which the appellant urged this Court to accept and no more, is available, applying the literal rule of interpretation. The meaning "**sexual activity**" or "**sexual intercourse**" is also available. In our view; sexual intercourse is the primary element in "carnal intercourse", whether it be between heterosexuals or between homosexuals. Sexual intercourse orientation fits in with "sexual act"; or "sexual activity", the dictionary meaning of the word sex, so sexual orientation is included in the word sex in ss.3 and 16 of the Constitution. For the reason that sexual intercourse is the primary element in carnal intercourse alone, we accept that,

the word sex in ss. 3 and 16 of the Constitution includes sexual intercourse, and sexual intercourse orientation.

[110] Moreover, including sexual orientation gives the word sex in ss. 3 and 16 of the Constitution a purposive and generous meaning for protecting human rights. Accordingly we hold that, s.53 of the Criminal Code is a law which discriminates on the basis of sex, which includes sexual orientation and is discriminatory against the respondent Orozco, a homosexual. The section is inconsistent with ss.3 and 16 of the Constitution, and is void to that extent.

[111] We proceeded further, however, because there was dual meaning of the word sex when we applied the literal rule. We were then required to apply the additional and specific principles of interpretation of statute stated in **s.65 of the Interpretation Act.** It provides that: (1) where there is more than one construction of a provision in a statute, the meaning which is consistent with the international obligation of the Government of Belize (the State) is to be preferred, and (2) where there is more than one construction, the meaning which promotes the general legislative purpose underlying the provision is preferred.

[112] Section 65 of the Interpretation Act in full is this:

> **65. The following shall be included among the principles to be applied in the interpretation of acts where more than one construction of the provisions in question is reasonably possible, namely,**
>
> **(a) that a construction which would promote the general legislative purpose underlying the provision is to be preferred to a construction which would not; and**
>
> **(b) that a construction which is consistent with the international obligations of the Government of Belize is to be preferred to a construction which is not; and**
>
> **(c) that, the absence of any express indication to the contrary, a construction which would exclude**

retrospective effect is to be preferred to a construction which would not.

[113] See also s.64 which provides for more general considerations in the interpretation of statues.

[114] Relevant to s. 65 (b) of the Interpretation Act, Belize has international obligation to respect, promote and achieve fundamental human rights and freedoms under, at least, three important treaties: (1) The United Nations Organisation Charter, 1945, and the United Nations Declaration of Human Rights Charter, 1948, (Resolution 217); (2) the Charter of the Organisation of American States, 1948, and the American Convention on Human Rights, 1969, adopted under the OAS Charter; and (3) the International Covenant on Civil and Political Rights, 1976 (Comnd.6702) - (the ICCPR,1976).By accepting membership of the two international organizations and signing the ICCPR, 1976, Belize has accepted international norms and standards regarding fundamental human rights and freedoms espoused by those organisations and in the three instruments. Belize therefore accepted obligation to adhere to those international norms and standards regarding fundamental rights and freedoms.

[115] This information is of great aid in interpreting Part II of the Constitution of Belize which is meant to guarantee constitutional fundamental rights and freedoms. Accordingly the word sex in ss.3 and 16 of Part II of the Constitution must be construed in a way that is consistent with those treaties and international instruments, and in a way that enhances protection of the constitutional fundamental rights and freedoms, rather than in a way that diminishes them or otherwise derogates from them.

[116] Under the ICCPR, 1976, the word sex in Articles 2 and 26 of the Convention was construed by the UN Human Rights Committee in **Toonen v Tasmania, UN Communication No. 488/1992**, to include sexual orientation. The Committee held that, the law of the State of Tasmania, Australia that criminalised consensual sexual conduct between adult men was discriminatory and incompatible with the ICCPR, 1976.

[117] In the case before us, The Chief Justice referred to, among others, the decision of the UN Human Rights Committee in **Toonen v Tasmania** to assist him in reaching his decision that, the meaning of the word sex in ss.3 and 16 of the Constitution of Belize includes sexual orientation. He referred to the decision which was made at international level, by the authority **of s.65 (b) of the Interpretation Act** and common law precedent. The Chief Justice did not err in that. The ground of appeal that, he erred in that he applied a treaty, the ICCPR, 1976, when it had not been adopted into domestic legislation fails.

[118] The Chief Justice also applied the purposive and generous principle of interpretation of statutes, and the recent approach that, the Constitution is **a living instrument**, in arriving at the decision that, the meaning of the word sex includes sexual orientation. He did not err in applying those principles. He was expressly authorised by s.65 **(a) of the Interpretation Act.** He was further obliged to apply common law precedent in cases such as (1) **Patrick Reyes v R [2002] UKPC 11**; (2) **Attorney General and others v Joseph (Jeffrey) and Boyce (Lennox) [2006] CCJ No.2 of 2005;** (3) **Boyce (Lennox) and Joseph (Jeffrey) v R [2004] UKPC 32/ (2004) 64WIR 37**; and (4) **DPP v Mollison (2003) UKPC 6.**

[119] In **DPP v Mollison**, an appeal from the Court of Appeal of Jamaica to the Privy Council (UK), Lord Bingham stated at paragraph 19, the following:

> **"[16]... First, it is now well established that constitutional provisions relating to human rights should be given a generous and purposive interpretation, bearing in mind that a constitution is not trapped in a time- warp, but must evolve organically over time to reflect the devolving needs of society: see Reyes v The Queen [2002] 2 AC 235, [2002] UKPC 11, paras 25 -26 and the authorities there cited".**

[120] In **Reyes v R**, an appeal from the Court of Appeal of Belize (this Court) to the Privy Council, their Lordships of the Privy Council were considering whether the mandatory death penalty in s. 102 of the Criminal Code of Belize was a cruel, inhuman and degrading penalty, in which case it would be inconsistent with ss. 3 and 7 of the Constitution of Belize. They held that, s.102 of the Criminal Code, in requiring a mandatory sentence of death to be passed on a defendant on a conviction for murder class A, by the sole fact of shooting, excluded any judicial consideration of the humanity of condemning him to death; and subjected him to inhuman, or degrading punishment or other treatment incompatible with the right afforded to him by section 7 of the Constitution.

[121] Regarding the generous and purposive approach to interpreting the provisions of the Constitution protecting human rights, the Law Lords in their judgment in **Reyes case** delivered by Lord Bingham, stated at paragraph 26, this :

> **"26 ... Decided cases around the world have given valuable guidance on the proper approach of the courts to the task of constitutional interpretation... It is unnecessary to cite these authorities at length because the principles are clear. As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society (see Trop v Dulles, above, at 101). In carrying out its task of constitutional interpretation the**

court is not concerned to evaluate and give effect to public opinion, for reasons given by Chaskalson P in State v Makwanyane, 1995 (3) SA 391, at para. 88."

[122] The purposive approach, the purposive interpretation of the Constitution, or statue is the interpretation which takes into the context the purpose of the Constitution or part of the Constitution, or the statute or part of the statute. In our view, this approach may include accepting contemporary meanings of the words of the Constitution or statute where the generality of the words used may be adopted to include new and unforeseen circumstances. In this way the purposive and generous approach will conform to the *dictum* that, an Act is always speaking- see the meaning of "always speaking" in **R v Ireland [1997] UKHL 34, R v Lewis (Mitchell) (2007) 70WIR 75; and Balkissoon Roodal v The State (Trinidad and Tobago [2003] UKPC 78/ (2003) 64 WIR 270.**

[123] The purpose of Part II of the Constitution is to declare and guarantee the constitutional fundamental rights and freedoms of the individual enumerated therein. The acts that guarantee the rights and freedoms are the enforcement measures set out in ss.4 to 20. These constitutional fundamental rights and freedoms of the individual are guaranteed regardless of, his race, place or origin, political opinion, colour, creed or **sex**. They are limited only by the need to respect the fundamental rights and freedoms of others, and public interest.

[124] It is our view that, consensual sexual intercourse between adult gays or between adult lesbians in private does not harm the fundamental rights and freedoms of others, nor does it intolerably harm contemporary public interest, even though it may be repugnant to christian morality, according to the testimonies received in the case, and repugnant to some non-christians. Accordingly the meaning of the word sex in section 3 and 16 of the Constitution which promotes fundamental rights and freedoms regardless of sex, is that the word sex includes sexual intercourse and sexual intercourse orientation. We confirm the decision of the Chief Justice on the meaning of the word sex in s. 3 and 16 of the Constitution.

Determination on the grounds of appeal.

(viii) The cases cited, but do not apply.

[125] Counsel for the parties cited two cases in particular, with much belief that the statements of law made in the cases would help their divergent submissions. It is appropriate to mention the cases here. They are: (1) **McDonald (AP) v Advocate General; and Pearce v The Governing Body of Mayfield School [2003] UKHL 34,** and (2) **Maurice Tomlinson v The State of Belize; and Maurice Tomlinson v The State of Trinidad and Tobago, CCJ Applications A01 and A02 of 2013.**

[126] McDonald; and Pearce case was cited by counsel for the appellant. It was a consolidated appeal cases for the purpose of hearing. **Tomlinson's case** was cited by counsel for the respondents. It was two consolidated applications to the CCJ (Original Jurisdiction) by the same applicant, for the purpose of hearing. The human parties in all the consolidated cases were all homosexual persons. However, in all the cases the House of Lords in one case, and the CCJ in the other case, did not concern themselves with the question, whether the word sex in the context of the particular statutory discrimination complained about, may be interpreted to include sexual orientation. So, the two consolidated cases were not relevant to this appeal, and did not assist us in answering the question, whether the Chief Justice erred in interpreting the word sex in ss. 3 and 16 of the Constitution to include sexual orientation. As a matter of recognising the value that counsel placed on the two cases, we examine them.

[127] McDonald; and Pearce case was cited by Mr. Hawke for the appellant, for the submission that, the House of Lords (UK), held that, under the Sex Discrimination Act, 1975, (UK), the word sex could not be interpreted to include sexual orientation, so this Court should similarly in this case, not accept that, the word sex in ss. 3 and 16 of the Constitution of Belize includes sexual orientation. We reject the submission. Their Lordships based their decision on their determination that, ss. 1 (1) and 2 (1) of the

Discrimination Act, 1975, (UK), were specific. They were about discrimination by treating a person less favourably on the basis of being a woman, or discrimination by treating a person less favourably on the basis of being a man. A lesbian woman in the Royal Air Force would have been dismissed just as Mr. McDonald was dismissed, their Lordships stated. That would not be discrimination under the sex Discrimination Act, 1975, (UK). It would be equal treatment of a man (a gay man) and a woman (a lesbian woman). The "comparators" for the purpose of discrimination under the Act were a gay man and a lesbian woman.

[128] Mr. McDonald's case was this. He was a senior officer in the Royal Air force at Preswick, Scotland. In an interview for promotion and security clearance, he was asked whether he was a practising homosexual. He admitted. He was dismissed in accordance with the RAF policy at the time. He made a claim for compensation at the Employment Tribunal under ss. 1 (1) and 2 (1) of the Sex Discriminating Act, 1975 (UK), on the ground that, his dismissal was an act of unlawful discrimination on the basis of his sex, and on the ground that, questioning him to ascertain his sexual conduct was sexual harassment under the Act. His claim was dismissed. He appealed successfully to the Appeal Tribunal. On final appeal to the House of Lords, Mr. McDonald's claim failed.

[129] Miss Pearce was a teacher at Mayfield Secondary School, Portsmouth, England, from 1975 to December 1995, when she successfully applied for early retirement because of ill health. She was a lesbian. From 1991 students subjected her to sexual harassment, calling her "lezzie", "lemon", "lesbian shit" and the like. She reported many incidents to the headmaster, but the school did not take practical steps to stop the harassment or to support her. She suffered stress and depression. She brought a claim against the Governing Body of the school under ss. 1 and 2 of the Discrimination Act, 1975, (UK), claiming compensation on the ground that, she was discriminated against on the basis of her sex. On final appeal to the House of Lords, it was held that, her case failed for the same reason that, Mr. McDonald's case failed. Their Lordships held that, Mr. McDonald and Miss Pearce were discriminated against, but not on the ground that he was a man, or that she was a woman. The Discrimination Act, 1975, (UK), proscribed discrimination

on the ground of sex which meant gender and not sexual orientation. In any case, in the course of hearing the appeal, it was admitted by counsel that, the word sex under ss. 1 and 2 of the Act meant gender and not sexual orientation.

[130] Section 1 (1) (a) of the Act, under which Miss Pearce's case was decided provided as follows:

> **A person discriminates against a woman in any circumstances relevant for the purpose of any provision of this Act if – (a) on the ground of her sex he treats her less favourably than he treats or would treat a man.**

Section 2 (1) under which Mr. McDonald's case was decided provided that, section 1 and the provisions of Part II and III in relation to sex discrimination were to be read as applying equally to the treatment of men, with the requisite modification.

[131] The decision in **McDonald; and Pearce** never became an established precedent. **The Human Rights Act, 1998, (UK),** which adopted the Articles of the European Convention on Human Rights, 1953, intervened. The Act came into force on 2 October, 2000. At the hearing of the appeal, it was accepted by counsel for all the parties, that the treatment of Mr. McDonald violated his rights under Articles 8 and 14 of the Convention. Miss Pearce's appeal had an additional issue: whether the Governing Body of the school could be held liable for the acts of the students.

[132] Tomlinson v The State of Belize No. CCJ A01; and, **Tomlinson v The State of Trinidad and Tobago No. CCJ A02** were high profile cases by a well-educated claimant in the Commonwealth Caribbean region. The cases were consolidated for hearing. Similarly, the cases did not help us in answering the question, whether sex in ss. 3 and 16 of the Constitution includes sexual orientation.

[133] Mr. Tomlinson was a homosexual man. He was a national of Jamaica, and an attorney at law, resident in Jamaica. Belize, Jamaica and Trinidad and Tobago were signatories to the Revised Treaty of Chaguaramas, 2007. Mr. Tomlinson brought a claim

No. CCJ A01 claiming that, Belize breached its treaty obligation by having in its Immigration Act a provision prohibiting homosexual persons from entering the country of Belize. In Claim No. CCJ A02, Mr. Tomlinson brought a similar claim that, Trinidad and Tobago breached its treaty obligation by having in its Immigration Act a provision prohibiting homosexual persons from entering the country of Trinidad and Tobago. He claimed that, the two Immigration Acts restrained his CARICOM right to free movement in member states, and discriminated against him on the ground of nationality, contrary to Article 7 of the Revised Treaty of Chaguaramas, 2007, the CARICOM treaty. He claimed further that, each law was, "an assault on his dignity as a human being", it subjected him, "to derogatory categorisation and imposed a stigma on him," contrary to the treaty. He asked for declaratory orders to the effect of the claim, and an order that, each of the member states amend their respective Immigration Act.

[134] Mr. Tomlinson's application against Belize was dismissed. The learned judges of the Caribbean Court of Justice held that, "there was no general rule [in International Law] that, enacting a law or retaining an Act which conflicts with a State's treaty obligation necessarily constitutes a breach of that obligation; much depends on the nature of the treaty obligation or whether and how the legislation is applied." – see paragraph 29 of the judgment. The application against Trinidad and Tobago was also dismissed. The CCJ stated in addition that, there were several legislations in Trinidad and Tobago which encouraged compliance with the Revised Treaty, it suggested the practice of applying the Immigration Act in a manner that was consistent with the Revised Treaty, other than in a manner that breached it.

Determination on the grounds of appeal.

(ix) Separation of powers, and s. 69 of the Constitution.

[135] Regarding the ground of appeal that, the Chief Justice erred by "extending" the meaning of the word sex to include sexual orientation and thereby "breached" the doctrine of separation of powers of the State, and s.69 of the Constitution, we see no merit in it. It

is the core function and responsibility of the Judiciary to interpret and apply to the particular case, laws of the land which may be the common law or legislation. It is the core function and responsibility of the Legislature, the National Assembly of Belize, "**to make Laws for the peace, order and good government [good governance] of Belize**" - **see section 68 of the Constitution**. It is the core function and responsibility of the Executive (the Government of Belize) to carry on the administration of the country in accordance with the powers and responsibilities conferred on it by law. For these statements of law, see: **(1) DPP v Mollison [2003] 2 AC 411; (2) The State of Mauritius v Khoyrally [2006] UK PC13/ [2007] 1 AC 80;** and **A v Secretary of State for the Home Department [2004] UKHL 56 [2005] 2 AC 68.**

[136] The constitutional principle by which core powers and responsibilities of the State are divided between three Branches (Organs) of the State is known as the doctrine of separation of powers. It is not explicitly set out fully in the Constitution of Belize. But it has been well established in the English Common law, since its recognisable form, in the days of philosophers, John Locke (1632-1704) of England, and Baron De Montesquieu (1748) of France. Belize has adopted the doctrine from the English common law- see **ss. 21 and 134 of the Constitution** and **ss. 1 to 6 of the Imperial Laws (Extension) Act, Cap 2, Laws of Belize.**

[137] Three important cases in the Commonwealth Caribbean region in which the doctrine of separation of powers was discussed and applied are: **DPP v Mollison** cited above, **Hinds, Hutchinson, Martin and Thomas v The Queen [1977] AC 95;** and **DPP v Jackson (Attorney General, intervener) [1977] AC 193.**

[138] The purpose of the doctrine of separation of powers was to prevent concentration of the powers of the State in one person or one body unchecked, in order to avoid autocracy (aristocracy at the time). That reason remains valid today. Allotting separate powers of the State to the three separate Branches of the State provides checks and balances in the exercise of the powers of the State and maintains democracy and liberty. This, we believe, was the underlying reason for the complaint in this ground of appeal. In

pursuance of the doctrine, Mr. Hawke argued that the Chief Justice "expanded" the meaning of the word sex, and Mr. Hawke asked: "shouldn't that be a matter for the elected representatives in the House?" The question then for this Court is, did the Chief Justice exceed his power, the power of the court, to interpret and apply the law to this case?

[139] Our view is that, the Chief Justice did not exceed the courts' power when he assigned the meaning sexual orientation to the word sex in ss. 3 and 16 of the Constitution so that, the word sex included sexual orientation. The meaning assigned by the Chief Justice was not so far-fetched that, it would change the context or purpose of these sections; the intention in the legislation was not subverted.

[140] The learned Chief Justice was conscious of the function and responsibility of the courts. He warned himself about the limit of the function and responsibility of a judge when interpreting legislation. At paragraph 51 of his judgment, the Chief Justice stated: "*It needs to be made pellucid that this claim stands to be decided on the provisions of the Belize Constitution… The source of the courts remit is firmly grounded in the Constitution itself which reflects the separation of powers. The claimant has approached the Court on the basis of alleged violations of stated fundamental rights provisions in Part II of the Constitution, and the Court is tasked by s. 20 (1) to inquire into the same. The Supreme Court is the designated guardian of the rights conferred under the Constitution. It cannot shirk from the responsibility by asserting that any change to the legislation is [a] matter best left to the Legislature*."

[141] All that the Chief Justice stated, except the last sentence, is the correct approach, and is consistent with restricting the power of the court within the scope of interpreting the Constitution or any other statute. The last sentence is somewhat misleading though. It may be understood to mean that, the court cannot shirk from responsibility **to change legislation**. That responsibility is, of course, the responsibility of the Legislature. The Chief Justice's sentence was in fact, an attempt to convey the statement made before in the judgment of the Privy Council in **Roodal v The State of Trinidad and Tobago [2003] All ER (D) 290**. At paragraph 34, Lord Bingham stated:

> **"The Constitution itself has placed on an independent, neutral and impartial judiciary, the duty to construe and apply the Constitution and statutes, and to protect guaranteed fundamental rights, where necessary. It is not a responsibility which the courts may shirk or attempt to shift to Parliament..."**

This quotation does not mention responsibility "to change legislation". It does not mean the same thing as what the Chief Justice stated in the last sentence in the passage in his judgement quoted. A similar statement was made in **R v Ministry of Defence, ex parte Smith [1996] QB 517**. See also **The State of Mauritius v Khroyatty [2006] UK PC [2007] 1 AC 80.**

[142] Despite his one flawed sentence, the Chief Justice did not stray, he did not change ss. 3 and 16 of Constitution. He did not stray into the power of the Legislature. In reaching the meaning of the word sex to include sexual intercourse orientation, he applied the correct rules and principles of interpretation of statutes, and correctly sought persuasion in cases decided in other jurisdictions and at international forum. The last approach has been recently accepted as an aid to interpreting the Constitution and other statutes concerning human rights.

Determination on the grounds of appeal.

(x) The order at paragraph 2 of the orders is an undesirable overreach.

[143] It was different when the Chief Justice decided to make the order at paragraph 2 of the orders. He ordered that, a sentence be added to s. 53 of the Criminal Code in these words: "**This section shall not apply to consensual sexual acts between adults in private.**" There is nothing wrong in the substance of the addition, and it is consistent with ss. 3 and 16 of the Constitution as correctly interpreted by the Chief Justice. But we consider that, ordering the rewriting of the legislation in specific words, rather than

recommending rewriting of the legislation in the circumstances, to be overreaching. The declaratory order at paragraph 1 of the orders made by the Chief Justice was an adequate relief. It was a complete redress for the complaint in the claim that, s. 53 of the Criminal Code discriminates against homosexuals and, in particular, against the respondent Orozco. Furthermore, the respondent Orozco in his claim asked for the order at paragraph 1, and did not ask for the order at paragraph 2, adding that sentence to s. 53 of the Criminal Code. Such fortuitous foray by one Branch of the powers of the State into the function of another Branch of the powers of the State could be viewed as disregard by that Branch for the usual deference that each Branch gives to the other two.

[144] The claim of the respondent Orozco was particularly suited for a declaratory order and no more, because the respondent had not been arrested or threatened with arrest and a charge under s. 53 of the Criminal Code. It was said in the court below that, the appellant did not intend to arrest and charge homosexuals under s. 53 of the Act, the claim was academic. A declaratory judgment or order is a binding determination by the court that defines the rights of the parties before the court and resolves the uncertainty and the dispute between them. The declaratory order at paragraph 1 accomplished that. A declaratory order is generally the usual relief in public law claims, and it is discretionary.

[145] We took examples of the appropriate order in a claim where a legislation is impugned, as in this claim, from our highest court, the Privy Council (at the time) and now the CCJ. From the Privy Council we took **Reyes v R; Hines and Others v The Queen** and **Bahamas District of Methodist Church in the Caribbean and the Americas and Others v The Hon. Vernon Symonette and Others [200] UK PC31.** From the **CCJ we took Gregory August v the Queen; and Alvin Gabb v the Queen [2018] CCJ 7 (AJ) [43].**

[146] In Reyes v R the Privy Council held that, "section 102 (3) (b) of the Criminal Code, to the extent that it referred to any murder by shooting is inconsistent with section 7 of the Constitution; and by virtue of section 2 of the Constitution, subsection (3) (b) is to that extent void; it follows that any murder by shooting is to be treated as falling within class

B as defined in section 102 (3) of the Criminal Code." Although their Lordships substantially read down s.102 (3) and made a drastic change in favour of constitutional fundamental rights, their Lordships did not order that, s. 102 of the Criminal Code be rewritten in words dictated by them. That is the difference. Such an order would be directed to the Legislature, a very strong measure indeed, to be reserved for exceptional strong and urgent circumstances, in our view. Their Lordships' final advice to the Crown was simply that: "the appellant's appeal against sentence should be allowed and the sentence of death be quashed; the case should be remitted to the Supreme Court of Belize in order that a judge of that court may pass an appropriate sentence on the appellant, having heard or received such evidence and submissions as may be presented and made." Their Lordships did not direct that s. 102 of the Criminal Code should be restated and altered in writing. Their order was limited to directing the reading down of s. 102 when courts apply it.

[147] In the consolidated appeal to the Privy Council, **Hinds and Others v The Queen; DPP v Jackson and Attorney General (Intervener)**, their Lordships held that, the sections of the Gun Court Act, 1974 (Jamaica), which transferred a part of the jurisdiction of a Supreme Court judge to a Full Court Division of three Magistrates was inconsistent with the Constitution. Further that, the sections of the Act which provided for mandatory sentence of detention of offenders during the Governor's pleasure and for a review and recommendation by a board to the Governor for release of the prisoners were also inconsistent with the Constitution. Their Lordships did not order the rewriting of the sections of the Gun Court Act 1974, let alone by the inclusion of particular words. That again is the difference.

[148] In the **Bahamas District of Methodist Church** case, the Privy Council stated the guiding rule more explicitly at paragraph 31 of their judgment as follows:

> **"31. Their Lordships consider that this approach points irresistibly to the conclusion that, so far as possible, the courts of The Bahamas should avoid interfering in the legislative process. The primary and normal**

remedy in respect of a statutory provision whose content contravenes the Constitution is a declaration, made after the enactment has been passed, that the offending provision is void. This may be coupled with any necessary, consequential relief. However, the qualifying words, "so far as possible," are important. This is no place for absolute and rigid rules. Exceptionally, there may be a case where the protection intended to be afforded by the Constitution cannot be provided by the courts unless they intervene at an earlier stage. For instance, the consequences of the offending provision may be immediate and irreversible and give rise to substantial damage or prejudice."

[149] The Chief Justice relied on the judgment of this Court in **San Jose Farmer's Co-operative Society Ltd. v Attorney General (1991) 43 WIR 63**, to support the rewriting of s. 53 of the Criminal Code. We acknowledge that, in **San Jose Farmers' case**, this Court made several far reaching modifications to the Land Acquisition (Public Purposes) Act (existing on 21 September 1981, Independence Day) in order to bring the Act into conformity with the Constitution of Belize, adopted on Independence Day. The modifications were carried out under **s. 134 of the Constitution** which states:

134.-(1) Subject to the provisions of this Part, the existing laws shall notwithstanding the revocation of the Letters Patent and the Constitution Ordinance continue in force on and after Independence Day and shall then have effect as if they had been made in pursuance of this Constitution, but they shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution.

(2)...

(3) The Governor-General may by order published in the Gazette within twelve months after Independence Day make such amendments to any

existing law (other than this Constitution) as may be necessary or expedient for bringing that law into conformity with the provisions of this Constitution or otherwise for giving effect or enabling effect to be given to those provisions.

(4) An order made under this section may be amended or revoked by the National Assembly or in relation to any existing law affected thereby, by any other authority having power to amend, repeal or revoke that existing law.

(5) The provisions of this section shall be without prejudice to any powers conferred by this Constitution or by any other law upon any person or authority to make provision for any matter, including the amendment or repeal of any existing law.

(6) In this section, the expression "existing law" means any Act of the Parliament of the United Kingdom, Order of Her Majesty in Council, Ordinance, rule, regulation, order or other instrument having effect as part of the law of Belize immediately before Independence Day (including any such law made before that day and coming into operation on or after that day).

[150] Related to s. **134** is s. **21** which states:

> **21. Nothing contained in any law in force immediately before Independence Day nor anything done under the authority of any such law shall, for a period of five years after Independence Day, be held to be inconsistent with or done in contravention of any of the provisions of this Part.**

[151] We note, however that, there are indications in the three separate judgments in the **San Jose Farmers** case that, the decision to carry out the far reaching modifications instead of to declare the Act inconsistent with s. 17 of the Constitution was not an easy one when the Court exercised discretion in favour of modification . The judgments were delivered on 25 September 1991, ten years after Independence Day. One indication of the difficulty in deciding whether to carry out modification or declare several sections of the Act inconsistent with the Constitution is disclosed in these words of Henry P. writing about s. 21 of the Constitution. He stated at the last paragraph on page 7, the following:

> **"... section 21 of the Belize Constitution was designed to overcome both problems by providing a breathing space during which the Governor- General and Parliament could effect the necessary legislative changes. The section does not, however, in my view, detract in any way from the power of a court either during the five-year period or afterwards to construe an existing law with such modifications, adaptations, qualifications, and exceptions as may be necessary to bring it into conformity with the Constitution. At the same time the modifications, etc., must be such only as are necessary and a court must be wary of usurping the functions of Parliament by introducing new and possibly controversial legislation in the guise of a modification necessary to bring a particular law into conformity with the Constitution."**

[152] At the second paragraph on page 21 Liverpool JA; writing about s. 134 of the Constitution also stated the limitation in the power of the Court to modify the Land Acquisition (Public Purposes) Act in these words:

> **"Section 134 (1) of the Constitution is explicit in its requirement that existing laws must be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution; and it is**

acknowledged that the Land Acquisition (public Purposes) Act is an existing law. In my view, the permitted modifications transcend those of nomenclature, reaching matters of substance and stopping only where the conflict between the existing law and the Constitution is too stark to be modified by construction."

[153] A much more overt indication of the difficulty in deciding whether to modify or declare the Act inconsistent and null is the fact that, although Smith JA agreed to reading down the existing Land Acquisition (Public Purposes) Act with modifications etc., he did not agree to the form of some of the orders that he considered rewrote parts of the Act. At paragraph 7 of his judgment on page 22, Smith JA sated the following:

"The power to amend any existing law under section 134 (4) includes the courts', but is limited to such modifications, adaptations, qualifications, and exceptions as may be necessary to bring it into conformity with the Constitution. My judicial colleagues are of the view that thereby they may create new law. This they have set out to do in regard to new court procedures by adding new subsections extending the right of access to the courts, namely, as sections 3(4A), 8(3), 17(3) and 18(3A). While I would wish to see such legislation passed to extend the right of access to the courts, I am unable to agree that can be done by the courts under the powers granted in the transitional provisions of Chapter XI, section 134(1) and (4), to improve access to the courts in matters arising under the Land Acquisition (Public Purposes) Act. I am of the view that has to be left to Parliament."

[154] The transition period of five years and the transition powers aside, we consider that, when the Supreme Court has decided that a legislation is inconsistent with any provision of the Constitution, the first and usual relief that it should grant is a declaratory order,

unless urgency requires some other additional order. Where the declaratory order sufficiently defines the right claimed, as in this case, the judge should refrain from making an order directing the rewriting of the legislation; he should be content with reading down the legislation and making a declaratory order accordingly. That avoids overreaching the power of the courts, or giving an appearance of overreaching.

Determination on the grounds of appeal.

(x) The fundamental freedom of expression.

[155] The ground of appeal regarding the fundamental freedom of expression was that: the Chief Justice erred in holding that, the fundamental freedom of expression guaranteed under s. 12 of the Constitution was contravened by s. 53 of the Criminal Code, in that the Chie Justice "failed to reason and rationalize," the decision.

[156] First, we observe that, the complaint that the Chief Justice, "failed to reason and rationalize," is mistaken. In his judgment, the Chief Justice pointed to the items of evidence in which sexual intercourse between a man and a woman, or between people of the same gender is regarded as an expression. Then he applied a persuasive judgment from Canada in which it was concluded that, an expression may be by conduct. Further he referred to s. 12 of the Constitution under which he decided the question whether the provisions protecting the constitutional fundamental freedom of expression was contravened. He decided that, the provisions were contravened. May be the Chief Justice did not set out his reasoning in a way that counsel could easily identify.

[157] The details are these. At paragraph 27 of his judgment, the Chief Justice summarised the first affidavit of the respondent Orozco, in which he deposed that, he was an adult whose, "expression of sexuality was consensual and conducted in private", but that, he was concerned that, the law, s.53 of the Criminal Code, encouraged public prejudice and affected his, "right to express his human sexuality," and affected his relationship with other consenting male partners. At paragraph 33, the Chief Justice

stated that, the deponent Mr. Kendale Trap, also a homosexual, in his own affidavit repeated the contents of Mr. Orozco's affidavit as applied to him, Kendale. At paragraph 36, the Chief Justice recorded the contents of the affidavit of Dr. Shape, an expert deponent. He deposed that: "homosexuality is defined in psychology as, the persistent sexual and emotional attraction to someone of the same sex; it is part of the range of sexual expression and not a disorder to be treated."

[158] At paragraph 76 to 79, the Chief Justice reviewed the affidavits of two bishops and a pastor of the Christian faith. The affidavit of Lord Bishop Philip Wright of the Anglican Church was consistent with the view that, sexual intercourse was "an expression", although he pointed out limits prescribed in Christianity. Bishop P. Wright deposed: "human sexuality is to be seen as a gift from God to enable human beings to express their affection, love and companionship for each other within marriage, and secondly to procreate and multiply species." Although the Lord Bishop deposed that, christians believed in heterosexuality and public morality, christians also believed in tolerance towards others, and that, "the Church extends pastoral and spiritual support to homosexuals." The offer of spiritual support may have included a prayer request to God for forgiveness. Lord Bishop's view was not compatible with penalising homosexuals as in s. 53 of the Criminal Code.

[159] Lord Bishop Derick Wright of the Roman Catholic Church did not depose as to whether sexual intercourse is regarded by the Roman Catholic christians as an expression. He noted, however that, christians regard homosexuality as immoral; "the act is immoral, but the person is created in the image of God and is entitled to the dignity inherent in his spiritual nature", Lord Bishop deposed. Again the belief was not compatible with penalising for sexual immorality. Pastor Eugene Crawford, President of Belize Association of Evangelical Churches, did not depose as to whether in his Association christians regarded sexual intercourse as an expression. His affidavit was about public immorality.

[160] From his detailed review of the evidence from non-christian and christian witnesses, the Chief Justice must have concluded that, sexual intercourse including homosexual sexual intercourse was an expression; and since s.53 of the Criminal Code criminalizes it on the basis of sexual orientation, the section contravenes the Constitution. The complaint that the Chief Justice did not give reasons for his conclusion must fail, in the first place, on the facts.

[161] The complaint would fail anyway. Assuming that, The Chief Justice did not give reason, we would have concluded that, the evidence outlined above would lead to the conclusion that, homosexual sexual intercourse and heterosexual sexual intercourse are forms of expression, and that s. 53 of the Criminal Code criminalizes homosexual sexual intercourse, a form of expression, in a discriminatory way on the basis of sex. We have already decided that, the meaning of the word sex in s. 3 of the Constitution includes sexual intercourse orientation. The Court of Appeal is authorised by **s. 19 of the Court of Appeal Act** to draw inferences of facts and make such orders as the Supreme Court or the judge thereof might have made.

Determination on the grounds of appeal

(xi) The orders on appeal.

[162] We have accordingly concluded that, the appeal be dismissed to the extent that, it is against the order of the Chief Justice at paragraph 1. We confirm the order which states: "The Court makes the following order [s]: A declaration that, s. 53 of the Criminal Code Chapter 101 contravenes section, 3, 6, 12, 14 and 16 of the Belize Constitution to the extent that, it applies to carnal intercourse against the order of nature between persons." We have also concluded that, the appeal be allowed to the extent that, the order at paragraph 2 states: "The following sentence be added to section 53 of the Criminal Code, Chapter 101: 'This section shall not apply to consensual sexual acts between adults in private.'" We set aside the order.

Costs

[163] The appellant has succeeded partly in the appeal. The respondents have partly successfully opposed the appeal. Parties shall bear their own costs of the appeal. There was no appeal against the order for costs in the court below. We do not make any order regarding costs in the court below. This order for costs is provisional, it shall become absolute in seven days, unless parties make an application for a different order.

Samuel L. Awich JA.

DUCILLE JA

[164] I have had the benefit of reading the judgement of my learned brother Awich JA. I am in full agreement with the reasoning and disposition. I cannot add anything further.

Murrio Ducille JA.

CAMPBELL JA

[165] Mr Caleb Orozco by Fixed Date Claim Form brought a claim under Part 56 of the Supreme Court (Civil Procedure) Rules, 2005 for constitutional redress pursuant to Sections 3,6,12,11and 16 of the Belize Constitution. Mr Orozco described himself as a health-educator and health-worker in a non-government organization and that he was 'a homosexual man and president of UNIBAM'.

[166] He sought the following reliefs:

> "(i) A Declaration that section 53 of the Belize Criminal Code, Chapter 101 contravenes the constitutional rights of the Applicant enshrined in sections 3, 6 and 14 of the Belize Constitution and affirmed in the Preamble of the Belize Constitution, and is accordingly, null and void and of no effect to the extent that it applies to carnal intercourse between persons;
> (ii) An Order striking out the words "with any person or" appearing in the said section 53;
> (iii) Such other declaration and orders and such directions as the Court may consider appropriate for the purpose of enforcing or securing the enforcement of those rights".

[167] The Grounds of the Claim were stated, inter alia, as follows:

> "In the premises and in the light of the preamble to the Constitution of Belize which recognizes 'the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their Creator', section 53 violates:
> (i) the right to the recognition of human dignity guaranteed by section 3(c) of the Belize Constitution;
> (ii) the right to the protection for personal privacy guaranteed by section 3(c);
> (iii) the right to the protection of the privacy of the home guaranteed by section 3(c);
> (iv) the right not to be subjected to arbitrary or unlawful interference with privacy or unlawful interference with privacy guaranteed by section 14(1);
> (v) the right to respect for private life guaranteed by section 14(1); and
> (vi) the right to the equal protection of the law without discrimination guaranteed by section 6(1)".

[168] In summary the claim alleged that section 53 of the Criminal Code, Chapter 101, of Laws of Belize, unlawfully provided for a discriminatory law in contravention of the claimant's constitutional rights and freedoms guaranteed pursuant to sections 3, 6, 12, 14 and 16 of the Constitution of Belize, Cap. 4, Laws of Belize, and it was, "null and void, to the extent that it applied to carnal intercourse between adult persons". His claim was for constitutional relief.

[169] By an application dated May 17, 2011, the Roman Catholic Church of Belize, the Belize Church of England corporate bodies, and the Belize Evangelical Association of Churches ("the Churches") were granted permission to be added as the 4th 5th and 6th Interested Parties.

[170] At trial, the First to the Third Interested Parties, filed written submissions in support of the Claimants challenge. The Fourth to the Sixth Interested Parties, filed submissions complementary to the Defendant. The Seventh Interested Party was also served with the notice of appeal, the judgment and the orders appealed, but did not participate in the proceedings. They are not parties in the appeal. UNIBAM had formerly appeared as a Claimant before being struck out on the basis of a lack of standing but was subsequently permitted to be added as an Interested Party. The Churches were jointly represented, and the leaders of each denomination swore to and filed affidavits in Opposition to the Claim. It is fair to say that collectively these religious bodies represent the vast majority of Christians in Belize. The Roman Catholic Church of Belize filed its own appeal No 31 of 2016, on 16 September 2016, but has since filed a notice stating that it withdrew the appeal.

[171] The judgment of the learned Chief Justice, noted how the claims in respect of sections 16, 12 and 11 came to be added to the amended Statement of Claim as issues were joined in the dispute between the parties. At paragraph 6:

"In the course of the trial, the Deputy Solicitor General supported by learned Senior Counsel for the Churches objected to the reliance by the Claimant in his submissions without amendment upon alleged violations to section 11 (freedom of conscience), section 12 (freedom of expression) and section 16 (protection from discrimination). Arguments were heard and additionally the Claimant applied to add section 16 as one of the grounds. It was ruled that the Statement of Case be amended to add section 16 as a ground. As to the submissions relating to sections 11 and 12, learned Senior Counsel for the Claimant pointed out that the invoking of those sections was in response to submissions by the Churches as to the importance of God in the interpretation of the Constitution, to which explanation there was no demur. The basis of the ruling was that the Defendant was not taken by surprise, that the Claim before the Court for determination was not thereby varied and that it was desirable that the challenge be comprehensively addressed".

[172] The Chief Justice outlined the history of S53 of the Criminal Code .The Criminal Code was brought into force on December 15, 1888 and introduced what the side note called 'Unnatural crime' , buggery (with consent) and bestiality were classified separately as public nuisances. The offence of unnatural crime was repealed and replaced by Ordinance No. 4 of 1944 with the wording substantially similiar to the present section 53, remaining in force up to the present.

[173] The legislative history of section 53 shows that it was enacted in post slavery Belize and remained unscathed by the debates and commentaries that were a part of the ***Wolfenden Report***, which heralded sweeping changes in the buggery laws in the United Kingdom. Consensual homosexual conduct achieved legal recognition in 1967 in England and Wales by the ***Sexual Offences Act UK 1967***. There was no recorded effort at transportation of the decriminalization of the buggery law to Belize .There was no evidence of efforts made on the part of the legislature, since the passage of Sexual Offences Act UK 1967, to transport similar provisions in Belize.

[174] In submissions, at trial, the Defendant conceded to the Claimant's first ground that section 53 criminalizes anal intercourse between consenting male adults in private. It was further submitted that the wide ambit of the term "against the order of nature" included anal intercourse between male and female and oral sexual intercourse between consenting adults. The Churches' submissions concurred with this interpretation and relied on decided cases from Commonwealth jurisdictions.

The Chief Justice's ruling

[175] The Chief Justice made the following ruling:

> *'I hold that section 53 is in breach of the dignity of the Claimant and in violation of section 3(c). Further, such breach operates to inform the other rights from which the concept of human dignity emanates. With regard to the right to Privacy, the court heard evidence from the Defendant and the Interested Parties, relied on the limitation imposed by S9 (2) (a)Morality. The Defendant, relied on the evidence of Professor Bain, who testified that there were no data to support the hypotheses' that the decriminalization of S53, would lead to a decrease in the incidence of HIV, amongst gay men.* The Court found at paragraph [73] g*iven the state of the evidence before the Court, it is more likely than not that the retention of section 53 so far as it relates to MSM hinders rather than aids testing and treatment as a matter of public health. The second stage of the test fails on evidence.*
>
> *If public opinion were to be decisive there would be no need for constitutional adjudication for the reasons I have espoused. I find that section 53 violates the fundamental right of the Claimant to privacy. The Claimant contended in his submissions that section 53, insofar as it criminalizes consensual private sexual activities between consenting adults, is a breach of the individual's freedom to express his or her preference or orientation.*

The onus is therefore on the Claimant to show that he has been discriminated against. On the evidence he has demonstrated that he has been discriminated against on the basis of his sexual orientation. No evidence has been led to show that such discrimination is justifiable. The same position applies in relation to section 16(1) and (3) applying the interpretation of sex to embrace 'sexual orientation' as enunciated by the UNHRC in Toonen I accept these contentions to the effect that the word 'sex' in section 16(3) of the Constitution is to be interpreted to extend to 'sexual orientation...'

[176] The Orders that the learned Chief Justice made were as follows:

"(1) It is hereby declared that section 53 of the Belize Criminal Code, Chapter 101 contravenes sections 3, 6, 12 and 16 of the Belize Constitution to the extent that it applies to carnal intercourse against the order of nature between persons;
(2) that the following sentence be added to section 53 of the Criminal Code, Chapter 101: This section shall not apply to consensual acts between adults in private;
(3) that costs shall be paid by the defendants, fit for two Senior Counsel. Such cost to be assessed by the Registrar unless agreed.

Judgment Under Appeal

[177] That part of the judgment of the Honourable Chief Justice Mr. Kenneth Benjamin that:

Section 53 of the Criminal Code of Belize, Chapter 101 contravenes section 16 and 12 of the Belize Constitution.

GROUNDS OF APPEAL

[178] 3. The grounds of Appeal were as follows:

> "3.1 The Learned Trial Judge erred or was misconceived in law when he found that section 53 of the **Criminal Code of Belize Chapter 101, Laws of Belize** contravened section 16 of the Belize Constitution in that it breached the Respondents right not to be discriminated against on the basis of his 'sexual orientation'.
> 3.2 The Learned Trial Judge erred in law in holding that sex in section 16 (3) of the Belize Constitution is interpreted to extend to 'sexual orientation' and so breached the scared Doctrine of separation of powers as it is only the Legislature who can properly change or amend an entrenched provision of the Constitution.
>
> 3.3 The Learned Trial Judge erred and was misconceived in law in holding that the Respondent's right to Freedom of Expression as enshrined in section 12 of the Constitution was contravened but failed to reason and rationalize how the right is breached in relation to section 53 of the Criminal Code, Chapter 101 Laws of Belize.
>
> 3.4. The learned trial judge erred in law when he accepted that the arguments in relation to section 12 whilst made in written submissions was not properly developed by the Respondent and as a consequence, there was no analysis by the trial judge to properly come to the decision that was arrived at.
>
> 3.5 The decision of the learned trial judge has raised matters of grave constitutional importance and it is a matter of Public interest that the issue in relation to 16(3) be ventilated in order that a pronouncement can be made by the court.

3.6 The Decision was against the core Constitutional principles

4. The parts of the decision of the learned trial judge, particularly in relation to sections 16(3) and 12 of the Constitution should be reversed, set aside; and a proper pronouncement ought to be made in relation to those constitutional provisions.

5. The names and addresses of the persons directly affected are set out hereunder."

[179] Counsel for the Appellant, in his oral submission said, the appeal was limited in scope in the sense that the appellants are only addressing two particular findings of the learned Chief Justice that the parts of decision in relation to sections S16 (3) and S12 of the Constitution should be reversed, set aside and a proper pronouncement ought to be made in relation those constitutional provisions.

Preliminary Objection

[180] The Respondents took a preliminary objection to the appeal proceeding. The first to the Third Respondents contended that both issues raised on the Appeal were academic in nature given the concession that was made by the Attorney General that the Chief Justice's core conclusion in reading down section 53 of the Criminal Code was correct, and the decision not to challenge the Chief Justice's findings under any of Section 3(c) (including the right to human dignity), Section 6 (the right to equal protection of law) and Section 14 (the right to privacy) of the Constitution. The gist of the secondary submission was that the absence of challenge to the Chief Justice's resolution of the issues joined between the parties meant that the Appellant has accepted those aspects of the learned Chief Justices decision .The only challenge is that s16 and s12 have been breached , mainly in particular , that the learned Chief Justice found that sex within s16 (30 , includes " sexual orientation" . Alternatively, and in any event, the Chief Justice's conclusions in relation to both Sections 16 and 12 were manifestly correct and should be upheld.

[181] Mr James argued that the appeal should be dismissed summarily as there was no issue that needs to be answered by this court, as they serve no practical purpose. That the answers that are being pursued are for purely academic curiosity.

[182] It was further submitted on behalf of the Respondent that, even if the appeal were successful, the Court's decision that Section 53 contravened the Constitution, and the Court's Order that an amendment be made to Section 53 to bring it into conformity with the Constitution, would remain unaffected. This means that Section 53, as originally worded, will remain unconstitutional and that Section 53 will continue to be read with the amendment added to it in order to bring it into conformity with the Constitution. Accordingly, a decision on this Appeal will have no practical effect.

[183] Mr James in his written submissions stated that the general principle is that the Court should not make a decision that would have no practical effect. He further submitted, that this is not a hard and fast rule since the Court retains a discretion to hear and determine such matters. Learned Counsel further submitted that , it is well established that the Court must be most cautious in the exercise of this discretion and that it should only do so where there are good reasons in the public interest to hear such an appeal: **Attorney, General of Belize v Barry Bowen (C.A. 7 of2009, 19 March 2010), Ya'azche Conservation Trust v Sabido et al (C.A.60 of 2010, I December, 2010), CCJ Application BZCV2014/003 Ya'azche Conservation Trust v Sabido et al I20I4I CCJ 14 (AJ).**

[184] The Appellant filed no written submission in opposition to the Respondents preliminary objection .The learned Solicitor General on behalf of the Appellant, presented oral arguments ,which were not always consistent with the written submissions prepared for the Appellant's substantive appeal. Mr Hawke accepted the Respondents submission that the general principle was that the Court should not adjudicate on academic matters. He made no submission whether the present appeal was academic or not , but submitted

that, it concerned public law issues and there were good reasons in the public interest to hear and pronounce on them.

Is the Appeal academic

[185] Are the issues raised in this appeal academic as the Respondent contends, or are there live issues as between the parties, remaining to be resolved. Issues whose resolution are of practical value.

[186] It is important to note, that breaches of s16 and s12, were not issues which were originally a part of the Respondents claim. These were incorporated in the claim at trial , when the Deputy Solicitor General objected to the Claimant placing reliance on S11, 12 and S16 without those sections being a part of the claim. The Claimant applied to amend the Claim by adding S16. Prior to that objection being taken the Claimant had not contended to being discriminated against by the Defendant as a result of his sexual orientation.

[187] In respect of S11 and S12 they were incorporated in the application by the Claimant as an answer to submissions by the Church, as it concerns the role of God in the Constitution .The Learned Chief Justice was of the view it was necessary to grant the amendments, in order that the "challenge be comprehensively addressed ". (The judgment at paragraph 6).

[188] The Respondent relied on a decision of this court (Mottley P; Carey, Morrison JJA) in **The Attorney General v Barry Bowen et al, Civil Appeal No.7 of 2009** delivered on the 19th March, 2010. The application raised a constitutional challenge to the Belize Constitution (Sixth Amendment) Bill 2008 , which proposed by its Clause 2, an amendment to Section 17 of the Belize Constitution . The applicant sought declarations that Clause 2 was an unconstitutional attempt to amend the Belize Constitution and was likely to contravene the constitutional rights of the Applicant generally and particularly

those rights enshrined in sections 1, 3 , 6 17, 20 and 95 of the Belize Constitution . The application sought an Order to strike down Clause 2.

[189] In **Barry Bowen** the learned trial judge agreed with the Claimant and held that Clause 2 would not be in consonance with the Constitution. The Attorney General appealed the trial judge's ruling On the day after the hearing commenced , Crown Counsel sought an adjournment , and on resumption gave a statement to the effect that it was never the intention of the government to acquire petroleum lands outwith the royalty provisions of the **Petroleum Act**, neither was it the government's intention to deny the applicants access to the court . The matter was adjourned to the October session of this Court.

[190] During the adjournment, the necessary amendment was made to clause 2. It was common ground that the amendment put the matter beyond doubt by confirming Crown Counsel's statement made to the court.

[191] On resumption of the Appeal, Counsel for the Attorney General, urged the court that the matter should be discontinued as it was now academic. However, Mr Courtenay SC on behalf of the Respondents submitted that the matter should be proceeded with as it was desirable to have the decision of the Chief Justice upheld. According to Counsel the public interest would be served by having the Court pronounce upon the proper construction to be given to Section 68 and 69 of the Constitution, which involved the extent of the power of Parliament to amend the Constitution.

[192] This Court found that although there was argument on the issue of amendment of the Constitution, no declarations were sought in relation to it. (See paragraph 26). The Court held that the matter was academic and no good reason had been shown why the appeal should be entertained. The matter on which the court had ruled was amended and it was not open to the Court to examine the Constitutionality of the amended legislation.

[193] The Court at paragraph 21, held, "In as much as the Bill which was before the Chief Justice is no longer in existence, the issue that the appeal raised had, in the view of the Court, become moot" .In **Barry Bowen** there was a clarification of the government's position and redrafting of the impugned Clause 2 in relation to the issues raised that put the matter beyond all doubt and which assuaged the concerns of the appellants.

[194] This Court in **Barry Bowen**, examined the case of the **Attorney General of Trinidad and Tobago v Trinidad and Tobago Civil Rights Association et al Civil Appeal 149 of 2005** to determine whether a Judicial Review Bill, which had lapsed before the declaratory order sought came up for hearing contained live issues. The Court said the bill was "hypothetical" but not academic.

[195] In delivering the judgment of the Court of Appeal, with which the others concurred, Warner JA said;

> "A court may choose to hear arguments and hand down a decision which has no practical effect, in order to clarify the law or to give guidance to decision makers where there is a good reason in the public interest or even resolving issues as to costs."

[196] Warner JA, adopted the approach of the Courts in the United States and Canada, where the issue is dealt with under the rubric of "the doctrine of mootness", and relied on the support of the Canadian case of **Borowski v Attorney General 1988 Can Lii123** where the Supreme Court said:

> "An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in most cases unless the court exercises its discretion to depart from it."

[197] What is clear in **Trinidad and Tobago Civil Rights** case, the lapsing of the bill, was due to the procedural proroguing of Parliament . On resumption of Parliament, the bill was likely to be brought back. The parties had no resolution to the issues between them. The bill therefore had the potential of affecting the rights of the parties, a position Warner JA describe as "hypothetical but not academic ". In contrast Barry **Bowen**, the applicants concern no longer existed, there were no live issues between the parties.

[198] At the core of the dispute in this appeal, are issues that the Fixed Date Claim did not initially include claims in respect of s11 12 and S16. The Attorney General and the Churches objected to those matters being relied on in the absence of pleading. Mr Ottey QC submitted that, "this Appeal does not raise a challenge to the unconstitutionality of the sexual orientation discrimination, under s3 and 6, there is therefore no practical value in determining whether S53 contravened the sexual orientation discrimination in S16".

[199] However, Mr Hawke submits that a relevant issue is 'whether the word sex was understood and placed by the framers of the Belizean Constitution could now be expanded by a judge to include sexual orientation. According to the learned Solicitor General, the decriminalization of consensual sexual intercourse between persons of the same sex, and the allied recognition of the other rights found by the Chief Justice provided no resolution to the issue as to whether sex in S16 was properly construed to mean sexual orientation.

[200] Mr Ottey QC submitted that , the Privy Council decision in **George Daniel (deceased) v Attorney General of Trinidad and Tobago (2011) 80 WIR 456** , and the Caribbean Court of Appeal's decision in **Ya'Axche Conservation Trust vs Sabido et al** merit attention as being recent decision of both apex courts .Mr Ottey QC submits that **George Daniel** supports the Respondents contention , that a decision in the instant appeal , is unnecessary and inappropriate.

[201] In **George Daniel** the main court complex housing the Supreme Court, in Trinidad and Tobago, made no special provision for the disabled. The applicant, the President of

a group representing the disabled, brought a motion asserting the violation of their fundamental rights and freedoms under S4 (a) ...liberty, (d) equality of treatment from any public authority (g) freedom of movement. The judge upheld the complaint under S4(a) only and declaratory orders were made with directions to remedy the defect within 18 months . The applicant appealed contending that the judge should also have made orders under Sections 4 (d) and 4 (g).

[202] The Court of Appeal , in Trinidad and Tobago , dismissed the appeal ,holding it was both unnecessary and inappropriate to say whether the judge was right or wrong in ruling against the appellant in respect of s4 (d) and s4(g).

[203] On appeal, the Privy Council, affirmed the decision of the Court of Appeal, holding that the appellant had his core grievance right recognised having gained access for the disabled to all the courts in Trinidad .. The State had not appealed that decision. In those circumstances, it was entirely correct, for the Court of Appeal to regard the appeal as academic between the parties and in concluding that there was no compelling public interest in the appeal. The Privy Council opined that no different substantive outcome would have resulted from a different conclusion in respect of the paragraphs dismissed. The finding as made by the trial judge did not create a binding precedent as to the scope of s4(d) and s4(g).

[204] Mr Ottey QC has commended the approach taken by their Lordships in **George Daniel**, as the correct approach to be taken by this Court in the instant appeal. I am reluctant to heed learned Queen's Counsel's advice to do so for the following reasons.

[205] The Privy Council was satisfied with two circumstances before it affirmed the Court of Appeal judgment. Firstly, although Mr Daniel had received public access to all the courts in the country, he nonetheless was appealing. Simply put Mr Daniel had gotten all he could have substantively achieve by the claim. Even if the Judge had ruled in his favour on the other two claims, no different substantive outcome could result. Secondly, the State had not appealed the decision. The effect of those two factors, meant that the

judicial system had resolved the contention between the parties, as far as the system could. The State had no outstanding issues, which it demonstrated by not contesting the trial judge's decision. The appellant could not properly complain having achieved all they had claimed. In short there were no live issues remaining between the parties.

[206] In the instant case, in contrast, The State is appealing the Chief Justices disposition of the claim, in two areas as it concerns 12, the freedom of expression and s 16 discrimination against sex. Both of these issues were concerns of the Appellant and became a part of the claim through the Appellants intervention. Unlike **George Daniel**, in the instant case, the successful party has not appealed, and the unsuccessful party has appealed. Secondly, the dismissal of the applications in George **Daniel**, could not create a binding precedent. However, in the instant appeal , the construction placed on 'sex' to include 'sexual orientation' will be so construed by the lower courts , particularly in dealing with sex in respect of constitutional matters and will be highly persuasive in other instances.

[207] Counsel for the Respondent , next referred to a decision of the Caribbean Court of Justice , in an appeal from this Court, BZCV2014/003 **Ya' Axche Conservation Trust vs Sabido et al)** The CCJ ,(Saunders, Hayton, Anderson JJJ) confirmed the judgment of the lower court ,that the appeal had become academic . The authorization to conduct a feasibility study in a "nature reserve "had been issued on the 13th October 2009. On the 26th January 2010 judicial review proceedings were launched, challenging the legality of the permit to conduct the study. On the 24th September 2010, the matter came up for hearing but the permit had already expired and was not renewed by the time the matter came before the court. The permit had allowed the activities that were at the core of the Claimants grievances. As a consequence, the feasibility study could not be done. The source of the claimants concerns had dried up. There remained no live issue between the parties. The Court refused the application for special leave, because there was no realistic possibility of overturning the decision in the Court of Appeal. The CCJ held that the matter was 'therefore academic or theoretical 'in the sense there was no live issue to be resolved between the parties. '(See para 2).

[208] In a judgment delivered by Justice Anderson J, CCJ on behalf of the Court, on the 31 July, 2014, at paragraph 3, the CCJ stated:

> "Not withstanding this broad competence to hear any appeal, it is an important feature of our judicial system that the court decides disputes between the parties before it and does not pronounce on abstract or hypothetical questions of law where there is no dispute to be resolved. In general there must exist between the parties a matter in actual dispute or controversy which the court can decide as a live issue."

[209] With respect , I am unable to see the support that Mr Ottey QC, derives from **YA' Axche Conservation Trust**. The core grievance of the appellant, in that case, was the permit which had been issued to the Third Respondent which allowed the feasibility study to be done. With the expiration and non-renewal of that permit, the core grievance had extinguished. The case was an adverserial , and the respondents, had indicated their disengagement with the dispute by their failure to put in a defence. In the instant appeal neither side has disengaged nor withdrawn from the dispute neither has the core grievance of the Appellant expired .To rule this matter academic, amounts to a prejudgment on the merits of the appeal. It was a live issue at the commencement of the trial and it remained so when the Attorney General dissatisfied with the judgment of the Honourable filed this appeal.

[210] The Respondent's written submission at paragraph 11, relied on the case of ZZ **v The Secretary State for the Home Department [2017] EWCA Civ 133** to determine in what circumstances a court of appeal should embark on the hearing and determination of an appeal that has become academic. In **ZZ** the appeal had become academic in that the outcome of the appeal either way would have no practical consequences.

[211] **ZZ** had been granted leave to remain in the United Kingdom. In 2005, whilst he was out of the country, the Secretary of State cancelled the grant of leave and excluded him from readmission. In 2006, he was refused entry and appealed, which was dismissed. In 2015, **ZZ** appeal was allowed. The Secretary of State decision in September 2006 to refuse ZZ permission was overturned. On the 18th August ZZ was readmitted. It was indicated that the State had no intention to seek to have ZZ leave the UK. So whichever way the appeal went it would have no practical purpose.

[212] As in George **Daniel**, ZZ had gotten the resolution of his core grievance, whilst the other party, indicated they would not be pursuing the matter. I also find that this case does not provide support for the factual matrix of the instant case. I find that there are live issues to be resolved amongst the parties.

A public Law question

[213] In any event, the general rule, that the courts will not ordinarily entertain academic appeals is not an absolute rule. The judgment of the CCJ in YA'Axche **Conservation Trust, notes at paragraph 4** as follows:

> " Several Caribbean courts have accepted that an academic appeal may be heard if it raises an issue of public interest involving a distinct or discrete point of statutory interpretation which has arisen in the past and may rise again in the future ., ...we agree that the court should be cautious in the exercise of its discretion to entertain an academic appeal and should in principle **only do so where the question is one of public law (as distinct from private law rights disputes between parties) and where there are good reasons in the public interest to hear such an appeal** .. We agree with Lord Slynn of Hadley who, in delivering the judgment of the House in **ex parte Salem**, stated an appropriate circumstance for hearing an academic appeal may **be where the appeal raises a discrete point of statutory interpretation of the powers of a public authority without need**

for detailed consideration of the factual situation, especially where the issue is likely to arise again for resolution in the future." (emphasis added)

[214] On the question of determining whether an academic appeal should be heard as an exercise of the courts discretion , Mr James relied on the decision of the CCJ , in ***Sattie Basdeo v Guyana Sugar Cooperation Limited 2018 CCJ .***He submitted that the Attorney General's appeal was not only academic , but had none of the reasons the CCJ considered as necessary prerequisites to allowing such an appeal . According to Mr James none of the reasons for the Court's exercise of its discretion was present in the instant case. It is a submission I cannot accept.

[215] Firstly, the CCJ, did not make the determination that the appeal in Sattie ***Basdeo*** was academic. The judgment at paragraph 22 states; inter alia, "we agree with the Applicants that **the alleged academic nature of the appeal** should not prevent the hearing of the appeal." (emphasis added. Then at paragraph 23, "In short, it is not entirely clear that the appeal is academic."

[216] Secondly, I also reject the submission, that the instant appeal displays none of the reasons given by the CCJ for the exercise of the Courts discretion to hear the appeal. Both appeals are concerned with questions of public law, and not private law rights between parties. The issues in both appeals provide good reasons in the public interest to hear such appeals. I would think that the Applicants' constitutional rights need to be determined to prevent future abuses thereof, if abuse there be , is a reason that applies to the entire LBGT community in the instant case , as it does to members of the trade unions in ***Sattie Basdeo.***

[217] I am clear that there remains live issues that have not lapsed, expired or have not been withdrawn by either side in this dispute. In any event the question herein raised , are issues of public law , brought by the claimant and interested organizations both domestic and international and will directly affect the rights of LBGT community and the State party which may be required to institute remedial and preventative services to avoid

future breaches . The appeal concerns the interpretation of the Constitution, in respect of an issue of national interest. The preliminary objection to this appeal being proceeded with and a request that summary judgment dismissing it be entered, is dismissed. The Appeal will continue.

The Appeal

[218] The Notice of Appeal, stated as follows:

"Judgment under Appeal

> That part of the judgment of the Honourable Chief Justice that Section 53 of the Criminal Code of Belize, Chapter 102, contravenes Section 16 and 12 of the Belize Constitution."

[219] See grounds on which the judgment was challenged at paragraph 14 above.

[220] By way of relief on this Appeal, the Appellant asks that those particular parts of the Chief Justice decision relating to s16 and 12 of the Constitution be reversed and set aside and that a proper pronouncement ought to be made in relation to those constitutional provisions.

[221] Mr Hawke, identified the central issue of the appeal as "whether the word sex as understood and placed by the framers of the Belizean Constitution could now be expanded by a judge to include sexual orientation". The Solicitor General queried whether such a construction would constitute judicial interpreting or judicial legislating. Mr Hawkes query, about judicial legislating did not raise a new issue, but was an extension of the Appellant's core issue, whether the Chief Justice erred in expanding the meaning of sex .Mr Hawke argued that the learned Chief Justice erred by applying an international covenant, articles 2 and 25 on the International Covenant on Civil and Political Rights, which has since been incorporated by legislation into the domestic law of Belize.

[222] The learned Solicitor General has described the appeal as a limited one and has maintained that position under a series of questions directly dealing with the scope of the appeal .The concession by a public official of the stature of the Solicitor General will create an expectation by parties to whom it has been made, that they will not be imperiled by placing reliance on it. The Respondents, on an examination of their submissions, were prepared for the limited appeal. For those reasons, I find myself in the unhappy position, of not being in agreement with the majority, on this point, the scope of the appeal.

[223] In his oral submissions , Mr Hawke contended that the interpretation of S16 (3) of the Belize Constitution , by the learned Chief Justice had encroached on the preserve of the elected representatives of the Belizean people .He submitted that the action of the Chief Justice was not in consonance with the judicial approach in other Caribbean jurisdictions and in Canada .

[224] Mr James, identified two issues raised by the appeal, for this Court's determination. The first, was whether the learned Chief Justice was entitled to interpret Section 16 in the way he did. The second is whether it was permissible to use international law as an aid to construction, in these circumstances. The issues identified as being able to resolve the appeal, to my mind, confirms the limited nature of the appeal.

[225] On behalf of the 1st to the 3rd Interested Parties, Mr Ottey QC submitted that, (i) Modern constitutional instruments, have what some authorities have described as a "golden thread" running through them. That golden thread recognizes the inherent dignity of all human beings, and the right to equal treatment of every person in the jurisdiction. It required special rules of interpretation to be applied to its construction. A court of construction should refrain from the restrictions of an overly legalistic approach and should aim for an interpretation which is generous and purposive. It was contended that in taking the course he did, the Chief Justice was emphatically not breaching any principle relating to the separation of powers. He instead, was discharging the core functions of the judicial branch of government. According to Mr Ottey QC, the approach taken by the

Chief Justice has, since his decision, found further significant support in a judgement of the Caribbean Court of Justice and in the Commonwealth and in other jurisdictions .

[226] The learned Solicitor General took no contention with learned Queen Counsel's submissions that the Constitution a living document which was imbued with a soul and is constantly evolving, and always speaking. The Solicitor did not quarrel with the further submission that the Constitution required special rules of interpretation to be applied to its construction and a court of construction should refrain from the restrictions of an overly legalistic approach and engage a generous and purposive interpretation when interpreting the Constitution.

[227] In the **Ministry of Home Affairs and Another v Fisher [1980] AC 318** ,on which Mr Ottey QC bolstered his submission ,the Privy Council (Lord Wilberforce, Lord Hailsham , Lord Salmon , Lord Fraser and Sir William Douglas) , had to consider "whether four illegitimate children 'who were born abroad , belonged to 'Bermuda . Also whether the word "child" in section 11 (d) of the Bermuda Constitution includes an illegitimate child. Their Lordship's Board held, that the Constitution should be construed differently from other statutes. Lord Wilberforce, who read the advice of the Board said at, p338 letter:

> "These antecedents and the form of Chapter 1 itself, call for a generous interpretation avoiding what has been called "the austerity of tabulated legalism" suitable to give to individuals the full measure of fundamental rights and freedoms referred to "

[228] Lord Bingham, in **DPP V Mollison (2003) 64 WIR 140**, in what he described as a "well-established principle", stated:

> "First, it is well established that constitutional provisions relating to human rights should be given a generous and purposive interpretation bearing in mind that a constitution is not trapped in a time -warp but must evolve organically over time to

reflect the developing needs of society ; See **Reyes v the Queen [2002] 2 A.C 235 , paras 25- 26."**

[229] In construing the Bermudian Constitution, the Privy Council in **Fisher**, took into consideration, among other factors, the consistency of the proposed interpretation with the social norms and the current legislation in Bermuda. The Board concluded that in the social context of Bermuda it was unlikely that there was a universal rule that "child" meant only a legitimate child. The court found that the omission of express words excluding illegitimate children as used in section 16 (4) (b) of the Act of 1956 was deliberate. The Court also found that if the children were not permitted to live in Bermuda, the rights of their parents would be infringed. As indicated in Maurice Tomlinson, the court of construction will make factual finding concerning the application of the State domestic legislation. (See **Maurice Tomlinson**, para 26).

[230] Clear guidelines were issued by their Lordships, in **Fisher**, as to the rules to be applied in the interpretation of the Constitution. The judgment states at page 328, letter E, this:

> "This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal document giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. **It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."** (emphasis added)

[231] Mr Hawke submitted that in all the other Commonwealth Caribbean jurisdictions the issue of sexual orientation is left for the Parliament or the legislature. According to Mr Hawke, in the South African and Canadian cases, on which the Chief Justice relied in his judgment, it was through Parliamentary procedure that sexual orientation was incorporated into the Constitutional law.

[232] Mr Ottey QC. submitted that the authorities meriting most attention, on the question of interpretation of the Constitution was the decision of **Tomlinson v Trinidad and Tobago** and the decision of the Indian Supreme Court in **Johar & Ors v Union of India , Ministry of Law and Justice, in the Supreme Court of India , No. 572.**

[233] In Tomlinson both Belize and Trinidad and Tobago, admitted that the Caricom Community Treaty obligations inured to the benefit of Mr Tomlinson. The issue before the Court was whether that obligation was breached by their respective Immigration Act .Trinidad and Tobago had conceded that their Act had classified homosexuals as prohibited people and therefore on its face prohibited Mr Tomlinson's entry into their countries. . It was common ground that in practice both states had never refused entry to Mr Tomlinson or any CARICOM national on the basis of homosexuality.

[234] In evaluating the use that can be made of international law and treaty obligations in interpreting domestic law , **Maurice Tomlinson** makes clear that it is possible to breach an international obligation by the retention of a pre-treaty legislation which has remained unmodified. The CCJ refrained from laying down a general rule , but indicated that retention may provide evidence of State practice inconsistent with the States international obligations. In **Myrie** the CCJ, stated that a 'violation of Community law is not so much caused by an apparent inconsistency, 'but by how the laws are applied in practice'. At paragraph 23 , inter alia , the CCJ , in Maurice Tomlinson held ;

" However, although the point is not often canvassed in the literature, there may be cases where retention of a pre-treaty legislative measure containing provisions incompatible with the treaty obligation may also constitute a breach of the treaty. Clearly, the retention of such unmodified legislative provisions may provide evidence of State practice which is inconsistent with the international obligation of the State."

[235] Mr Orozco illustrated quite graphically how retention of s53 of the Criminal Code affected him. That affidavit evidence of Claimant, was adduced to show the consequences the criminalization of consensual sexual intercourse between adult males had on the Claimant during his minority. Para. 28 of the Chief Justices judgment, notes, inter alia:

" Paragraphs 21 to 23 of the Claimant's 1st affidavit detail his experience up to the age of 15 years when he accepted that he was a homosexual. He spoke of being aware from the age of three years that he was regarded as different from other boys and his non-traditional traits, interests and behaviour were the subject of ridicule. Conflict arose between himself and his father and siblings. At school, he was taunted and called disparaging names. He referred to being the object of "constant harassment, mocking and stigmatization which caused him to be angry and very depressed as a teenager."

[236] Due deference will be paid by a court of construction to the State as to the meaning of its laws. It was essential to examine the relevant aspects of the municipal law in order to establish the factual elements. Then decide whether those elements constitute conduct contrary to the Treaty. Where the question is crucial, the Court will weigh the jurisprudence of the State. The burden of proving that the legislation is in breach of the State's obligation lies upon the Claimant. Proof includes the consistent application of such laws and the pronouncement of domestic courts.

[237] Counsel for the Respondent had submitted that the Indian case of **Johar & Ors v Union of India , Ministry of Law and Justice , in the Supreme Court of India , No.. 572.,** supported their submission that the Indian Supreme Court has , construed sex to mean "sexual orientation" in a Constitutional instrument. This case was referred to in order to blunt the submission of the Solicitor General , that such a construction should be made by the Legislature , who alone would have the power to amend the Constitution.

[238] In **Johar** during submissions by counsel for the Petitioner the Court's attention was drawn , to the legislative amendments to the Criminal Law as reported by Justice J. S Verma Committee. In that work, it was reported that the word 'sex' occurring in Article 15 of the Constitution includes 'sexual orientation". That amendment to the criminal code was consonant with counsel's submission. The Court accepted that unchallenged submission and ruled that the impugned section was violative of the of Article 15 of the Constitution. (See paragraph 28, of the judgment in Johra).

[239] Mr. Hawke relied on the case of **Egan v Canada** ,in which the Supreme Court of Canada considered in the case of **Delwin Vriend and others v Her Majesty the Queen in Right of Alberta and Others [1998] 2 SCR 493**. Appellant submitted that the principles of the separation of powers, would be breached by the Judiciary amending the Constitution, by expanding the meaning of sex to include sexual orientation.

[240] In Egan, while interpreting a breach of Section 15(1) of the Canadian Charter of Rights and Freedoms, the Court arrived at the conclusion that "sex" includes sexual orientation. In Egan it was held on the basis of historical social , political and economic disadvantage suffered by homosexuals and the emerging consensus amongst legislatures (at paragraph 176) as well as previous judicial decisions (para 177) that sexual orientation is a ground analogous to those listed in s15 (1). It appears that in Egan, some of the provinces legislature, had passed

legislation which expressly stated that sex includes sexual orientation. Mr Hawke argued that, in a recognized developed jurisdiction as Canada, the Courts waited on the legislature to include sexual orientation in constitutional legislation and did not expand the meaning ahead of the Legislature.

[241] The learned Chief Justice accepted the accession of Belize to the ICCPR in 1996 two years subsequent to **Toonen** and opined that it could be argued that in doing so, Belize tacitly embraced the interpretation rendered by the UNHCR. The learned Solicitor General has attacked this ruling as being misconceived. The Chief Justice relied on section 65 of the **Interpretation Act, Chapter 1**, to base his finding that when more than one interpretation is reasonably possible, "a construction which is consistent with the international obligations of the Government of Belize is to be preferred to a construction which is not".

Interpretation Act

[242] Section 64 and 65 of the **Interpretation Act** read:

> " 64 (1) In ascertaining the meaning of any provision of an Act, the matters which may be considered shall, in addition to those which may be considered for that purpose apart from this section, include the following, that is to say:-
> (a) all indications provided by the Act as printed by authority, including cross-headings, punctuation and side-notes, and the short title of the Act.
> (b) **any relevant treaty or other international agreement which is referred to in the Act**;
> (c) any relevant report of a commission, committee or other body which had been presented or made to or laid before the National Assembly or either House before the time the Act was passed;

(d) any provision of the Caribbean Community Treaty and any Community instrument issued under the Treaty, where relevant.

(1) Shall be no more than is appropriate in the circumstances.

(2) The weight to be given for the purposes of this section to any such matter as is mentioned in subsection

(3) Nothing in this section shall be construed as authorising the consideration of reports of proceedings in the National Assembly for any purpose for which they could not be considered apart from this section.

[65] The following shall be included **among the principles to be applied in the interpretation of Acts** where more than one construction of the provisions in question is reasonably possible, namely:-

(a) **that a construction which would promote the general legislative purpose underlying the provision is to be preferred to a construction which would not; and**

(b) **that a construction which is consistent with the international obligations of the Government of Belize is to be preferred to a construction which is not; and**

(c) that, in the absence of any express indication to the contrary. a construction which would exclude retrospective effect is to be preferred to a construction which would not."

[243] Sections 64 and S65 represent the codification of the common law principles applicable when a court of construction is confronted with more than one reasonable interpretation to legislation. There exists at common law a presumption against a violation of international law. The learned authors of **Maxwell on the Interpretation of Statutes, Twelve Edition**, put it this way at page 183;

"Under the general presumption that the legislature does not intend to exceed its jurisdiction , every statute is interpreted so far as its language permits , so as not to be inconsistent with the comity of nations or the established rules of international law , and the court will avoid a construction that will give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language , But if the language of the statute is clear it must be followed notwithstanding the conflict between municipal and international law which results ."

[244] Mr James had posed as an issue whether it was permissible to use international law as an aid to construing a provision of the Constitution .It seems to me that s65 (b) of the Interpretation Act, answers that directly. Where a Court is faced , as the learned Chief Justice was at trial , with having to interpret S16 (3) of the Belizean Constitution , which had two constructions and both were reasonably possible.

[245] The opening sentence of Section 65 , indicates that the principles , three in number , listed in the section are not exhaustive of the principles that may be considered, they are " included among the principles to be applied in the interpretation of Acts" , which are open to more than one interpretation . The matters listed in S65 are three principles whose application are preferred, above the alternative that does not achieve the objective therein.

[246] These principles may as far as it is possible be applied conjunctively. There is nothing in The Interpretation Act. S65, to indicate what weight is to be attached to any of the three principles listed there. Unlike the aids to construction listed in S64(1), which pursuant to S64(2) provides that, " the weight to be given to any matter listed there shall be no more than is appropriate in the circumstances." The silence on the question of the weight to be attached to the aids used in S65, following so closely on the expressed limitation imposed in s64 (2), indicates that

the draftsman, deliberately left the weight to be attached to the three principles, for the discretion of the court.

[247] The learned Chief Justice would be entitled to invoke subsections s65(a) and s65(b), as aids in the constructions of S12 and S16(3) of the Constitution of Belize and to give them as much weight has he thinks the circumstances of the case demands . The general legislative purpose underlying both provisions may be gleaned by applying the indications pursuant to s64 (a). I would think that the title under which the sections fall would give a clear indication of the legislative purpose. That title speaks for itself "Protection of Fundamental Rights and Freedoms". The preamble to s.3, declares, "every person in Belize, is entitled to the fundamental rights and freedoms of the individual." The purposive approach would correctly allow the learned Chief Justice to prefer construing, "sex " to mean "sexual orientation", 29 than to mean a person's gender , in that it better promotes the purpose of s12 and s16(3) .

[248] International law and municipal law differ fundamentally. International law regulates the relations between sovereign and equal States without the power of enforcement. Municipal law is concerned with relations between the citizen and the State, with coercive power in the hands of the State. To make the Treaty available to the court as an aid to construction, it is not necessary for that Treaty to be incorporated into municipal law, however the State has to have become signatory to the Treaty, thereby undertaking obligations under the Treaty.

[249] Belize had international obligations , relevant to fundamental rights and freedoms as signatory to at least, three important treaties: (1) The United Nations Organisation Charter, 1945, and the United Nations Declaration of Human Rights Charter, 1948, (Resolution 217); (2) the Charter of the Organisation of American States, 1948, and the American Convention on Human Rights, 1969, adopted under the OAS Charter; and (3) the International Covenant on Civil and Political Rights, 1976 (Comnd.6702) - (the ICCPR,1976).By accepting membership of the

two international organizations and signing the ICCPR, 1976, Belize would have undertaken international obligations as a State to adhere to certain protocols .

[250] In the case of **Pratt and Morgan v Attorney General for Jamaica and ANOR [1993] UKPC 2 ND November 1993**. The Jamaican Government declined to accept the recommendation of an international organization to commute the applicant's death sentence. The Board of the Privy Council, in their landmark judgment noted at paragraph 44, inter alia:

> Their Lordships have not seen the Attorney General's advice, but do not doubt it would correctly advise that, Jamaica being a signatory to the International Covenant on Civil and Political Rights, and to the Optional Protocol the views of the UNHCR should be afforded weight and respect but were not of legally 30 binding effect, and that the like consideration applied to the IACHR.

[251] The learned Solicitor General, has not refuted that the meaning of sex in s16(3) which the Respondent urged on the court is more consistent with Belize's international obligations under the international Covenant on Civil and Political Rights (ICCPR) than the meaning he has contended for at trial and before this Court.

[252] Mr Ottey submitted that, interpretation of the Constitution is guided by the core values of dignity, equality and the promotion for respect for international law. According to Mr Ottey, if the Chief Justice had disregarded Belize's international obligations, he would be acting in disregard of the decision of the CCJ in **Boyce** and **Maurice Tomlinson**.

Separation of Powers

[253] Mr Hawke, has submitted that the Chief Justice's interpetation of s16(3) , was an act of judicial legislation , which circumvented and usurped the functions of the legislature and breached the principles of separation of powers . The Separation of powers, is a concept that enhances democratic government. It appears to have had its genesis in the book, **The Spirit of the Laws** by the French philosopher Charles Louise de Baron de Montesquieu. It recognizes that the three arms of government are co-equal partners. It ensures that there is not a concentration of power in the hands of any one branch. Such concentration of power, may lead to tyranny and oppression.

[254] The Executive is charged with the implementation of policy. The legislative arm makes the laws to effect the objectives of the country within the provisions of the Constitution .The Constitution is supreme above all three arms of government and all three must conduct their operation pursuant to the Constitution.

[255] In **Justice K Puttaswamy (Retired) and Anr v Union of India , writ of petition (Civil) No.494 of 2012** delivered 26th September 2018). Sikri J who wrote for the majority said at paragraph 74: 31 Judicial Review means the supremacy of law. It is the power of the court to review the actions the Legislature, the Executive and the Judiciary itself and to scrutinize (sic) the validity of any law or action. It has emerged as one of the most effective instruments of protecting and preserving the cherished freedoms in a constitutional democracy and upholding principles such as separation of powers and rule of law. The Judiciary, through judicial review, prevents the decisions of other branches from impinging the constitutional values. The fundamental nature of the Constitution is that of a limiting document, it curtails the power of majoritarianism from hijacking the State. The power of review is the shield which is placed in the hands of most judiciaries of constitutional democracies to enable the protection of the supreme document.

[256] The judges role is to interpret and ensure that legislation is consistent with and does not derogate from the Constitution .The Judiciary here was fulfilling their

core function of construing the Constitution to safeguard the rights and freedom of an applicant who had applied for redress . There was here no trespass on the realm of the other branches. There is no dispute that this matter was properly before the court, and the Court was constitutionally empowered to adjudicate. I reject the submission that the Chief Justice's construction, amounts to an amendment of the Constitution. There was no alteration variation addition or deletion from the text of the impugned provision s16(3) .

[257] A similar generous and expanded interpretation, was applied to the word "child" in the case of Fisher, which was approved by the Board of the Privy Council. Batts J , sitting in the Full Court , in the Jamaican case of CI2018HCV01788, **Julian Robinson v Attorney General of Jamaica [2019]JMFC Full 04** , describe the judges constitutional role ,. at paragraph 374.

> "[374] Judges, as the learned Attorney General reminded us, are not responsible for policy or for the content of legislation. We however interpret and apply legislation intended to implement the 32 policy. It is our sworn duty to ensure that enactments are consistent with, and do not derogate from, the Constitution which is our highest law. It is not within the remit of judges to say whether the premise of the Constitution is right or wrong. It is our duty to uphold the policy of the Constitution as revealed in its words, structure and historical roots. We do this without regard to our popularity which, as judges, we neither crave nor require. In the words of Justice Hiler B Zobel an associate Justice of the Massachusetts Superior Court of the United States: "Elected officials may consider popular urging and sway to public opinion polls. But judges must follow their oaths and do their duty heedless of editorials, letters, telegrams, picketers, threats, petitions, panellists and talk shows. In this country, we do not administer justice by plebiscite. A judge in short is a public servant who must follow his conscience whether or not he counters the manifest wishes of those

he serves; whether or not his decision seems a surrender to prevalent demands." (Quoted in "The Literature of the Law "by Brian Harris page 20).

[258] The Respondent has adduced evidence to show that, the continued retention of s53 of the Criminal Code , has been violative of the Respondents S 16(3) rights, not to be discriminated against on the basis of sex. (See para [28] in Maurice Tomlinson.) The court of construction must examine the relevant acts or practice to determine whether there exists an inconsistency between those acts and the international obligations of Belize. The purposes and principles of the United Nations Declaration on Human Rights promote and encourage respect for all human rights and fundamental freedoms for all 33 without distinction as to race, sex, language or religion. Article 3, of The **CHARTER OF THE ORGANIZATION OF AMERICAN STATES** proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex. These treaties represent international obligations of Belize. The Courts when confronted with an ambiguity in interpreting may use the construction which is consistent with these treaties. The learned Chief was correct in using the decision of the United Nations Committee in **Toonen v Tasmania , UN Commuication No 488/1992**, in which the word " sex" was construed to mean ' sexual orientation . I reject the learned Solicitor General submission that relying on **Toonen** was an error.

[259] The evidence adduced on behalf of the Respondent has for the most part been unchallenged. I find that the Respondent has adduced evidence proving that s 53 of the Criminal Code of Belize, Chapter 101, Laws of Belize is violative of s16 and s12 of the Belize Constitution. I find: That the learned Chief Justice was correct in holding that sex in Section 16(3) of the Belize Constitution is properly construed to include "sexual orientation" .That the learned Chief Justice pursuant to s65 of the Interpretation Act correctly preferred a construction which is consistent with the international obligations of the Government of Belize to one which is not. That the Chief Justice is correct in applying a generous and

purposive interpretation to the human rights provision. There was no evidence to justify the limitations that s.53 of the Criminal Code placed on the fundamental rights of the Respondent.

[260] I have read the draft judgment of my brother Awich JA and concur in his reasoning and conclusion, in respect of the ground of appeal regarding the freedom of expression. I respectfully adopt paragraphs 148 to 154, of that judgment. I also agree that, the declaratory order made by the Chief Justice was an adequate relief for the claim. There was no need for the additional order adding a sentence to section 53 of the Criminal Code. The sentence is set aside.

[261] The appeal is partly allowed and partly dismissed. The Chief Justice's decision relating to s.16 and s.12 of the Constitution is confirmed .The decision of the Chief Justice adding to s.53 of the Criminal Code the sentence: "This section shall not apply to consensual sexual acts between adults in private", is set aside. Parties shall bear their own costs of the appeal.

Lennox Campbell JA