Children - radio - insufficient evidence that large number of children in audience when bestiality joke was broadcast - joke also not indecent or obscene, although coarse and in questionable taste – question of internal ethical standards raised. N Smyth vs. 94.7 Highveld (2) 38/2002.

SUMMARY
At about 08:15 a presenter, in a joke based on a pornographic movie, mentioned, as part of what was intended to be a comical story, intimate acts performed in the movie, including oral sex, bestiality and so-called “golden showers”.

On a re-hearing of the matter, the Commission held that there was insufficient evidence that a large number of children was in the audience on that date, since both public and private schools within the area reached by the Respondent were open on the relevant date. The rule concerning children was, accordingly, not transgressed.

Secondly, it was held that the references, although in questionable taste and coarse, also did not reach the level of “indecency or obscenity or offensiveness to public morals,” since details of the acts were not conveyed.

JUDGMENT

JCW van Rooyen

[1] At about 08:15 on a weekday morning, the 17th July 2002, a presenter from the Respondent referred to a pornographic film and based what was intended to be a joke, on it. He referred to some scenes in the movie by inter alia stating that there had been oral sex, bestiality and “golden showers”. The transcript reads as follows:

“Jeremy: Okay, okay, okay. The traffic joke today is essentially a musical traffic joke. It involves Timothy the trumpeter

Sam: Right!

Jeremy: Timothy the trumpeter

Harry: So, it’s slightly cultural?

Jeremy: It is very cultural. It involves music, it involves the movies, it involves sweeping vistas. Timothy the trumpeter is hired by a company to do two… the brief is specific. We want Two haunting trumpet solos.

Harry: On wow!!
Jeremy: To be used in a movie, you know [Music played in the background]. No, that’s not it. We’re wanting the big sweeping vistas… it’s like.

Harry: I know what you’re saying. It’s like the English patient kind of feel. [Music played in the background]

Jeremy: Yes, that’s right. So Timothy the trumpeter takes three weeks off and he works, he puts his heart, soul, his everything into these haunting trumpet solos. He goes, he records and he’s paid handsomely for it. He is told by the director: “That’s spot on kid. That’s just what we’re wanting for a movie. We’ll give you, we’ll send you an invite to the opening night.”

Harry: On wow!!

Sam: I’m sure he is expecting a real premier!

Jeremy: Three months later, of course, the whole card arrives with: “You are cordially invited by Arthur P Goldstuck Promotions to the opening to the Steven Spineburg film, Spunky Christmas.

Harry: Spunky Christmas? Like a thriller!

Jeremy: He goes along there and he walks into the foyer. There’s all these people standing around and he realizes, by virtue of, A, the people and B, the posters on the wall, that Spunky Christmas is in fact a porn movie.

Harry: No! Oh no! Brilliant.

Jeremy: He is highly embarrassed about this and he pulls his hat down a bit lower and he closes his jacket up a bit. And he sneaks into the theatre, which is really dim. He sneaks into the back row and sits next to this elderly couple and he proceeds to watch this film. And my goodness gracious me, this is a porn film of note. I mean, this porn film has the most explicit sex scenes. I mean, the whole trip. I mean there’s oral intercourse, there’s anal intercourse, there’s sado-masochism. There’s a dog, which has intercourse with the leading female character. There’s golden showers there. There’s everything in the film. Timothy the musician is immensely embarrassed.

Sam: Good thing!

Jeremy: He turns to the elderly couple and he whispers to them. I am just here because I wrote the music and I am here for my trumpet solo. And the old lady says, that’s all right, we just came to see our dog.

Sam: On no. Jeremy!”

[2] The Registrar received a complaint from a listener who stated that he regularly listened to Highveld Stereo and that he felt that the references had gone too far. He wrote the following letter to the Registrar:
“I wish to draw your attention to the unacceptable conduct of Jeremy Mansfield on Thursday 18 July 2002 somewhere between 08h00 and approximately 08h30 on Radio Highveld/94.7, when he told a particularly vile and distasteful 'traffic joke' about anal sex, oral sex, sadomasochism, bestiality, and golden showers (partners urinating on each other). I am hardly a prude, but this type of joke does not belong on national public radio. Imagine a child hearing the joke and asking the parent 'Dad, what's anal sex, what's sadomasochism, what are golden showers, do people have sex with dogs'? I am of the view that the strongest form of disciplinary action should be taken against him for what is essentially inexcusable and tasteless conduct. Please acknowledge receipt of this complaint and please take appropriate action.”

[3] At our first hearing of this matter we held that since, on the evidence before us, a large number of children was present in the audience, the references in the joke were harmful to children and amounted to a transgression of the Broadcasting Code.

[4] Soon after the judgment was handed down, the Respondent, after discussions on the matter, conveyed to the Registrar that it would wish to address the Tribunal afresh on the matter of the presence of children in the audience. I consulted with the other Commissioners on the Tribunal and we decided, in the light of a principle expressed in Traub v Administrator Transvaal,\(^1\) that the Commission was entitled to re-open the matter. We were of the opinion that the matter of children in the audience had not been canvassed sufficiently at the first hearing of the matter. The Complainant who has a legal background agreed to this procedure.

[5] At the re-opening of the matter, evidence was presented on affidavit that both public and private schools were open on the 17th July 2002. Mr. Smythe, nevertheless, argued that even if the schools were open on that date, there would nevertheless have been a large number of children in the audience. Based on the listener figures provided by the Respondent, he argued that if 77000 listeners were between the ages of 16 and 24 or were over 50, approximately 46200 were between 18 and 24 and hence, according to his argument, approximately 10266

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\(^1\) 1989(4) SA 731(A) at750C.
persons aged 16 and 17 listened to the broadcast. He further argued that even if only 10% of those under 18 listeners in fact had access to the broadcast, that in itself constituted a “large number of children” in terms of the Code, which provides that the electronic media shall exercise due care and responsibility in the presentation of programmes where a large number of children is likely to be part of the audience.

[6] In the light of the expanded evidence that schools in the reception area were open on the 17th July, we cannot, with sufficient confidence, come to the conclusion that a large number of children was in the audience. Even if the number of more or less 1000 were to be assumed to be correct, we do not believe that this number could be regarded as a large number in terms of the Code. In any case, we do not believe that the joke was so explicit that we can conclude that the joke had not been told “without due care and responsibility”. The joke was not that explicit and required mature insight before the full extent of the material presented would be understood.

[7] The next question is whether the material was not, in any case, “indecent or obscene” in terms of the Code. Mr. Smythe argued that it was and also argued that the American case law, quoted by Mr. Marcus, was distinguishable on the facts. Mr. Marcus argued that even if we were to hold that the material was obscene or indecent, the provisions were so vague that they could not pass Constitutional muster and that we should not apply them. He referred us to the Supreme Court of Canada in Douglas/Kwantlen Faculty Association v Douglas College,\(^2\) where the following was stated by the Court:

“A Tribunal must respect the Constitution so that if it finds invalid a law it is called upon to apply, it is bound to treat it as having no force and effect”

\(^2\) 77 DLR(4th) 94(SC C).
He also referred us to *Stanton v Johannesburg Municipality*,\(^3\) where the Court stated the following:

“As I understand it, a bye law which is *ultra vires* – that is, one which there is no power to make – must be considered as non-existent; it does not bind anybody, and if it does not bind a citizen or ordinary individual, I cannot understand how it binds a magistrate, who has to administer laws which are in force, and not laws which are not in force. It seems to me, on grounds of convenience and logic, a monstrous thing that a magistrate should be compelled to convict a man, perhaps of a criminal offence, when he knows he is not guilty, and that the upper courts must declare him not guilty. The same considerations apply in a civil case. In many civil cases rights of parties depend on the validity or invalidity of bye-laws, and it seems to me monstrous that a man should not be able to obtain redress in the tribunal which the legislature has appointed to redress his wrongs…”

\([7]\) It is a crucial requirement of law in a Constitutional Democracy that it must be reasonably precise. In *Dawood and Another v Minister of Home Affairs and Others*, *Shalabi and Another v Minister of Home Affairs and Others*, *Thomas and Another v Minister of Home Affairs and Others*\(^4\) O’Regan J stated the following:

“It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that s 36 requires that limitations of rights may be justifiable only if they are authorized by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.”

\([8]\) Before we may ignore a provision of the Code as a result of its possible invalidity, we must first of all attempt to read it down in terms of section 39(2) of the Constitution of the Republic. We are aware of Mokgoro J’S approach in *Case and Another v Minister of Security*\(^5\) that the definitions of “indecent or obscene” in the *Indecent or Obscene Photographic Matter Act 1967* were so vague that it was impossible to read them down into understandable criteria. We also realize that it is primarily the task of the *Legislature, and not that of the judicial*

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\(^3\) 1910 TPD 742 at 757.
\(^4\) 2000 (3) SA 936 (CC) at par [47].
\(^5\) 1996(3) SA 617(CC) at par [77].
arm of the state, to legislate. Compare the following words of Sachs J in *S v Coetzee and Others*:

“But, too much reading down of too many terms, coupled with too many excisions of the text, leaves something so tattered and insecure, that it cannot be said that effect would be given to any of the principal objects of the Legislature.”

Also see the caution expressed by Ackermann J in the *Gay and Lesbian Immigration case*:

“In essence, however, it involves restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the Legislature. Whether, and to what extent, a Court may interfere with the language of a statute will depend ultimately on the correct construction to be placed on the Constitution as applied to the Legislation and facts involved in each case.”

Also compare what Kriegler J stated in *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison*:

“in order to(excise only offending provisions)...this Court would have to engage in the details of law-making, a constitutional activity given to the Legislatures.”

We are of the opinion that the vagueness of the terms “indecency and obscenity” could, in this instance, be cured by “reading down”, which is comparable to the notional severance which Langa DCJ undertook in *Islamic Convention v Independent Broadcasting Authority and Others*. The learned Deputy Chief Justice held that the vague proscription by the Broadcasting Code of material which “is likely to harm relations between sections of the population” could be cured. The words were reduced to what is proscribed in section 16(2) of the Constitution. Whilst not deciding whether the balance of clause 2(a) (our Code clause 7.1) is Constitutionally valid, the Court significantly pointed out that

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6 1997(3) SA 527(CC) at par 226.

7 2000(2) SA 1(CC) at par 66:

8 1995(4) SA 631(CC) at par [17]

9 2002(4) SA 294(CC).
the balance of the clause was also drafted before the Interim Constitution was enacted. The “balance” includes the provisions as to indecency and obscenity.

[10] The Constitution does not assist us in reading down “indecent” or “obscene” into a reasonably understandable criterion. What can be gleaned from pre-constitutional judgments is that the material had to be of such a nature that it would be regarded as grossly offensive to common propriety or that the material horrified and disgusted ordinary normal people and outraged their sense of what is decent and proper. In the case of “obscenity” the accent would seem to have been on that which had the tendency to deprave or corrupt. In South African Connexion CC t/a Reel Communications v Chairman, Publications Appeal Board 1996(4) SA 108(T) it was held that the test as to whether material was indecent or offensive to public morals was whether the “fictional reasonable man, whose morality represents the morality of the community, taking all relevant factors into account, inter alia, who the likely viewers would be, would consider it to be indecent or offensive to public morals.” The Court also held that “the issue…is what the community will tolerate in its midst, not what members thereof might themselves be offended by seeing.”

Although this test shifts the paradigm within which decisions must be taken it, nevertheless, leaves the application thereof open to arbitrary decision-making, which has been regarded as unacceptable.

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10 S v Gordonia Printing and Publishing Company 1962(3) SA 51(C); S v H 1974(3) SA 405(T); S v R 1964(1) SA 394(T); R v B & G 1949(2) SA 582(T); Publications Control Board v Gallo (Africa) Ltd 1975(3) SA 665(A) where it was held that “offensive” (in regard to religious feelings) does not relate to matter which is merely displeasing or annoying, but to material which is repugnant, mortifying or painful.

11 S v R 1964(3) SA 394(T).

12 The Court referred to Human & Rousseau Uitgewers (Edms) Bpk v Snyman NO 1978(3) SA 836(T) at 846H, where it was held that the Appeal Board had irregularly excluded the likely reader from its inquiry into the indecency, obscenity and offensiveness of the work under consideration.

13 The Court referred the Canadian Supreme Court judgment in Towne Cinema Theatres Ltd v R (1985) 18 DLR (4th) 1 in which it was held that it is the standard of tolerance not taste which was relevant in such an inquiry. The BCCSA Tribunal which decided on the question whether semi-soft pornography was acceptable for late night broadcasts, also accepted this approach in allowing such broadcasts – see e-tv v Howell and Others 28/2002.
within the parameters of the Constitution.\(^{14}\) *Reel Communications* also pertained to a matter which had been decided upon before the enactment of the Interim Constitution, which required (as does the present Constitution) that all laws should be in conformity with the fundamental rights set out in the Constitution. The Constitutional Court in *Case and Curtis*\(^{15}\) held the terms “indecent” or “obscene” to be unconstitutional for vagueness within the context of the *Indecent or Obscene Photographic Matter Act* 1967. If one were to apply *Reel Communications* within a Constitutional democracy, where reasonable precision in laws which limit fundamental rights is a requirement, the problem remains that in the determination of what the community would tolerate, the decision-maker would ultimately have to rely on his or her own view of what such community would tolerate: little guidance can be gleaned from the terms “indecent”, “obscene” or “offensive” as such. The decision-maker and the broadcaster would, accordingly, still find themselves in a most uncertain position. Even the apparent certainty of the decision-maker is often illusory within this sphere.

\[\text{[11]}\] The said terms are so vague that they would have to be read down in terms of section 39(2) of the Constitution. In this process we are assisted by the Films and Publications Act 1996. Section 26(4) prohibits the broadcasting of material, which falls within the category of XX in terms of Schedule 6 of the said Act. When the Films and Publications Board has classified a film as XX or, in cases where a film has not yet been classified, it falls within the XX category, the film is prohibited for broadcasting.

\(^{14}\) S v Lawrence; S v Negal; S v Solberg 1997(4) SA 1176 (CC) at para 33; In Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) O’Regan J states the following at paragraph [47]: “It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that s 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.” Also compare Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd 2001 (1) SA 545 (CC) par[24].

\(^{15}\) 1996(3) SA 617(CC).
Section 26(4), however, does not deal with radio. Nevertheless, we believe that it would be reasonable to accept that insofar as radio is concerned, the criteria set out in the XX category are also applicable when the material on radio reaches the level of explicitly describing or representing what is forbidden as XX and bona fide dramatic, scientific, documentary or artistic nature of the material is absent.

On the advice of a Ministerial Task Group, Parliament did not employ the words “indecent or obscene or offensive to public morals” in the Films and Publications Act 1996 and described five forbidden categories, based on the harm principle. According to Schedule 6 read with Schedule 9 of the Films and Publications Act 1996 the following visual material is prohibited for public screening or distribution: child pornography (which may also not be possessed in terms of section 27 of the Films and Publications Act 1996), explicit sexual conduct combined with violence, bestiality, explicit sexual conduct which degrades a person and certain forms of extremely explicit violence. Radio, of course, depends solely on sound, the impact of which is generally less powerful than that of a film, where sound plus visual images are employed; the spoken word (whether in monologue, dialogue or song) would, accordingly, generally have to be quite explicit or detailed before the impact level of a film is reached. Context would also, as is the case with films and publications, be of special significance.

The fundamental right to freedom of expression would be a constant reminder that even speech, which has no value, may not summarily be found to be in

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16 This is understandable because the Films and Publications Act only deals with publications and films.
17 We are aware of the fact that Schedule 6 does not add “explicit” in the case of bestiality. Nevertheless, given the medium of radio, it would be unreasonable to prohibit the mere mentioning of bestiality without requiring explicit description.
18 Artistic merit is no defence in the case of child pornography.
20 Schedule 1 prohibits the same categories of visual material insofar as publications are concerned.
21 “Degrade” is defined as the advocacy of hatred based on gender, which constitutes incitement to cause harm. This definition is, clearly, derived from section 16(2)(c) of the Constitution.
22 Stated to lie at the heart of democracy – see inter alia South African National Defence Union v Minister of Defence and Another 1999(4) SA 469(CC) at par [7].
contravention of the Code for that reason alone. As the European Court of Human Rights has emphasized, freedom of expression is

“applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.”

In *National Defence Union v Minister of Defence and Another* O'Regan J also stated that

“the corollary of the freedom of expression and its related rights is Tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.”

[15] We have come to the conclusion that although the references to the pornographic movie were in particularly questionable taste and coarse, they were not that descriptive or explicit that they reached the level of what is forbidden in terms of Schedule 6. The fact that many adult members of the community would regard the reference to intimate sexual acts as unacceptable, especially at that time of the day, does not in itself entitle us to regard the references as “indecent or obscene or offensive to public morals”. That the joke would seem to have made no contribution to furthering moral values is irrelevant. Had explicit details of a “golden shower” or the bestiality been conveyed, we would have had no doubt in finding that the material was “indecent or obscene or offensive to public morals” as read down. Even if we had not read down the terms and applied the pre-constitutional tests, we are not convinced that the reasonable fictional member of society, given the adult likely listeners and the absence of a “large” number of children and of explicit detail, would regard the material as so disgusting or horrifying or intolerable that the references would have reached the level of indecency or obscenity or offensiveness.

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23 *Sunday Times v The United Kingdom (no 2) (1992) 14 EHRR 229*, par 50(a) at 241.  
24 1999(4) SA 469(CC) at par [8].  
25 *See Publications Control Board v William Heinemann 1965(4) SA 137(A) at 154D*
Although the foreign case law is distinguishable on the facts, as argued by Mr. Smythe, the principles pertaining to freedom of expression are, broadly, in conformity with what our Constitutional Court regards as lying at the basis of the freedom of expression doctrine in South Africa. We agree with Mr. Smythe that the value of this kind of speech is non-existent. However, we do not regard the mere fact that speech has no value as sufficient to prohibit it in law. If our task was limited to having to decide whether the material employed was morally risqué, we would probably have found that the Code had been contravened. Our task is, however, to decide whether the material was presented in an “indecent or obscene or offensive to public morals” manner, a test which is not built merely on immorality. We would, however, wish to add that as a result of the fact that bestiality in the visual sphere is regarded as a taboo by the Legislature and exemptions only apply to bona fide science, drama and art, this radio joke moved on the brink of a contravention. It is coarse, risqué and in questionable taste. We suggest that the Respondent should consider whether, as a matter of internal ethical policy, this kind of joke is appropriate within the sphere of broadcasting.

The Complaint is not upheld.

JCW VAN ROOYEN SC  
CHAIRPERSON  
14 JANUARY 2003

*Deputy Chairperson Ratha Mokgoathleng and Rev. du Toit concurred in the judgment of the Chairperson.*

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26 See Schedules 1 and 6 of the Films and Publications Act 1996.