IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDUCTION

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No BBCR2021/002
BB Magisterial Criminal Appeal No 7 of 2019

BETWEEN

COMMISSIONER OF POLICE **APPELLANT**

AND

STEPHEN ALLEYNE **RESPONDENT**

Before the Honourable: **Mr Justice A Saunders, PCCJ**
Mr Justice J Wit, JCCJ
Mr Justice W Anderson, JCCJ
Mme Justice M Rajnauth-Lee, JCCJ
Mr Justice D Barrow, JCCJ
Mr Justice A Burgess, JCCJ
Mr Justice P Jamadar, JCCJ

Appearances

Ms Krystal Delaney and Mr Oliver JM Thomas for the Appellant

Mr Arthur E Holder with Ms Rhea Layne, Ms Mariah Arthur, Mr Ensley Grainger and Ms Nkasi Blair for the Respondent

Statute – Interpretation – Sexual Offences Act Cap 154, s 3(1) - Respondent charged with rape of another man- Respondent discharged by Magistrate- Magistrate found that rape did not include anal intercourse between men – Magistrate decision upheld by Court of Appeal- Meaning of 'rape' - Whether a man can be charged for rape of another man.

SUMMARY

Stephen Alleyne ('Alleyne') was charged with the offence of Rape contrary to the Sexual Offences Act ('the Act'). Before the start of the evidence in his trial he was discharged by the Magistrate after hearing submissions that the charge alleged that he had sexual intercourse with another man without his consent. The Magistrate decided that the crime of rape in (s 3(1)) did not extend to anal intercourse between men. On appeal by the Commissioner of Police the

majority in the Court of Appeal agreed with the Magistrate's decision. The Commissioner of Police appealed to this Court.

The Court, in a judgment authored by Barrow JCCJ, found that on a correct interpretation of s 3(1) of the Act, a man can be charged for the rape of another man. The Act uses gender neutral language and extends the definition of rape to include anal penetration. The Court found that considering the literal meaning of the words used in the Act, their context, and comparable legislation, any person, male or female, can be the offender or victim of rape. The retention in the legislation of the offence of buggery did not prevent males from being charged with rape, as the Interpretation Act (s 22) allows offenders to be charged with either offence, once they are not punished twice for the same act. The Court noted that it was aware that the issue of the constitutionality of the offence of 'buggery' has been adjudicated in several courts, including within the Caribbean. However, the issue did not arise for decision, and in the circumstances, it was the duty of the Court to exercise proper judicial restraint and refrain from deciding an issue that was not argued before it.

In a separate judgment, Jamadar JCCJ, entirely supported the opinion of Barrow JCCJ and agreed that the Act permits a man to be charged for rape of another man. Jamadar JCCJ, found when judges are interpreting legislation, they must also respect the fundamental rights in the Constitution and consider a State's international treaty commitments. A gender-neutral interpretation of the Act respects the right to protection of the law regardless of sex, and the prohibition against discriminatory laws under the Constitution. It also respects Barbados' international law commitments to ensure equality before the law regardless of gender and the enjoyment of fundamental rights and freedoms without restrictions based on sex.

In a dissenting judgment, Burgess JCCJ found that the Act does not create an offence of rape of a male by another male and would have dismissed the appeal. He considered that under the common law, only a man could commit rape and only against a woman. He found that s 3 of the Act does not purport to do anything as revolutionary as changing the common law to create an offence of rape by a male of another male. For Parliament to do so, it would have had to express that intention in clear and unambiguous language. He considered the natural and ordinary meaning and legal meaning of the words used in s 3, as well as their context in the Act as a whole and the rules of natural justice. Burgess JCCJ found that the words 'sexual

intercourse' used in creating the statutory offence means penile-vaginal penetration. He found that s 3(6) of the Act, modifies the common law by providing that, not only a man can commit the *actus reus* of rape, but any of the parties to sexual intercourse, a male, or a female, can do so.

The appeal was therefore allowed, and the case remitted to the Magistrate's Court for it to proceed with the preliminary inquiry.

Cases referred to:

A-G v Joseph [2006] CCJ 3 (AJ), (2006) 69 WIR 104; *A-G v Prince Ernest Augustus of Hanover* [1957] AC 436; *Baptiste v Alleyne* (1970) 16 WIR 437; *Belize International Services Ltd v A-G of Belize* [2020] CCJ 9 (AJ) BZ, [2021] 1 LRC 36; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591; *Canada Sugar Refining Co v The Queen* [1898] AC 735; *Colquhoun v Brooks* (1889) App Cas 493; *Commissioner of Police v Alleyne* (Barbados CA, 15 April 2021); *Duport Steels Ltd v Sirs* [1980] 1 WLR 142; *Fraser v Greenaway* (1992) 41 WIR 136; *Grey v Pearson* [1857] 6 HL Cas 61; *Guyana Geology and Mines Commission v BK International Inc* [2021] CCJ 13 (AJ) (GY); *Hinds v R* [1975] 24 WIR 326; *Hoyte v The Queen* (Barbados CA, 6 April 2000); *Johar v Union of India* AIR 2018 SC 4321; *Jones v A-G of Trinidad and Tobago* [2018] 3 LRC 651; *Lawrence v Texas* 539 US 558 (2003); *Longford, The* (1889) 14 PD 34; *Marin v R* [2021] CCJ 6 (AJ) BZ; *McCoskar v the State* [2005] FJHC 500 (Fiji HC, 26 August 2005); *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ), (2019) 94 WIR 332; *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; *Nervais v R* [2018] CCJ 19 (AJ), (2018) 92 WIR 178; *Orozco v A-G of Belize* (Belize SC, 10 August 2016); *Pant v Nepal Government* (2008) 2 NJA LJ 261; *Persaud v Nizamudin* [2020] CCJ 4 (AJ) (GY); *R v G* [2004] 1 AC 1034; *R v Hewitt* [1997] 1 VR 301; *R v Jacobs* (1817) Russ & Ry 331, 168 ER 830; *R v Secretary of State for Justice* [2013] 3 WLR 1076; *R (Quintavalle) v Secretary of State for Health* [2003] 2 WLR 692; *Sakshi v Union of India* [2005] 2 LRC 111; *Smith v Selby* [2017] CCJ 13 (AJ) (BB), (2017) 91 WIR 70; *SW v United Kingdom* (1996) 21 EHRR 363; *The Queen v Flowers* [2020] CCJ 16 (AJ) BZ, [2020] 5 LRC 628; *Wik Peoples v State of Queensland* (1997) 23 CLB 201.

Legislation referred to:

Australia – Crimes Act, 1958 (Vic), Crimes (Sexual Offences) Act, 1980 (Vic); **Barbados** – Constitution of Barbados 1966, Interpretation Act, Rev Ed 1971, Cap 1, Sexual Offences Act, Rev Ed 1971, Cap 154; **Trinidad and Tobago** – Larceny Ordinance, Rev Ed 1950, Chap 4 No 11; **United Kingdom** – Sexual Offences Act, 2003.

Treaties and International Materials referred to:

Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; International Covenant

on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

Other Sources referred to:

Antoine R-M, *Commonwealth Caribbean Law and Legal Systems* (2nd edn, Routledge-Cavendish 2008); Bindra N S, Rao M N and Dhanda A, *N S Bindra's Interpretation of Statutes* (10th edn, LexisNexis Butterworths 2007); Butler, T R Fitzwalter and Mitchell S, *Archbold: Pleading, Evidence and Practice in Criminal Cases* (38th edn, Sweet & Maxwell 1973); *Collin's English Dictionary* (3rd edn, 1991); Galand A S, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (Brill 2018); Hale M, *The History of the Pleas of the Crown* (1736); *Merriam-Webster's Collegiate Dictionary* (10th edn, 1993); *Oxford Advanced Learner's Dictionary of Current English* (5th edn, 1995); Robinson T, Bulkan A and Saunders A, *Fundamentals of Caribbean Constitutional Law* (Sweet & Maxwell 2015); Williams G, *Textbook of Criminal Law* (2nd edn, Stevens 1983).

JUDGMENT
of
The Honourable Justices Saunders, Wit, Anderson, Rajnauth-Lee, Barrow and Jamadar

Delivered by
The Honourable Mr Justice Barrow

and

CONCURRING JUDGMENT
of
The Honourable Mr Justice Jamadar

and

DISSENTING JUDGMENT
of
The Honourable Mr Justice Burgess

on the 1st day of February 2022

JUDGMENT OF THE HONOURABLE MR JUSTICE BARROW:

[1] The issue to decide on this appeal is whether the law permits a man to be charged for rape of another man.

The Legislation

[2] Before the start of the evidence in his trial for the offence of rape contrary to s 3(1) of the Sexual Offences Act[1] ('the Act'), Stephen Alleyne was discharged by the Magistrate for District B Magistrate's Court after hearing submissions. Alleyne had been charged that he "… at the parish of Christ Church within the jurisdiction of the Magistrate of District 'B' on the 2nd day of August 2015 had sexual intercourse with HN (abbreviation) without his consent and knew that HN did not consent to the intercourse or was reckless as to whether he consented to the intercourse." As the pronouns used in the charge indicated, the alleged victim was a man.

[3] The Magistrate decided that the crime of rape did not extend to anal intercourse between men, and a majority in the Court of Appeal (Chandler JA (Ag) and Narine JA, Belle JA dissenting) later upheld him. The provisions of the Act which gave rise to this interpretation are as follows:

> 3.(1) Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the intercourse or is reckless as to whether the other person consents to the intercourse is guilty of the offence of rape and is liable on conviction on indictment to imprisonment for life.
>
> …
>
> (6) For the purposes of this section "rape" includes the introduction, to any extent, in circumstances where the introduction of the penis of a person into the vagina of another would be rape,
>
> (a) of the penis of a person into the anus or mouth of another person; or
>
> (b) an object, not being part of the human body, manipulated by a person into the vagina or anus of another.

The Literal Meaning

[4] A notable feature of these proceedings is that in all judicial opinions, that of the Magistrate and those of all three Justices of Appeal, it has been accepted that a literal reading of s

[1] Cap 154.

3(1) of the Act leads to the conclusion that because the word 'person' is gender neutral[2], the victim may be a male and, therefore, rape may be committed against a male. However, the majority decided that on a proper interpretation of the words used, they should not be given their literal meaning.

[5] The words used are perfectly ordinary words and easily understood; they are 'Any person who has sexual intercourse with another person without the consent of the other person' is guilty of rape. There is no limitation on who may be offender or victim: the expressions 'any person' and 'another person' are fully capable of referring to either gender. More pointedly, another person may be male or female. Therefore, as agreed in all judicial opinions, on a literal interpretation the 'other person', the one who is the victim, may be male and hence, a man may be raped in violation of s 3(1).

[6] The decision of the majority to the contrary, that the literal meaning is not the applicable meaning rested on the sole basis that rape of a man cannot be charged under s 3(1) because of the retention in the legislation of the s 9 offence of buggery. Another basis for rejecting the literal meaning, namely that the context of the words so required, was advanced only by Chandler JA (Ag), and was not supported by Narine JA.

Retention of the Offence of Buggery

[7] The Court is, of course, aware that the issue of the constitutionality of the offence of buggery has been adjudicated in several courts, including within its jurisdiction; see *National Coalition for Gay and Lesbian Equality v Minister of Justice*[3], *Lawrence v Texas*[4], *McCoskar v the State*[5], *Pant v Nepal Government*[6], *Orozco v Attorney General of Belize*[7], *Jones v Attorney General of Trinidad and Tobago*[8] and *Navtej Singh Johar v Union of India*[9]. Counsel informed the Court that, at the time of the hearing, the issue was the subject of litigation before the courts in Barbados. However, the issue was not

[2] See Interpretation Act, Cap 1, s 36(1).
[3] [1998] ZACC 15.
[4] 539 US558 (2003).
[5] [2005] FJHC 500 (Fiji HC, 26 August 2005).
[6] 'Decision of the Supreme Court on the Rights of Lesbian, Gay, Bisexual, Transsexual and Intersex (LGBTI) People' (2008) 2 NJA LJ 261.
[7] (Belize SC, 10 August 2016).
[8] [2018] 3 LRC 651.
[9] AIR 2018 SC 4321.

argued in this Court, and it did not arise for decision, and in the circumstances, it is the duty of this Court to exercise proper judicial restraint. The Court notes that it is not, by refraining from deciding or commenting upon the constitutional validity of the section creating the offence, indicating any acceptance of its validity: it is only dealing with the implications that were said to flow from the existence of the offence in the legislation.

[8] It was fundamental that the single agreed reason for the majority for upholding the magistrate's decision was that the offence of buggery was retained in the Sexual Offences Act which was passed in 1992 to reform the law relating to rape (and sexual offences generally). This was the reason for decision of the appeal. On this reasoning, the decision by the legislature not to abolish the offence of buggery was a clear indication that it was not the legislative intention to convert rape to a gender-neutral offence, as the prosecution argued. The majority decided that in a case of non-consensual anal penetration of a man, a charge of buggery, contrary to s 9 of the Act, was to be laid and not rape. As expounded by Narine JA and embraced in Alleyne's submissions to this Court, since the crucial element of rape is absence of consent it would be absurd to lay a charge for doing an act without consent when there can be no consent to it. The law in Barbados is that anal intercourse, whether homosexual or heterosexual, is absolutely prohibited and there can be no consent to it. On this view, according to the Court of Appeal majority, if the court decided that anal rape is a permissible charge, the court would implicitly be accepting there could be consent to anal intercourse because the charge would be for failure to obtain consent. That would be to accept that there could have been consent to anal intercourse but, in law, as the law currently stands, this is not possible.

[9] The flaw in this reasoning is readily identified. It begins with the failure to consider what flows from the truism that persons do prohibited acts all the time; the essence of crime is the violation of the stricture, "thou shalt not …". The law recognizes that the prohibited act was done; rather than pretending it did not occur the law calls for its exposure and punishment. In the instant case, the essence of the alleged offence is the doing of the prohibited act of anal penetration but with the further element to the doing of the prohibited act, which was doing it knowing or being reckless that the virtual complainant did not consent.

[10] The majority failed to give regard to the fact that it makes no difference that, in a case of buggery, even if the virtual complainant had consented to the prohibited act, the law, as it stands currently, treats that giving of consent as a nullity and therefore legally ineffective. Irrespective of whether there was consent, the prohibited act would continue to be a prohibited act and the court would not and could not be asked to decide otherwise. But that null consent would still have been given; the law would not need to pretend it had not been given. It will be denied legal effect. But that denial would be of the effect in law; it is not a denial that the hypothetical (and ineffective) consent had been given. The significance of the null consent is that its existence means the prohibited act is simple buggery. Where, however, there is knowing or reckless absence of consent, that absence makes the prohibited act rape.

Consent in Fact and in Law

[11] There is cogent confirmation in the Act itself that the law recognizes the distinction between consent in fact and consent in law. Section 6(1) of the Act creates the offence of incest; a person cannot effectively consent to sexual intercourse with a person who is by blood relationship his or her parent, child, brother, sister, grandparent, grandchild, uncle, niece, aunt or nephew. The nullification of consent to the prohibited act is done by providing in s 6(2) of the Act that "it is immaterial that the sexual intercourse referred to in sub-s (1) occurred with the consent of the other person." There could hardly be a clearer demonstration of the recognition that the law gives to the distinction between consent in fact and consent in law.

[12] In a hypothetical incest case, it must certainly matter that the victim did not consent to sexual intercourse and the perpetrator persisted despite the lack of consent. The law recognizes that a victim may consent in fact while treating that consent as immaterial to the commission of the offence. Therefore, in a case where there was no consent in fact the prosecutor could charge either the predicate sexual offence of incest or the offence of rape; the possibility of charging the predicate offence does not prevent charging rape. In a case where there has been no consent, a prosecutor may choose to charge rape because it will attract a more severe sentence and that outcome may be appropriate on the facts of a particular case.

[13] Similarly with this case, the inability of the victim lawfully to consent to the predicate offence of buggery did not prevent charging rape. It was properly recognised in the Court of Appeal that it is no bar to a prosecution that one act may constitute an offence under two or more enactments, so long as there is not double punishment[10]. However, that did not avert the majority's conclusion that since the offence of buggery was retained in the legislation, the same act could not alternatively be prosecuted as rape. The misstep to that conclusion was the reasoning that to allow non-consensual buggery to be charged as rape would 'absurdly' imply that if there had been consent there would be no offence because consent negates the existence of rape. The majority failed to see that if there was legally null consent this would not legalize the sexual activity. The null consent would mean merely that rape could not be charged but buggery could be charged.

[14] Curiously, and apparently without appreciating the logical implications, the majority accepted that non-consensual anal penetration of a female could be charged as rape.[11] But, as both judges also observed[12], it is the law that anal intercourse with a female is also buggery; see s 9 of the Act, *Archbold*[13]. As the law currently stands, a woman cannot consent to such intercourse, in the same way that a man cannot consent. So, how could it be possible to charge rape in the case of non-consensual anal penetration of a female, and not be confined to charging buggery, but decide it is not possible – indeed, supposedly it would be absurd – to do the same if it is a male and not a female who is penetrated? The answer to that rhetorical question is that logically there is nothing in the legislation or otherwise which makes it possible to charge anal rape of a woman but not of a man and that, it seems to me, decides the issue on appeal. As noted, the determination by the Court of Appeal that the retention of the crime of buggery made it impossible to charge non-consensual anal penetration of a male as rape was the sole, dispositive reason for deciding against applying the literal meaning of the gender-neutral words in s 3(1) of the Act and for deciding that a male cannot be charged for raping another male. It is a reason that cannot stand.

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[10] Interpretation Act (n 2), s 22.
[11] *Commissioner of Police v Alleyne* (Barbados CA, 15 April 2021) at [39] (Chandler JA (Ag)), at [57] and at [59] (Narine JA).
[12] Ibid at [21] (Chandler JA (Ag)) and at [59] (Narine JA).
[13] T R Fitzwalter Butler and S Mitchell, *Archbold: Pleading, Evidence and Practice in criminal cases* 38th edn, Sweet & Maxwell (1973) para 2968.

Context

[15] That would seem to dispose of the appeal but for completeness I go on to consider the view of Chandler JA (Ag) that the material words should not be given their literal meaning because of their context. As mentioned, it was accepted in all judicial opinions that the words 'person' and 'another person', used in s 3(1) of the Act, on their literal meaning refer to both male and female. It was in the opinion of Chandler JA (Ag), that a gender-neutral meaning was not to be given because the meaning of the words 'person' and 'another' in s 3(6) is constrained by context. The context that supposedly produced this qualified meaning is provided by the definition that "rape" includes the introduction, to any extent, of various instruments of penetration into various human orifices "in circumstances where the introduction of the penis of a person into the vagina of another would be rape …". The learned judge reasoned that in the case of person, the word "penis" appears before 'person' and therefore 'person' can only refer to a male. In the case of 'another' the word "vagina" appears before 'another' so that word can only refer to a female.[14] It follows on this reasoning, that 'person' means a male, and 'another' means a female and that the qualifiers that are contained in sub-s (6) must be read into sub-s (1), the section that creates the offence of rape.

[16] The problem with this reliance on sub-s (6) is that it fails to appreciate the context in which the words were used and the object of using them. The object was simply to establish as a legal reference point the circumstances in which the actions described in sub-paras (6)(a) and (b), which previously did not amount to rape, will amount to rape. The Act now makes it rape where the actions described in those sub-paras are done in circumstances where it would be rape if a man inserted his penis into a female. As variously stated by both Narine JA and Belle JA, the circumstances are essentially that the perpetrator was above a certain age and knew there was lack of consent or was reckless about it. But the circumstances which can make it rape if there is sexual penetration by a male of a female include much more than would have been conveyed by the simple expression 'without consent'. Without seeking to be exhaustive and drawing from the opinion of Belle JA, these include:

[14] *Alleyne* (n 11) at [39].

(a) the application of force to the complainant or to a person other than the complainant;
(b) threats or fear of the application of force to the complainant or to a person other than the complainant;
(c) the personation of the spouse of the complainant;
(d) false and fraudulent representations as to the nature of the act; and
(e) the use of the accused's position of authority over the complainant.

[17] It is because of the broad scope that the expression 'in circumstances' provided that the new forms of rape were defined in the reforming Act by reference to the panoply of circumstances that exist for the historical form of rape. Subsection (6) simple stated, in essence, that rape now extends to the insertion of the penis into the anus or mouth, or an impersonal object into the vagina or anus, of another person, in circumstances where, had that insertion been of the penis into the vagina, it would be rape. It was an erroneous interpretation to hold that 'another person', the victim of the anal penetration, referred only to a female.

[18] As stated, for his part Narine JA did not engage in the slightest with this contextual interpretation. In his dissent, Belle JA discussed why the gender qualifications contained in the 'In circumstances' phrase of the sub-s (6) definition could not have been intended as a section-wide limitation of the meaning of 'another person', and to thereby confine the expression to a female.

Comparable Legislation

[19] The erroneous interpretation of the expression 'another person' is not rescued by reference to the drafting style employed in similar legislation from the Australian state of Victoria, the *Crimes (Sexual Offences) Act 1980*. In that Act appears the following definition:

> "Rape" includes the introduction (to any extent) in circumstances where the introduction of the penis of a person into a vagina of another person would be rape, of – (a) the penis of a person into the anus of mouth of another person (*whether male or female*); or (b) an object (not being part of the body) manipulated by a person (whether male or female) into the vagina or anus of another person (*whether*

male or female) – and in no case where rape is charged is it necessary to prove the emission of semen."[15] (Emphasis added)

[20] Chandler JA (Ag) found that "The words in parenthesis make it clear that the victim of rape can be male or female in Victoria." He went on to decide that if the Barbados legislature had intended to make rape gender-neutral, it would have been perfectly open to the legislature to make that intention plain by legislating in similar fashion. But the observation by Belle JA seems entirely on point: the words "whether male or female" could only have been inserted for the purpose of emphasis. This is borne out distinctly by the Victorian draftsperson's device of placing the words in parenthesis. It is commonplace that a parenthetical inclusion is one that is made 'by the way'; it is not essential or central to the sentence in which it is included. The stylistic disposition of the Barbadian draftsperson, that no parenthetical inclusion was necessary, is validated by the observation made earlier that all judicial opinions were agreed on the literal meaning of the words 'another person' – that it was gender-neutral. The parenthetical insertion was not necessary for those opinions to be reached. As also earlier stated, s 36(1) of the Interpretation Act[16] provides that person includes male and female. Therefore, it would have been superfluous to add "(whether male or female)" and there is no interpretational significance to their absence from the Act.

Conclusion

[21] For the reasons given, I would allow the appeal and remit the case to the Magistrate's Court for it to proceed with the preliminary inquiry.

JUDGMENT OF THE HONOURABLE MR JUSTICE JAMADAR, JCCJ:

[22] I entirely support the opinion of Justice Barrow and the finding that the majority of the Court of Appeal incorrectly rejected the literal and plain meaning reading of s 3(1) of the Sexual Offences Act[17]. Such a reading and interpretation of s 3(1), giving the words used

[15] Crimes (Sexual Offences) Act, 1980 (Vic.).
[16] Cap 1 (n 2).
[17] See (n 1).

their natural and ordinary meanings and regarding that as used they reflect the intention of the legislature, is dispositive of this appeal. The language used consistently throughout s 3(1) is gender-neutral ('any person' and 'another person') and pursuant to s 36(1) of the Interpretation Act[18] is intended and presumed to include all genders. A victim/survivor of rape as defined in that section (s 3(6)) therefore includes a male person and the law thus recognises that rape (as defined) may be committed against a male. No intra or inter textual ambiguities, contradictions, or conflicts arise from such a reading. Indeed, it is overtly intra-textually consistent. Therefore, pursuant to s 3(1) the law permits a man to be charged for rape of another man. On this basis alone the appeal should be allowed.

[23] However, this is not the end of the matter in the context of statutory interpretation in constitutional democracies. In constitutional democracies all statutory interpretation must include a consideration of whether the law as stated can be interpreted in a manner that is consistent with the Constitution, as to the extent that there is an inconsistency, the law is void[19]. Statutory interpretation in a state where there is constitutional supremacy, such as in Barbados, necessarily requires that all legislation be filtered through constitutional lenses[20].

[24] In addition, and consistent with the principle of sovereignty[21], the task of statutory interpretation in Barbados includes attending to the state's declared international undertakings through signed and subscribed international treaties and legal instruments[22]. Sovereignty in a constitutional democracy means that a state that enters into treaty arrangements does so with full autonomy, intending to mean what it represents to the world and its citizens as having been done. The agency of the executive to act for the state in this regard is constitutionally warranted, and the imprimatur of the Parliament is not a necessary requirement. In this regard the pure notion of dualism that has its origins in Parliamentary supremacy is arguably and conceptually tenuous. The result is a constitutional impetus to interpret all domestic laws in alignment with state undertaken

[18] Cap 1 (n 2).
[19] Constitution of Barbados 1966, s 1.
[20] *Marin v R* [2021] CCJ 6 (AJ) BZ at [27]-[46]; *Guyana Geology and Mines Commission v BK International Inc* [2021] CCJ 13 (AJ) (GY) at [54]-[56], [72]-[79], [82].
[21] Preamble (a) to the Constitution of Barbados.
[22] *R v Secretary of State for Justice* [2013] 3 WLR 1076 at [121].

international obligations and commitments, an approach recognised and endorsed by this Court[23].

[25] Thus, two principles of statutory interpretation emerge for states which exist in the context of constitutional supremacy. Methodologically, a) respect for fundamental rights and basic deep structure principles[24], and b) formal international treaty commitments are both lenses through which all statutes must be viewed, interpreted, and applied so as to adhere to and be consistent with, so far as is appropriate, those core values, principles, and commitments.

[26] In this case the following principles are therefore engaged in interpreting s 3(1). Constitutionally, the right to protection of the law regardless of sex, and the prohibition against discriminatory laws (ss 11 (c) and 23 of the Constitution). And based on international law commitments, equality before the law regardless of gender[25] and the enjoyment of fundamental rights and freedoms without restrictions based on sex.[26] These values, principles, and commitments all support a gender-neutral reading, interpretation, and application of the provisions of s 3(1).

[27] Thus, even as the words in s 3 of the Act are plain and unambiguous as explained in the opinion of Barrow JCCJ, these meanings are confirmed by the application of the aforesaid two rules of statutory interpretation. It is not that the application of these two rules is unnecessary because their application support the outcome arrived at without their application, but that in any event these two rules of statutory interpretation must be considered and applied. This is so because in a constitutional democracy where the Constitution and not Parliament is supreme, it is a constitutional imperative. Put another way, applying these two rules of statutory interpretation in Barbados is not an 'add on' to supplement some primary interpretative process, but is integral to the task of statutory

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[23] See *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ), (2019) 94 WIR 332 at [54], [55].

[24] See *A-G v Joseph* [2006] CCJ 3 (AJ), (2006) 69 WIR 104 at [20] (Wit JCCJ); *Nervais v R* [2018] CCJ 19 (AJ), (2018) 92 WIR 178 at [59] (Byron PCCJ); *McEwan* (n 23) at [41]-[45], [51] (Saunders JCCJ); *Belize International Services Ltd v A-G of Belize* [2020] CCJ 9 (AJ) BZ, [2021] 1 LRC 36 at [319]-[321], [350] (Jamadar JCCJ); *Guyana Geology and Mines Commission* (n 20) at [75]-[97] (Jamadar JCCJ); Tracy Robinson, Arif Bulkan and Adrian Saunders, *Fundamentals of Caribbean Constitutional Law* (Sweet & Maxwell 2015) para 3-028.

[25] International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 26.

[26] Convention on the Elimination of All Forms of Discrimination against Women Rights (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

interpretation whenever a statute falls to be interpreted and applied. The Constitution is not on the periphery of statutory interpretation, it is at the centre[27].

[28] There was therefore no need for the Court of Appeal to engage s 9. However, I wish to add a few short comments on the errors made by the majority of the Court of Appeal in their approach to interpreting s 3(1) by making references to the offence of buggery in s 9. In relying on s 9 to interpret s 3 the majority of the Court of Appeal erred in making findings that they were not called upon to make, namely that consent is irrelevant in the offence of buggery[28]. Belle JA also erred in making similar findings[29]. Nevertheless, Belle JA correctly found that the reference to the offence of buggery is irrelevant and should play no part in the construction of s 3 of the legislation[30]. This Court has repeatedly emphasised that where there is no ambiguity, uncertainty or inconsistency, with the plain meaning of the words used in legislation, no further interpretation is needed[31]. It is only necessary to add to this approach, that the plain meaning must be constitutionally vires and where appropriate aligned with international commitments.

[29] The Court of Appeal was therefore not called upon to interpret s 9. To compound matters, in construing s 9 they failed to demonstrate whether their interpretation included an analysis that considered the aforesaid two principles of statutory interpretation, namely a hermeneutic that involved a) respect for fundamental rights and basic deep structure principles, and b) relevant international commitments. Before s 9 could be used as an aid in interpreting s 3, the Court of Appeal would have been required to discover what is the constitutionally vires, and 'internationally aligned' meaning of the law in s 9. The failure to do so deprived the Court of Appeal of the opportunity to first determine the constitutionally vires meaning of the law before using it as a central feature in the analytical process.[32]

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[27] *Marin* (n 20) at [29]: Fifty plus years on, what has begun to emerge is a sort of chiastic analytical pattern (emerging out of a resonant chiastic epicentre) to the approaches to Caribbean constitutional interpretation. This approach is to be contrasted with an 'either-or' methodology which promotes pressures towards interpretative exclusivity.

[28] *Alleyne* (n 11) at [59], [62], [64], [65], [67], [69].

[29] ibid at [121], [124], [155].

[30] ibid at [147].

[31] *The Queen v Flowers* [2020] CCJ 16 (AJ) BZ, [2020] 5 LRC 628 at [37], [40]; *Persaud v Nizamudin* [2020] CCJ 4 (AJ) (GY) at [13].

[32] For example, and without in any way making any pre-judgments and intending only to be illustrative, an interpretation of s 9 may involve consideration of the following: constitutionally a) the right to privacy of the home, the right to protection of the law, regardless of sex, the prohibition against discriminatory laws (ss 11 (b)), 11 (c) and 23 of the Constitution (n 19)); and based on international law commitments a) freedom from discrimination on the basis of sexual orientation (arts 2(1) and 26 of the International Convention on Civil and Political Rights

[30] In this appeal we are not called upon to interpret or to determine the constitutional validity of s 9, as the issue of consensual anal sex between adults did not 'arise'[33] in these proceedings. The Respondent was charged for non-consensual anal sex. And as explained, s 9 is not needed to interpret s 3(1).

JUDGMENT OF THE HONOURABLE MR JUSTICE BURGESS, JCCJ:

Introduction

[31] The question of whether a male can commit the offence of rape of another male under the law in Barbados is fraught with controversial policy issues that have been the subject of much public and parliamentary debate and argumentation. This appeal concerns that question. The dispositive question in the appeal is whether Parliament in enacting s 3(1) of the Sexual Offences Act, Cap 154 (Cap 154) has answered this question in the affirmative. It bears emphasising here that the question can only be answered by this Court interpreting that subsection as it has been written.

[32] This appeal was heard by all seven justices of the Court. The overwhelming majority, six justices, have held that s 3(1) does create such an offence and that Parliament has indeed answered the question in the affirmative. It is therefore with considerable deference that, I confess to having a deep doctrinal doubt as to whether the majority is correct in their holding. My difficulty is this: How can Parliament be held, except by supplementary judicial legislation disguised as statutory interpretation, to have made such a fundamental change in the common law of rape in the absence of clear, unmistakable words to that effect in the Act. Accordingly, I respectfully offer my opinion as to how I would dispose of this appeal.

(n 25)); and b) the obligation of the state to take all appropriate measures including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women (art 2 (f) of the Convention on the Elimination of All Forms of Discrimination against Women (n 26)). And as well, the rule of law principle of legality: as explained in *McEwan* (n 23) at [125]; 'The principle of legality is a rule of statutory interpretation: if Parliament intends to interfere with fundamental rights or principles, or to depart from the general system of law, then it must express that intention by clear and unambiguous language.'. And *Guyana Geology and Mines Commission* (n 20) at [69]-[72].

[33] *Marin* (n 20) at [57]-[60], [64]-[66].

Background Facts

[33] The background facts are quite straightforward. The respondent appeared before the court charged that he "at the Parish of Christ Church within the jurisdiction of the Magistrate of District "B" had sexual intercourse with HN without his consent and knew that HN did not consent to the intercourse or was reckless as to whether he consented to the intercourse". The charge ended: "Refer to Section 3 Subsection (1) of the Sexual Offences Act Chapter 154."

[34] According to Magistrate Watts, the magistrate at District "B", on presentation to the court on 17 February 2019 after the case was before him since 11 July 2017, he enquired of the virtual complainant, HN, whether the person presenting was male or female. The virtual complainant indicated that he was male. On similar enquiry to the respondent by Magistrate Watts, the respondent indicated that he was male.

[35] Again, according to Magistrate Watts, those admissions prompted him "to consider the charge which was before the court". Magistrate Watts drew his concern to the Police Prosecutor that "the parties before the court and the charge appeared to [him, Magistrate Watts] to be incongruent". Magistrate Watts invited submissions from counsel for the accused and from the police prosecutor.

[36] After hearing these submissions, Magistrate Watts dismissed the charge against the respondent. The only reason given by the learned Magistrate for his decision was that a male could not be a complainant of rape alleged to have been committed by a male accused under s 3(1) of Cap 154. It is to be stressed here that the Magistrate did not base his decision on the fact that the accused was not charged for buggery under section 9 of the Act.

[37] The appellant appealed the decision of the Magistrate to the Court of Appeal. The Court of Appeal by a majority (Narine JA and Chandler JA (Ag), Belle JA dissenting) upheld the decision of the Magistrate. The appellant has now appealed the decision of the Court of Appeal to this Court.

Appeal Before this Court

[38] Four grounds of appeal raised by the appellant before this Court. These are that:

(a) The Court of Appeal erred in its interpretation of s 3(6).

(b) The Court of Appeal erred in interpreting s 3 when it held that it does not apply to a male complainant who alleges that his anus was penetrated by the penis of another male without consent.

(c) The Court of Appeal erred by interpreting s 3 by reference to the fact that there was another offence (buggery) that would have been easier to prove.

(d) The Court of Appeal erred by interpreting s 3 in a manner that potentially breaches the right to the protection of the law of male persons in Barbados under s 11(c) of the Constitution of Barbados.

[39] It is readily apparent that these grounds all relate to the interpretation of s 3. Before considering these grounds, however, I consider it fundamentally important in light of submissions made to this Court by counsel for the appellant to examine the role of this Court in interpreting that section.

Role of this Court in Interpreting s 3(1)

[40] The landmark decision in *Hinds v R*[34] is undoubted authority for the proposition that, though not expressly stated in the Barbadian Constitution, the separation of powers doctrine is a foundational principle which must guide the functioning of the arms of state in Barbados. In this regard, s 48 of the Constitution resides the power to make laws in Parliament. The undoubted constitutional function of the judiciary *vis-a-vis* laws made by Parliament is to interpret those laws to give effect to the intention of Parliament as expressed in the words of the legislation passed by Parliament.

[41] Common law courts have developed various approaches and guidelines over the centuries to aid in discerning the intention of legislators when interpreting Acts of Parliament. These guidelines, now called "rules of statutory construction" or "cannons of

[34] [1975] 24 WIR 326.

construction", were developed to minimise arbitrariness, inconsistency, and subjectivity in the process of judicial interpretation.

[42] Professor Rose-Marie Antoine in *Commonwealth Caribbean Law and Legal Systems* (2nd edn. Routledge-Cavendish 2008) has identified six such "rules" or approaches which have been applied in our courts. These are the literal rule[35]; the golden rule[36]; the mischief rule[37]; the purposive approach[38]; the contextual approach[39], and the policy approach[40]. The truth is that these rules or approaches often overlap but have as their common purpose the ascertainment of the legislators' intention as expressed in the words of the legislation. As this Court commented in *Smith v Selby*[41], it is for this Court in seeking to discern that intention to decide on the relevant weight which should be placed on any of these approaches.

[43] Counsel for the appellant, Ms. Delaney, has argued before us that this Court should adopt the literal rule or plain meaning rule in this case. This rule asserts that the interpretation of a statute should be based on the ordinary, literal, and grammatical words used in the statute by the legislature. Put differently, the true sense of the statute is revealed by making the statute its own expositor. (Narotam Singh Bindra, M N Rao and Amita Dhanda *N S Bindra's Interpretation of Statutes* (10th edn. LexisNexis Butterworths 2007) 4.

[44] I agree with counsel that the literal rule should be adopted in this case. That approach reinforces the fundamental doctrine of separation of powers and strongly disapproves of the use of judicial authority as a mechanism to make law under the guise of statutory interpretation. In my view, this approach is even more apposite where legislation such as the one involved in this case seeks to give effect to policies that are the subject of public

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[35] Discussed hereafter.
[36] This rule is that where the literal rule would lead to some absurdity, the grammatical and ordinary sense of the words in the statute should be modified to avoid that absurdity: see, eg, *Grey v Pearson* [1857] 6 HL Cas 61 at 106.
[37] This rule also called the rule in Heydon case is that the statute should be interpreted to remedy the wrong or mischief which Parliament was attempting to correct: see, eg, *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591.
[38] This approach seeks to promote general legislative purpose underlying the provision in issue: see, eg, *Fraser v Greenaway* (1992) 41 WIR 136.
[39] This approach gives particular emphasis to the context of words used in the statute: see, eg, *A-G v Prince Ernest Augustus of Hanover* [1957] AC 436.
[40] This approach asserts that where there is an ambiguity in the statute, the judge will choose the interpretation that best accords with their view of policy: see eg, *Wik Peoples v State of Queensland* (1997) 23 CLB 201.
[41] [2017] CCJ 13 (AJ) (BB), (2017) 91 WIR 70.

and parliamentary controversy. In such a case, this Court should confine its role narrowly to ascertaining from the words that Parliament has approved as expressing its intention what that intention is, and to giving effect to it. As Lord Diplock said in *Duport Steels Ltd v Sirs*[42]:

> Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters…. there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our constitution it is Parliament's opinion on these matters that is paramount.

[45] In my view, the foregoing is not in any way attenuated by the rule in s 31(1) of the Interpretation Act[43] that legislation is to be interpreted "as always speaking". That section provides:

> Every enactment shall be construed as always speaking and anything expressed in the present tense shall be applied to the circumstances as they occur, so that effect may be given to each enactment according to its true spirit, intent and meaning.

[46] In my opinion, the "always speaking" principle enacted in s 31(1) of Cap 1 does not empower this Court to, as contended in the appellant's novel and creative argument, "construe section 3 in light of modern social views" to change the meaning of the words used in that section. The principle means that the words of a statute should be treated as ambulatory and speaking continuously in the present in accordance with the true spirit, intent and meaning of the Act.

[47] To be sure, the time-honoured maxim *contemporanea expositio est optima et fortissima in lege* has not been abolished by s 31(1). This maxim which has long governed the interpretation of statutes in Anglo-Caribbean law[44] means that statutes are to be construed in accordance with their natural meaning as at the date of their enactment, considering the circumstances existing at that time. The fundamentality of this maxim as a default rule of statutory interpretation was confirmed by the House of Lords in 1979 in *Black-Clawson*

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[42] [1980] 1 WLR 142 at 157.
[43] Cap 1 (n 2).
[44] See *The Longford* (1889) 14 PD 34 at 36-37.

International Ltd v Papierwerke Waldhof-Aschaffenburg[45]. Lord Simon of Glaisdale explained what this maxim involves as follows:

> I confess, my Lords, that when I first read section 8 of the Act I was under an immediate and powerful impression that the Court of Appeal must be right. It seemed obvious that subsection (1) was dealing with the cause of action estoppel and subsection (3) with issue estoppel… [b]ut though the foregoing was my first impression, I soon realized that I was looking at section 8 with 1974 eyes and interpreting it in 1974 terms; and that in doing so I was falling into fundamental error. *Contemporanea expositio est optima et fortissima in lege*. The concepts of cause of action and issue estoppel were not developed in 1933 … and could not possibly be what Parliament and the draftsman then had in mind. My initial response had been scarcely less anachronistic than if I had attempted to interpret Magna Carta by reference to *Rooks v Barnard* [1964] AC 1129.

[48] Lord Bingham's reconciliation of the *contemporanea expositio est optima et fortissima in lege* maxim and the "always speaking" principle in the 2003 House of Lords decision of *R (Quintavalle) v Secretary of State for Health*[46] is, in my view, very helpful. There, he stated:

> There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats, but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now.

[49] Again, in *R v G*[47], Lord Bingham emphasised:

> Since a statute is always speaking, the context or application of a statutory expression may change over time, but the meaning of the expression itself cannot change.

[50] In my judgment, Lord Bingham's adumbration makes it plain that the core meaning of the statute is fixed at the date of the enactment, but its context or application may change to accord with its true spirit, intent and meaning. Accordingly, in seeking to discern the intent of Parliament, it would be, in my view, a fundamental error to invoke the "always

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[45] See (n 37) at 643-644.
[46] [2003] 2 WLR 692 at 697.
[47] [2004] 1 AC 1034 at 1054.

speaking" provision in s 31(1) to ascribe a future meaning to a statute, which meaning Parliament may not have considered. This could lead to the unintended consequence of changing the meaning of the statute by judicial overstepping of the bounds of interpretation. Section 31(1) could not possibly be interpreted as justifying any such overstepping.

Analysis of and Conclusions on the Grounds of Appeal

[51] Always remembering the foregoing, I now turn to the four grounds of appeal raised before us by the appellant. In my view, these grounds resolve themselves into the following four questions: (i) Does s 3(1) create an offence of rape by a male of another male, (ii) If no, does s 3(6) change the meaning of s 3(1) to create such an offence; (iii) Can s 3(1) be interpreted by reference to s 9 which creates the offence of buggery in discerning the meaning of s 3(1); and (iv) Does the Court of Appeal's interpretation of s 3 "potentially breach the right to protection of law of male persons in Barbados under s 11 (c) of the Constitution of Barbados".

[52] I will consider the appellant's grounds of appeal under these heads *seriatim*.

(i) Does s 3(1) create an offence of rape by a male of another male?

[53] Section 3(1) of Cap 154 enacts as follows:

> Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the intercourse or is reckless as to whether the other person consents to the intercourse is guilty of the offence of rape and is liable on conviction on indictment to imprisonment for life.

[54] It is instructive to recall here the common law definition of the offence of rape which was the law on rape before the passage of this subsection. At common law, rape was defined as a man having sexual intercourse with a woman without her consent by force, fear, or fraud[48]. The *actus reus* of rape at common law then was "having sexual intercourse" and

[48] 1 East PC 434; and 1 Hale 627.

the *mens rea*, knowledge of lack of consent. Only a man could commit the offence and only against a woman.

[55] Section 3(1), the statutory provision on the offence of rape, was enacted in furtherance of the intention of Parliament in passing Cap 154 "to revise and reform the law on sexual offences". Like the common law offence, the offence created by that subsection requires two primary elements to be established. These are (i) the *actus reus* -having sexual intercourse by a person (X) with another person (Y) and (ii) the *mens rea* - lack of consent by Y to that sexual intercourse or knowledge by X that Y did not consent to the intercourse or recklessness by X as to whether Y did not consent to the intercourse.

[56] Section 3(1) has changed the common law offence of rape from "a man" having sexual intercourse with "a woman" without her consent to "any person" having sexual intercourse with "another person" without that other person's consent. Notably, however, s 3(1) has maintained the common law *actus reus* of rape, having sexual intercourse, as the *actus reus* of rape created by that subsection. In this regard, it is interesting to observe here *en passant* that most legislation in common law jurisdictions aimed at revising and reforming the common law offence of rape make "penetration"[49] or "introduction"[50] and not "having sexual intercourse" the *actus reus* of that offence.

[57] Be that as it may, it follows from the s 3(1) change that, in deciding whether a man can be charged with the offence of rape of another man under that section, the only question to be answered is whether [X], a male, can in law have "sexual intercourse" with [Y], another male. The s 3(1) *mens rea* required for the commission of the offence is not materially different from the common law *mens rea* and therefore has no bearing on deciding that question.

[58] So, can [X], a male, have sexual intercourse with [Y], another male under s 3(1)? The answer to this question no doubt is to be found in the intention of Parliament as expressed in the words of the subsection read in the context of Cap154.

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[49] See, eg, s 2(1) of the Sexual Offences Act, 2003 (UK) which defines it as "penetration of the vagina or anus of another".
[50] See, eg, s 4 of the Crimes (Sexual Act) 1980 (Victoria) discussed infra.

[59] To begin with, as s 3(1) is intended to create a criminal offence by making changes to the common law, that section must be interpreted on the presumption that the words used in the subsection are a clear and unambiguous expression of the intention of Parliament. The subsection must also be strictly interpreted because the rules of natural justice dictate that an accused should not be prejudiced by his inability to determine his criminal liability. That rule is as firmly established in international human rights law as it is in the common law.

[60] As to international human rights law, the European Court of Human Rights in *SW v United Kingdom*[51] noted:

> Accordingly, as the Court held in its *Kokkinakis v Greece judgment of 25 May 1993 (Series A no. 260-A, p. 22, para. 52),* Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. In its aforementioned judgment the Court added that this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.

[61] In his book, *UN Security Council Referrals to the International Criminal Court*[52], Alexandre Skander Galand elaborated on the principle *nullum crimen, nulla poena sine lege* in the following passage:

> The principle of legality, as Kenneth S. Gallant has defined it, "is a requirement that the specific crimes, punishments and courts be established legally – within the prevailing legal system." This definition can be broken down into three rules: (1) no crime without law (*nullum crimen sine lege*); (2) no punishment without law (*nulla poena sine lege*); and, (3) no court without law.
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> The most important precept of the principle of legality for the purpose of this chapter is *nullum crimen sine lege* (no crime without law). *Nullum crimen sine lege* encapsulates four basic notions: (1) *nullum crimen sine lege praevia* (non-

[51] (1996) 21 EHRR 363.
[52] Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (Brill 2018) 110-111.

retroactivity); (2) *nullum crimen sine lege scripta* (written law); (3*) nullum crimen sine lege certa* (specificity); (4) *nullum crimen sine lege stricta* (strict construction).

According to *nullum crimen sine lege scripta*, the law needs to be written and enacted otherwise there is no law and therefore no criminal liability. *Nullum crimen sine lege scripta* poses a challenge to common law jurisprudence and customary criminal law. In order to accommodate these legal systems, written as well as unwritten law are said to satisfy *nullum crimen sine lege*. *Nullum crimen sine lege certa* expresses the value of legal certainty. Clarity, precision, certainty and specificity are generally the requirements for a law to be considered in accordance with *nullum crimen sine lege certa*. In order to alleviate the risks posed by vague laws or general definitions, criminal provisions must be interpreted strictly. *Nullum crimen sine lege stricta* encompasses two principles, first the judiciary cannot broadly or extensively interpret a criminal rule and, relatedly, it cannot define criminal acts by analogy to existing crimes. These prohibitions imply that criminal rules must be strictly construed.

The most prevalent notion of the principle of *nullum crimen sine lege* is the rule of non-retroactivity. *Nullum crimen sine lege praevia* is the notion that there is no crime without pre-existing law. A behavior can be held criminal only if at the time it was committed there was a law providing for its criminalization. The law must have been in force at the time the conduct took place and must have been applicable to the conduct in question. The core of *nullum crimen sine lege* is in non-retroactivity, while the concept of written law, the rule of specificity, and the rule of strict construction are tools to ensure that retroactive creation of crimes does not take place. The aim of all these notions is to act as safeguards against an arbitrary exercise of authority.

[62] As to the common law, the Trinidad and Tobago Court of Appeal decision of *Baptiste v Alleyne*[53] is a good illustration of the operation of the principle. In that case, the accused was found outside a house with his hand through a window choking a female occupant. He was charged under s 29 (d) of the Larceny Ordinance with the offence of being "found in [a] building with intent…" and was convicted. He appealed the conviction. The Court of Appeal overturned the conviction on the basis that, for the accused to be convicted of the offence charged, there had to be clear and unmistakable evidence that he was literally "found in" the building and there was no such evidence. De la Bastide JA, as he then was, in delivering the judgment of the court said:

> …on a full and reasonable interpretation of the evidence which was that the appellant was standing on the ground outside of a window with both hands inside the house, he cannot in this court's view be said to have been 'found in the building'

[53] (1970) 16 WIR 437.

on a literal meaning or ordinary interpretation of the words of s 29 (d) of the Larceny Ordinance.

[63] The foregoing principles are to be borne firmly in mind in approaching the interpretation of the phrase "[a]ny person who has sexual intercourse with another person" in s 3(1). In my judgment, such an approach requires that three critical questions must be confronted. These are: (a) What was the natural and ordinary meaning of that clause at the date Cap 154 was enacted; (b) What is its general legal meaning; and (c) What is its meaning considered within the context of the entire Act itself. Each of these questions will be dealt with in turn.

(a) What was the natural and ordinary meaning of having "sexual intercourse" at the date of the enactment of Cap 154?

[64] The preponderance of English dictionaries at the date of the enactment of Cap 154 define sexual intercourse as meaning male/female intercourse involving penetration of the vagina by the penis. For example, the definition in *Collin's English Dictionary*[54] stated that it is "a joining of the sexual organs of a male and a female, in which the erect penis of the male is inserted into the vagina of the female, usually with the ejaculation of semen into the vagina" and "the act carried out for procreation or for pleasure in which, typically, the insertion of the male's erect penis into the female's vagina is followed by rhythmic thrusting usually culminating in orgasm; copulation; coitus". *Oxford Advanced Learner's Dictionary*[55] defined sexual intercourse as the physical activity of sex, usually describing the act of a man putting his penis inside a woman's vagina and *Merriam-Webster*[56]: "The meaning of sexual intercourse is heterosexual intercourse involving penetration of the vagina by the penis: coitus."

[65] Admittedly, as argued by Ms. Delaney, some contemporary explications of sexual intercourse have extended it to include male/female oral sex, female/female and male/male oral sex, male/female anal sex, male/male anal sex, digital penetration, and

[54] (3rd edn, 1991).
[55] (5th edn, 1995).
[56] *Merriam-Webster's Collegiate Dictionary* (10th edn, 1993).

non-penetrative sex. Be that as it may, the natural and ordinary meaning of sexual intercourse as penile-vaginal penetration for sexual pleasure or sexual reproduction at the date of the enactment of Cap 154 has not changed. Dictionary sources and scholarly sources after that date continue to so define sexual intercourse and continue to use words like coitus, copulation, and carnal knowledge as substitutes for sexual intercourse and as sharing an indistinguishable meaning of penile-vaginal penetration.

(b) The general legal meaning of "sexual intercourse"?

[66] The general legal meaning of "sexual intercourse" is no different from the ordinary dictionary meaning. Thus, Professor Glanville Williams in discussing the definition of rape in his *Textbook of Criminal Law*[57] writes:

> The phrase "sexual intercourse" is used out of prudery, but it is a misleading way of stating the legal requirement which is satisfied by the least degree of penetration. The carnal act must be per vaginam; forcible buggery and fellatio ("oral sex" simulating rape) are not included.

[67] It is clear from this passage that the general legal meaning of "sexual intercourse" and its ordinary meaning are the same. The judgment of Mathur J, in the Supreme Court of India in the case of *Sakshi v Union of India* [58] provides some support for this view.

[68] In that case, in determining whether an enlarged meaning of sexual intercourse, and by extension, rape, could be given within the construction of the Indian Penal Code (IPC), Mathur J stated:

> [25] The main question which requires consideration is whether by a process of judicial interpretation the provisions of s 375 of the IPC can be so altered so as to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and object/vaginal penetration within its ambit. Section 375 uses the expression 'sexual intercourse' but the said expression has not been defined. The dictionary meaning of the word 'sexual intercourse' is heterosexual intercourse involving penetration of the vagina by the penis....
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> …

[57] (2nd edn, Stevens 1983) para 10.8.
[58] [2005] 2 LRC 111.

> [27] Sections 354, 375 and 377 of the IPC have come up for consideration before the superior courts of the country on innumerable occasions in a period of almost one and a half centuries. Only sexual intercourse, namely heterosexual intercourse involving penetration of the vagina by the penis coupled with the explanation that penetration is sufficient to constitute the sexual intercourse necessary for the offence of rape has been held to come within the purview of s 375 of the IPC. The wide definition which the petitioner wants to be given to 'rape' as defined in s 375 of the IPC so that the same may become an offence punishable under s 376 of the IPC has neither been considered not accepted by any court in India so far. Prosecution of an accused for an offence under s 376 of the IPC on a radically enlarged meaning of s 375 of the IPC as suggested by the petitioner may violate the guarantee enshrined in art 20(1) of the Constitution, which says that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

[69] Mathur J stressed that sexual intercourse had a specific meaning up until the making of the IPC, penile-vaginal penetration, and that if Parliament intended to widen the scope of this meaning, it ought to have done so by providing rules of interpretation or definitions.

(c) Meaning of "sexual intercourse" under s 3(1)

[70] Counsel for the appellant argued before us in effect that the general legal meaning of "sexual intercourse" as heterosexual intercourse involving penetration of the vagina by the penis is pre-empted in s 3(1) by the use of the words "any person" and "another person" as the subject and object respectively of having "sexual intercourse". Counsel argued, rather attractively, that the use of those words is a statutory indication that "sexual intercourse" should be given a broader meaning than penile-vaginal penetration. According to her, pursuant to s 36(1) of the Interpretation Act[59], the word "any person" in s 3(1) must be interpreted as meaning either male or female and "another person" also as meaning either male or female. In this way, s 36(1) makes the offence of rape "gender neutral" and thereby redefines "sexual intercourse" to include sexual acts between a male and another male, (and presumably between a female and another female).

[59] Cap 1 (n 2).

[71] Section 36(1) of Cap 1 provides that: "Words in an enactment importing (whether in relation to an offence or otherwise) persons or male persons shall include male and female persons, corporations (whether aggregate or sole) and unincorporated bodies of persons." It is to be noted, however, that this section is subject to the caveat in s 3(1) of Cap 1: "unless a contrary intention appears in this Act or in the enactment." As has been seen, "sexual intercourse" has the unique, gender-specific meaning of heterosexual intercourse involving penetration of the vagina by the penis. Therefore, the juxtaposition of the words "any person" and "another person" to "sexual intercourse" is an unmistakable indication of a contrary intention and that "any person" and "another person" should not be interpreted in accordance with s 36(1) of Cap 1. Rather, the *noscitur a sociis* doctrine applies so that the words "any person" and "another person" used in association with "sexual intercourse" compels the conclusion that "any person" refers to a male or female and "another person" a female or a male in the restricted context of having "sexual intercourse".

[72] The upshot of the foregoing is that, unlike at common law, either a male or female may commit the crime of rape in a male/female or female/male sexual act. Section 3(1) is "gender neutral" to that extent. To be clear, the use of the words "any person" and "another person" in that subsection does not somehow transmogrify the meaning of "sexual intercourse" to include sex between a male and another male or, for that matter, between a female and another female.

[73] But there is another reason why "any person" and "another person" as used in s 3(1) cannot be interpreted as transforming the meaning of "sexual intercourse" to include sex between a male and another male or, for that matter, between a female and another female. It is that the Act has made "sexual intercourse" the *actus reus* of other types of sexual offences and in all of those cases "sexual intercourse" is treated by Parliament as meaning heterosexual intercourse.

[74] That is important, because as Byron PCCJ stated in *Smith v Selby*[60]: "The Court, when interpreting any part of a statute, should review other parts of the Act which throw light

[60] (n 41) at [11].

upon the intention of the legislature and may show how the provision ought to be construed". Similarly, in the English House of Lords case of *Colquhoun v Brooks*[61], Lord Herschell said:

> It is beyond dispute, too, that we are entitled and indeed bound when construing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to shew that a particular provision ought to be [construed] if considered alone and apart from the rest of the Act.

[75] This principle of statutory interpretation was echoed by Lord Davey in the Privy Council decision of *Canada Sugar Refining Co v The Queen*[62] where he said:

> Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute… relating to the subject matter.

[76] Based on this high modern and ancient authority, I feel bound to review these other types of sexual offences created by the Act which have "having sexual intercourse" as their *actus reus*. The provisions on these offences throw extremely valuable light on how having "sexual intercourse" as used in s 3(1) should be construed and understood.

[77] One such offence is found in s 3(4). That subsection provides that a husband commits the offence of rape where he has sexual intercourse with his wife without her consent. Now, same sex marriage is not recognised in Barbados, only marriage between a male and a female. It follows therefore that "sexual intercourse", as used in s 3(4), can only mean sex between a male and a female, or in other words, heterosexual intercourse.

[78] Another example found in s 4(1) is even more compelling. That subsection creates an offence "[w]here a person has sexual intercourse with another who is not the other's spouse and who is under the age of 14". Notably, this subsection uses the words "a person" and "another person" in relation to the *actus reus* of the offence, namely, having "sexual intercourse". However, the proviso "who is not the other's spouse" makes it plain that

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[61] (1889) App Cas 493 at 506.
[62] [1898] AC 735 at 741.

"sexual intercourse" means male/female intercourse as only male/female spousal relations are recognised in Barbadian law.

[79] Equally compelling is s 8(1) which creates an offence "[w]here a person under circumstances that do not amount to rape has sexual intercourse with another who is an idiot, imbecile or mentally subnormal and who is not the person's spouse…". Here, as in s 4(1), "a person" and "another" are the subject and object respectively of the *actus reus* of the offence, namely, having "sexual intercourse". But the offence is not committed where the other is "the person's spouse". Again, having "sexual intercourse" in the context of spousal relations of necessity contemplates in Barbadian law heterosexual intercourse.

[80] Throughout Cap 154, then, where having "sexual intercourse" is the *actus reus* of an offence created by that Act, there is clear statutory context which leads inevitably to the conclusion that "sexual intercourse" in the Act means heterosexual intercourse. And this is so no matter that "a person" and "another person" may have been used in relation to "sexual intercourse". As I see it, no reason has been given to this Court as to why "sexual intercourse" in s 3(1) should be given a different meaning from that in the remainder of the Act. To the contrary, that expression as used in s 3(1) should in principle be given the same meaning as the remainder of the Act to make a consistent enactment of the whole of Cap 154.

[81] It is also very important to observe here that, that throughout Cap 154, where Parliament intends "sexual intercourse" to be interpreted as meaning something other than heterosexual penile-vaginal intercourse it has used express language to so indicate. This is evident in s 10(3). Section 10(1) creates the offence of "bestiality" and s 10(3) provides: "In this section "bestiality" means sexual intercourse *per anum* or *per vaginam* by a male or female person with an animal". As a matter of simple logic, if sexual intercourse in s 3(1) meant "sexual intercourse *per anum* or *per vaginam* by a male or female person" there would be no need for the special definition of sexual intercourse in s 10(3).

[82] Section 23 is another provision which shows that when Parliament intends to add anything to the ordinary meaning of "sexual intercourse" it does so in express terms. That subsection makes provision in respect of what is necessary to prove "sexual intercourse". The section provides expressly that in such an event "it shall not be necessary to prove completion of the intercourse by the emission of seed, but the intercourse shall be deemed complete upon proof of penetration only". In this way, Parliament added to the definition of "sexual intercourse" by express language to make it clear, *ex abundante cautela*, that mere penetration constitutes "sexual intercourse".

[83] Another argument deployed by Ms Delaney is that "sexual intercourse" as used in s 3(1) must be interpreted on the principle that a statutory provision is "always speaking". I understand her argument to be that, using the example of Lord Bingham in *R (Quintavalle) v Secretary of State for Health*[63], "sexual intercourse" is analogous to "dogs" in the scenario where an Act applicable to dogs could be interpreted to mean "animals which were not regarded as dogs when the Act was passed but are so regarded now". According to her "sexual intercourse" is now regarded as including sexual acts other than penile-vaginal penetration such as anal penetration of a male by a male.

[84] It is undeniable that, as pointed out at para [65] of this judgment, there is a body of opinion, some of it recent, which regards different kinds or acts of intercourse as included within the general meaning of sexual intercourse. It is equally undeniable that, as has been shown above, Parliament has, in the teeth of this body of opinion, clearly legislated the meaning of "sexual intercourse" as heterosexual intercourse in several provisions in Cap 154. It is therefore not obvious to me how "sexual intercourse" as used in s 3(1) can be interpreted as "speaking" and saying anything which contradicts Parliament's express intended meaning.

[85] Before leaving this ground of appeal, I feel bound to say that I do not share the view that Cap 154 is to be interpreted as if it represents an avant-garde, cutting edge code aimed at aligning the sexual offences law in Barbados with "changing attitudes to sexuality and

[63] See (n 46).

sexual behaviours". Section 3(4) is an excellent example of why it cannot be so interpreted. That subsection provides as follows:

> A husband commits the offence of rape where he has sexual intercourse with his wife without her consent by force or fear where there is in existence in relation to them Cap 214:
>
> (a) a decree nisi of divorce;
> (b) a separation order within the meaning of s 2 of the Family Law Act;
> (c) a separation agreement; or
> (d) an order for the husband not to molest his wife or have sexual intercourse with her.

[86] On its plain words, that subsection provides that a husband may commit the offence of rape of his wife. The Act, however, omits to enact any corresponding provision for an offence of rape of her husband by a wife. This is so notwithstanding the fact that, as has been seen, under s 3(1), a female can commit the offence of rape and as will be seen, by s 3(6), can do so by penetration of the mouth or anus of her husband with "an object, not being part of the [her] body". In my judgment, that omission is hardly consistent with the argument that "gender neutrality" is the organising principle on which the provisions of Cap 154 are grounded and that consequently "sexual intercourse" in s 3(1) must be seen as a gender-neutral term which admits of an offence of rape of a male by another male. That omission is more consistent with a conclusion that Parliament has not constructed Cap 154 on any esoteric principles but has identified and legislated expressly the changes which it intended to make to the common law of rape.

[87] There is another aspect of s 3(4) which demonstrates further that Cap 154 is not a charter of revolutionary change. Writing in his venerated treatise *History of the Pleas of the Crown*[64], Sir Mathew Hale declared the law of marital rape as follows:

> But the husband cannot be guilty of rape committed by himself upon his wife, for by their mutual matrimonial and contract the wife hath given up herself in this kind unto her husband which she cannot retract.

[64] (1736) 1 Hale PC 629.

[88] It does not require much imagination to see that s 3(4) clings tightly to the Hale doctrine of limited criminal liability of husbands for marital rape and makes only limited concessions to that doctrine in the exceptions stated in s 3(4) (a), (b), (c), or (d). In my view, s 3(4), like so much of Cap 154, describes an attempt by Parliament to pour new wine (new statutory sexual offences) into old wine skins (common law principles relating to sexual offences).

[89] Section 9 is a further statutory indication that Cap 154 cannot be interpreted as introducing radical and fundamental reform in sexual offences law. This section provides as follows:

> Any person who commits buggery is guilty of an offence and is liable on conviction on indictment to imprisonment for life.

[90] "Buggery" is not defined in Cap 154. However, since the decision of *R v Jacobs*[65], the offence of "buggery" has been confirmed as relating to intercourse *per anum* by a man with a man or woman, or intercourse *per anum* or *per vaginam* by either a man or a woman with an animal.

[91] "Buggery" is an ancient criminal offence. As it relates to intercourse *per anum* by an adult male with a consenting adult male or female, categorising buggery as a criminal offence is widely regarded as not being in accord with contemporary notions of sexual crimes. Unsurprisingly, the offence as it relates to homosexual acts between consenting adults has been decriminalised in many common law jurisdictions in legislation pre-dating Cap 154 aimed at modernising the law. The fact that the offence of "buggery" has been retained in s 9 further undermines any argument that the provisions of Cap 154 can be regarded as a code which is intended to align the law on sexual offences in Barbados with changing attitudes to sexuality and sexual behaviours.

[92] It is clear from the foregoing that s 3(1) is not to be interpreted as part of any radical redefinition of rape. Basically, that subsection retains the common law *actus reus* of rape, namely, having sexual intercourse. The subsection, however, modifies the common law

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[65] (1817) Russ & Ry 331, 168 ER 830.

by providing that, not only a man can commit the actus reus of rape, but any of the parties to sexual intercourse, a male, or a female, may commit the *actus reus* of the offence. It must be emphasised that the subsection does not purport to do anything as revolutionary as creating any offence of rape by a male of another male. If Parliament intended to do that, it would not have dragged the common law *actus reus* of "sexual intercourse" into s 3(1), it was bound to, and would have legislated an appropriate *actus reus* in clear and unmistakable statutory language.

(ii) Does s 3(6) change the meaning of s 3(1) to create an offence of rape by a male of another male?

[93] Section 3(6) provides as follows:

> For the purposes of this section "rape" includes the introduction, to any extent, in circumstances where the introduction of the penis of a person into the vagina of another would be rape, (a) of the penis of a person into the anus or mouth of another person; or (b) an object, not being part of the human body, manipulated by a person into the vagina or anus of another.

[94] This subsection is without doubt an exercise by Parliament of its power to enlarge the meaning of the word "rape" as used in s 3(1) to cover other acts not ordinarily contemplated by that word. It is important to emphasise here also the fact that s 3(6) does not purport to be a definition of "rape". The *actus reus* and *mens rea* of "rape" are defined in s 3(1). Thus, the primary definition of "rape" as a criminal offence is in s 3(1), not s 3(6).

[95] The foregoing conclusion is manifest from an analysis of sub-s (6). By providing expressly that "… 'rape' includes…", sub-s (6) makes it plain that that subsection is merely adding to the meaning of rape already given in s 3(1). This is consistent with the principle that an "including" provision is to be interpreted as comprised or contained as part of a whole. Therefore, sub-s (6) cannot be construed as purporting to set out the elements necessary to be proved for the commission of the crime of rape. As has been seen, as far as relevant to this case, that has been done in s 3(1). Section 3(6) and s 3(1) must therefore be read together.

[96] Reading these two subsections together, the meaning of the phrase "in circumstances where the introduction of the penis of a person into the vagina of another would be rape" in sub-s (6) is readily understood. That phrase is a reference to the circumstances or elements set out in s 3(1), namely, sexual intercourse by any person with another person without that other person's consent. Similarly, as Chandler JA (Ag) in his admirably closely reasoned judgment in the Court of Appeal opined, when the two subsections are read together the word "any person" must refer to either a male or female in the circumstances of non-consensual heterosexual intercourse and "another person" either a female or a male in the circumstances of non-consensual heterosexual intercourse.

[97] It follows from the foregoing that s 3(6) (a) and (b) must be understood in the context of the primary definition of rape in s 3(1). Thus understood, s 3(6) (a) extends rape to include the introduction of the penis of a male into the anus or mouth of a female in the circumstances of non-consensual heterosexual intercourse and s 3(6) (b), the introduction of an object, not being part of the human body, manipulated by a male into the vagina of a female or by a female into the anus of a male during non-consensual heterosexual intercourse. The effect of s 3(6), therefore, is that it brings within the ambit of "rape" as defined in s 3(1) forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and object/vaginal penetration in the circumstances of non-consensual heterosexual intercourse. On its plain language, s 3(6) does not expand the definition of "rape" to include rape of a male by another male. On settled principle, if Parliament intended to so expand s 3(1), it would have had to do so in clear and unmistakable language. After all, this would have been a radical change in the common law.

[98] Notwithstanding, in her written submissions, counsel for the appellant cites dicta from two case authorities in which she claims support her argument that s 3(6) expands "the definition of rape so that (1) it could be committed in other ways besides penile penetration of the vagina, (2) men could be complainants of rape and (3) women could be perpetrators of rape". It may be observed, parenthetically, that counsel does not include in this expanded definition rape by a male of another male which is the matter at issue in this appeal. In her oral address to this Court, however, counsel did cite the dicta in these

authorities as supporting an expanded definition of s 3(1) by s 3(6) to include rape of a male by another male.

[99] The first authority cited by counsel is the Barbadian Court of Appeal decision in *Hoyte v The Queen*[66]. In this case Hoyte was convicted of the rape of GH, a female, and sentenced to imprisonment for 10 years. Hoyte appealed against his conviction to the Barbados Court of Appeal. It is to be stressed here that no question arose before that court as to whether a charge for rape could be brought under s 3(1) for rape by a male of another male and Sir Denys Williams CJ, that venerable jurist, who delivered the judgment of the court, expressed no opinion on that question. His *obiter* statement was as follows:

> Turning to the local scene rape was a common law offence until February 13, 1992, when the Sexual Offence Act came into operation and section 3 made it a statutory offence. This Act was, according to the long title, an Act to revise and reform the law relating to sexual crimes and it does effect changes in relation to the crime of rape.
> One change is the provision in subsection 3 (sic)[6] of section 6 (sic)[3] that for the purposes of the section "rape" includes the introduction to any extent, the circumstances where the introduction of a penis of a person into the vagina of another would be rape, (i) of the penis of a person into the anus or mouth of another person or (b) an object, not being part of the human body, manipulated by a person into the vagina or anus of another. So that the Act enlarges the category of potential rapists as well as the categories of potential victims. A woman as well as a man can now commit rape and a man as well as a woman can now be the victim of rape.

[100] Sir Denys' dictum doubtlessly supports counsel's written submission on the effect of s 3(6). Respectfully, however, that dictum does not support counsel's oral submission that the subsection expands the definition of rape to include rape of a male by another male.

[101] The second obiter statement cited by counsel was that of Winneke P in the Supreme Court of Victoria case of *R v Hewitt*[67]. In that case, Hewitt was jointly presented with William Powell before a judge and jury on three counts of rape of a female by Hewitt with aggravating circumstances. Winneke P noted at para [1] of his judgment that the charges against Hewitt were laid pursuant to s 45(3) of the Crimes Act, 1958. He then commented

[66] (Barbados CA, 6 April 2000).
[67] [1997] 1 VR 301.

at paras [2] and [3] that that Act had been significantly amended by the Crimes (Sexual Offences) Act, 1980 and was further amended by the Crimes (Sexual Offences) Act, 1991.

[102] At para [4] of his judgment, Winneke P said of these amendments:

> It will at once be seen that these amendments significantly changed the pre-existing common law definition of rape. Amongst other things the amendments were intended to make the crime "gender neutral" so as to render it one capable of being committed by man or woman or by use of penis or objects.

[103] It will be noticed that this dictum is uttered in respect of the statutory amendments to the Crimes Act, 1958 and does not purport to be an interpretation of s 4 of the Crimes (Sexual Offences) Act, 1980 which provides, in similar terms to s 3(6) of Cap 154, as follows:

> "Rape" includes the introduction (to any extent) in circumstances where the introduction of the penis of a person into a vagina of another person would be rape, of—
>
> (e) the penis of a person into the anus or mouth of another person (whether male or female); or
>
> (f) an object (not being part of the body) manipulated by a person (whether male or female) into the vagina or anus of another person (whether male or female)—
>
> and in no case where rape is charged is it necessary to prove the emission of semen.

[104] Reliance cannot therefore be placed on the dictum of Winneke P cited above as any authority for the interpretation of s 3(6) of Cap 154.

[105] In any event, I am of the view that there are two very consequential differences between s 3(6) of Cap 154 and s 4 of the Crimes (Sexual Offences) Act, 1980 (Victoria). The first is that, unlike s 3(6), s 4 of the Crimes (Sexual Offences) Act, 1980 includes the words "whether male or female" to define "a person" and "another person". Those words are not mere surplusage, as suggested by counsel, those words are inserted to satisfy the onus which rest on Parliament wishing to change the common law to do so by clear language. In my judgment and, as Chandler JA (Ag) correctly pointed out in the Court of Appeal, the absence of these words or similar words means that s 3(6) cannot be interpreted as

effecting a change to the common law which does not recognise rape of a male by another male.

[106] The second consequential difference is that s 4 of the Victorian Act defines the offence of rape which is created at s 45 of that Act. Section 45 reads as follows:

> A person who commits rape is guilty of an indictable offence and liable to imprisonment for a term of not more than ten years.

[107] It will be observed that s 45 does not attempt to enact any preconditions for the commission of the offence of rape. This is unlike s 3(1) of Cap 154 which, as has been seen, in creating the offence of rape, lists the elements, *actus reus* and *mens rea*, of that offence. This means that, unlike s 3(6), s 4 is free-standing and is not to be read subject to any preconditions in s 45.

[108] In sum, s 3(6) cannot be interpreted either on its plain words or on authority as expanding the *actus reus* of the offence of rape created by s 3(1) to include rape of a male by another male. Section 3(6) brings within the ambit of "rape" as defined in s 3(1) forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and object/vaginal penetration in heterosexual sexual intercourse. Contrary to the opinion expressed by Narine JA at para [57] of the judgment of the Court of Appeal, that is the extent to which s 3(6) expands "rape" as defined in s 3(1).

Whether s 3(1) is to be interpreted by reference to s 9 which creates the offence of buggery?

[109] As already noted, this Court in *Smith v Selby*[68], Byron PCCJ stated that when interpreting any part of a statute, a court should review other parts of the Act which throw light upon the intention of the legislature and may show how the provision ought to be construed. As already noted also, Byron PCCJ's statement is supported by Lord Herschell in *Colquhoun v Brooks* and Lord Davey in *Canada Sugar Refining Co v The Queen*. To the

[68] (n 41) at [11].

extent then that s 9 was thought to throw light on the meaning of s 3(1), therefore, the Court of Appeal was fully entitled to have regard to s 9.

[110] In my view, this is the way in which Narine JA in the Court of Appeal approached ss 3(1) and 9. According to him, interpreting s 3(1) as creating a new offence of rape by a male of another male, with a defence of consent, which involves the same conduct that constitutes buggery under s 9, which is absolutely proscribed under that section, lead to an absurdity. To avoid that absurdity, Narine JA interpreted s 3(1) as not creating the new offence. On the authority of *Smith v Selby*, Narine JA was fully entitled to interpret s 3(1) by reference to s 9. Admittedly, however, that authority does not warrant any judicial suggestion as to what the appropriate choice of offence is, (s 3(1) or s 9) to prosecute. The discretion in respect of which offence to prosecute resides in the Director of Public Prosecution and, as here, the Commissioner of Police.

Whether the Court of Appeal interpretation of s 3 "potentially breaches the right to protection of law of male persons in Barbados under s 11 (c) of the Constitution of Barbados"?

[111] The appellant raised as a ground of appeal that the interpretation given by the Court of Appeal to s 3 of Cap 154 "is discriminatory on the basis of gender and does not afford men equal protection of law". In her written submissions to and oral arguments before this Court, counsel for the appellant argued that the Court of Appeal's interpretation of s 3 as not creating an offence of rape to include rape of a male by another male was contrary to ss 11 and 23 of the Barbados Constitution.

[112] I must confess profound difficulties in understanding this ground. Either s 3 is constitutional, or it is not. If it is, as it is presumed to be, then it must be interpreted on its express words; not to make it conform to the constitution. I would add here, parenthetically, that the only power of judges to make legislation conform with the constitution is pursuant to the Constitution where an existing law is held not to be in conformity with the Constitution. In my view, that power does not arm judges with immeasurable discretion to, like latter-day knights errant, roam over legislation interpreting it in search of constitutional justice. Consistent with the foregoing, if s 3 is

not constitutional, then no question of interpretation arises as the section would be void. Be that as it may, counsel did not pursue this ground before us and nothing more needs to be said in respect of this ground.

Conclusion

[113] For all the above reasons, it is my judgment that s 3, read in light of s 3(6) and the other relevant provisions of Cap 154, does not create an offence of rape of a male by another male. I would therefore dismiss the appeal.

Orders of the Court

[114] The Court makes the following Orders-

(a) The appeal is allowed, and the decision of the Court of Appeal dated 15 April 2021 is set aside.

(b) The case is remitted to the Magistrate's Court for it to proceed with the preliminary inquiry.

/s/ A Saunders

The Hon Mr Justice A Saunders, President

/s/ J Wit

The Hon Mr Justice J Wit

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ D Barrow

The Hon Mr D Justice Barrow

/s/ A Burgess

The Hon Mr Justice A Burgess

/s/ P Jamadar

The Hon Mr Justice P Jamadar