

IN THE SENIOR COURTS OF BELIZE  
CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE  
(CRIMINAL JURISDICTION)

INDICTMENT NO: C82 OF 2022

THE KING

and

JEFFERY GILLETT

Accused

**Before:** The Honourable Mr. Justice Nigel Pilgrim

**Appearances:** Mr. Glenfield Dennison for the Crown.  
Mr. Leeroy Banner for the Accused.

**Date of Hearing:** 12<sup>th</sup> September 2023

**Date of Delivery:** 27<sup>th</sup> September 2023  
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**RAPE OF A CHILD- UNLAWFUL SEXUAL INTERCOURSE- PROOF OF THE ABSENCE  
CONSENT-AMENDMENT OF INDICTMENT**

**RULING ON AMENDMENT OF INDICTMENT**

[1] **PILGRIM J.:** Jeffery Gillett (hereinafter referred to as “the Accused”) was indicted on 26<sup>th</sup> September 2022 for two counts of rape of a child, contrary to section 47A of the **Criminal Code**<sup>12</sup> (hereinafter referred to as “the Code”). The allegation is that the Accused inserted his penis into the anus of a male child (hereinafter referred to as “J”) on two occasions on 21<sup>st</sup> August 2021. The Accused was arraigned on 26<sup>th</sup> July 2023 and pleaded not guilty to both counts and a trial began before this Court,

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<sup>1</sup> Chapter 101 of the Substantive Laws of Belize. Revised Edition 2020

<sup>2</sup> Revised Edition 2020

by judge alone, pursuant to section 65A(2)(g) of the Indictable Procedure Act<sup>3</sup> (hereinafter referred to as “the IPA”).

- [2] J testified before the Court on 12<sup>th</sup> September 2023. In his evidence in chief, he indicated that the penetration alleged in the indictment was the result of a “deal” he had made with the Accused where they would have sexual intercourse in return for “gems”, which were currency for playing a videogame called “Freefire”. J did not testify to any physical or other coercion by the Accused to engage in sexual intercourse. J was, at the time of the incident, 12 years old.
- [3] The Court of its own motion enquired from the Crown whether the elements of the offence of rape of a child could be made out in light of the testimony of J that there was no factual evidence of the absence of consent. The Court was concerned with whether the indictment was in fact defective having regard to the evidence which emerged at trial, and whether the appropriate charges on the evidence should have been for unlawful sexual intercourse.
- [4] The Crown submitted that there was no need for amendment because section 12(b) of the Code made legally void the consent of any child under 16 years of age. The Court pointed out to the Crown that it seemed odd that the National Assembly would create two different offences, one of rape of a child under 16 years old, with the legal meaning of rape under the Code requiring evidence of the absence of consent, and one for unlawful sexual intercourse which explicitly references liability “with or without consent” of that child, without requiring for the former offence factual proof of the absence of consent. The Court also highlighted to the Crown that there was a 3-year increase in the mandatory minimum sentence for rape of a child in these circumstances when compared to unlawful sexual intercourse, which seemed to suggest the National Assembly sought to punish the former more seriously than the latter. This seemed to suggest to the Court that the National Assembly increased the sentence because in rape there would have been evidence of force or coercion.

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<sup>3</sup> Chapter 96 of the Substantive Laws of Belize. Revised Edition 2020

Therefore, the Crown had to provide factual evidence of the absence of consent to prove rape and could not rely on section 12(b) of the Code to prove the absence of consent. The Crown submitted that if the Court had concerns about the issue of consent, it could convict for the lesser offence of unlawful sexual intercourse pursuant to section 130(a) of the IPA.

- [5] Mr. Banner for the Accused submitted that the Crown's argument is "anomalous" and that the Court had the power to amend the indictment to reflect counts of unlawful sexual intercourse and ought to in the interests of justice.

### **ISSUES**

- [6] The questions in the Court's mind are as follows:

- i. Does the charge of rape of a child require factual evidence of the absence of consent?
- ii. If it does can the Court amend the indictment to substitute counts for unlawful sexual intercourse?

#### **ISSUE 1: Does the charge of rape of a child require the factual evidence of the absence of consent?**

- [7] The Court begins by considering the statutory matrix in the Code which is, where relevant:

*"Rape of a child*

*47A. Every person who rapes another person and that person is under the age of sixteen years commits an offence and is liable on conviction on indictment to—*

*(a) imprisonment for not less than twelve years, but may extend to life, where that other person was over fourteen but under the age of sixteen years at the time the offence was committed; or*

***(b) imprisonment for not less than fifteen years, but may extend to life, where that other person was under the age of fourteen years at the time the offence was committed.***

...

*Rape defined*

71.-(1) *Rape is the penetration of a person's mouth, vagina or anus, with a penis, **without that person's consent**.*

...

*Unlawful sexual intercourse*

47.-(1) *Every person who, **with or without consent**, has sexual intercourse with a person who **is under the age of fourteen years commits the offence of unlawful sexual intercourse and is liable on conviction on indictment to imprisonment for a term that is not less than twelve years but may extend to imprisonment for life**.*

(2) *Every person who has unlawful sexual intercourse with a person who is above the age of fourteen years but under the age of sixteen years, commits an offence and is liable on conviction on indictment to imprisonment for a term that is not less than five years but no more than ten years...*

...

*Consent*

12. *In construing any provision of this Code by which it is required for a criminal act or criminal intent that an act should be done or intended to be done without a person's consent, or by which it is required for a matter of justification or exemption that an act should be done with a person's consent, the following rules should be observed, namely–*

...

(b) *In the case of **a sexual assault** upon a person, a consent shall be void if the person giving it is under sixteen years of age without prejudice to any other grounds set out in this section.*

...

**Sexual assault**

45A.-(1) *Every person who intentionally touches another person, that touching being sexual in nature, without that person's consent or a reasonable belief that that person consents, and where the touching involved–*

(a) *that person's vagina, penis, anus, breast or any other part of that person's body; or*

*(b) that person being made to touch the person's vagina, penis, anus or breast or any other part of the person's body, commits an offence...*  
*(emphasis added)*

[8] The Court finds the guidance of our apex court, the Caribbean Court of Justice (hereinafter the "CCJ"), in the Belizean case of **Titan International Securities Inc. v Attorney General of Belize and another**<sup>4</sup> helpful in relation to the exercise of statutory interpretation of the relevant provisions of the Code, per Rajnauth-Lee JCCJ:

*"[40] The court's role in statutory interpretation has been settled. Parliament makes the law; judges interpret it. Judges have a duty to interpret an Act according to the intent of those who made it. **The primary indication of legislative intention is the legislative text, read in context using internal aids, like other provisions in the act or external aids, such as the legislative history.**" (emphasis added)*

[9] The CCJ also noted the presumption that the National Assembly does not legislate in vain, in **R v Rambarran**<sup>5</sup>, where they referred to the "fundamental canon of construction of statutes described in the textbooks as the presumption against tautology" per Byron P, Wit and Hayton JJCCJ:

*"[23]...**This canon requires the court to presume that Parliament intends that each word in a piece of legislation should have effect and that, without more, different words mean different things.**" (emphasis added)*

[10] The Court starts by looking at the entire Code to construe the provisions in their context and presumes every word has meaning. The National Assembly created two separate offences, one after the other, sections 47 and 47A, penalising sexual intercourse with children under 16 years old. Section 47 speaks to the irrelevance of consent and has a lower mandatory minimum sentence for sexual intercourse

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<sup>4</sup> [2019] 2 LRC 279

<sup>5</sup> (2016) 88 WIR 111

with a person under 14 years old. Section 47A(b) uses the word “rape”, which is defined at section 71 as including as an element of the offence the absence of consent, with a higher mandatory minimum penalty for sexual intercourse with a person under 14 years than section 47. In the Court’s view having regard to the plain words of the two provisions, 47 and 47A, their juxtaposition, and the difference in sentence the National Assembly meant to penalise differently sexual intercourse with children with force or coercion and sexual intercourse with children without it.

[11] The question then is what is the Court to make of section 12(b)? That section applies to cases of “sexual assault”. “Sexual assault” is not defined in the Code, however that phrase is used as a side-note for the offence at section 45A(1) of the Code. It is used nowhere else. An element of that offence is the absence of consent. In the Court’s view section 12(b) could only be meant to attach to section 45A(1) of the Code to state that a person under 16 years old could not consent to that type of touching.

[12] The Court uses the side-note as a legitimate aid to construction pursuant to section 64(1)(a) of the **Interpretation Act**<sup>6</sup> (hereinafter referred to as “the IA”):

*“64.-(1) In ascertaining the meaning of any provision of an Act, the matters which may be considered shall, in addition to those which may be considered for that purpose apart from this section, include the following, that is to say, (a) **all indications provided by the Act** as printed by authority, **including** cross-headings, punctuation and **side-notes**, and the short title of the Act;” (emphasis added)*

[13] The Court also finds helpful the English House of Lords decision of **R v Montila**<sup>7</sup> with regard to why side-notes may be helpful:

*“[33] ... It is not true that headings and side notes are inserted by ‘irresponsible persons’, in the sense indicated by Phillimore LJ. They are drafted by Parliamentary Counsel, who are answerable through*

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<sup>6</sup> Chapter 1 of the Substantive Laws of Belize, Revised Edition 2020

<sup>7</sup> [2005] 1 All ER 112

*the Cabinet Office to the Prime Minister. The clerks, who are subject to the authority of Parliament, are empowered to make what are known as printing corrections. These are corrections of a minor nature which do not alter the general meaning of the Bill. But they may very occasionally, on the advice of the Bill's drafter, alter headings which because of amendments or for some other reason have become inaccurate: Bennion, p 609. Nor is it true that headings are inserted only after the Bill has become law. **As has already been said, they are contained in the Bill when it is presented to Parliament. Each clause has a heading (previously a side note) which is there throughout the passage of the Bill through both Houses. When the Bill is passed, the entire Act is entered in the Parliamentary Roll with all its components, including those that are unamendable. As Bennion states at p 638, the format or layout is part of an Act"** (emphasis added)*

[14] The Court observes that there is a similar legislative process in this jurisdiction.

[15] The Court is of the view that section 47 of the Code must have meaning. The National Assembly must have put it in for a reason. The construction of section 12(b) advanced by the Crown that it relieves them from factually proving the absence of consent on a charge of rape of a child under section 47A would make section 47 a dead letter. Indeed, taking the argument of the Crown to its logical conclusion the Court would never have to rely on section 130 of the IPA<sup>8</sup>, because on proof of requisite age, if the Court was sure of intercourse, it could only legally return a verdict of rape of a child and never unlawful sexual intercourse under section 47. The Crown's construction of section 12(b) of the Code would make section 130(a)

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<sup>8</sup> 130. *If upon the trial of any indictment for—*  
*(a) rape, the jury is satisfied that the accused person is guilty of a crime under section 47 or 50 of the Code, or of an indecent assault, but is not satisfied that the accused person is guilty of the crime charged in the indictment, or an attempt to commit such crime, the jury may acquit the accused person of the crime charged in the indictment and find him guilty of the crime as aforesaid, or of an indecent assault;... and thereupon the accused person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such crime as aforesaid or for the misdemeanour of indecent assault.*

of the IPA, in relation to section 47, otiose, and the Court must presume the National Assembly did not legislate in vain.

[16] The Court is consequently of the view that proof of rape of a child requires the Crown to prove the factual absence of consent. The Court now turns to consider whether the indictment is defective and if so, whether it can be amended at this stage.

**ISSUE ii: Can the Court amend the indictment to substitute counts for unlawful sexual intercourse?**

[17] The Court's power of amendment is set out at section 77 of the IPA:

*"77.–(1) Where, before trial, or **at any stage of a trial, it appears to the court** that the indictment **is defective**, the court **shall** make any order for the amendment of the indictment which the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice." (emphasis added)*

[18] The Court interprets this section, having regard to the use of the mandatory word "shall", that once the Court forms a view that the indictment is defective it has a duty to amend it once it can be done without injustice. The Court in this regard relies on section 58 of the IA<sup>9</sup> as well as the English Court of Appeal decision of **R v Fraser**<sup>10</sup> which considers an almost identical English equivalent to section 77 of the IPA, section 5(1) of the Indictments Act 1915, per Hewart LCJ:

***"...s. 5, sub-s. 1 of the Indictments Act, 1915, imposes a duty on the Court to amend the indictment. There was no injustice, and it would have been a failure of duty on the part of the Court if the amendment had not been made."** (emphasis added)*

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<sup>9</sup> 58. In an enactment "shall", shall be construed as imperative and the expression "may" as permissive and empowering.

<sup>10</sup> (1924) 17 Cr. App. R. 182

[19] The Court interprets the word “defective” as covering not only a count unknown to law but a count that does not meet the evidence which has emerged at trial. The Court finds very instructive the English Court of Appeal decision of R v Radley<sup>11</sup> which again considered the English equivalent of section 77 of the IPA, per LCJ:

*“Now it is accepted by Mr. Farquharson and by everybody else, and indeed averred by him, **that it was a good indictment in the sense that there was no defect in regard to form, but the fact that the indictment is not liable to be quashed on that ground does not mean that it is not defective, because “defective” in the context of section 5 has got a very much wider meaning.***

...

*Lord Parker C.J., dealing with the question of the meaning of the word “defective” in the context which I have mentioned, said this at pp. 204 and 227 of the respective reports ‘**An indictment which charges offences which are not disclosed in the depositions and fails to charge an offence which is, lacks the most essential quality of an indictment. It makes an accusation of crime without cause when it should have made one with cause. This is what the indictment under consideration in this appeal did before it was amended. In our opinion, this indictment contained a latent defect which made it just as much defective within the meaning of section 5 (1) as if the defect had been a patent one.**’*

...

***From those two passages, I derive two conclusions, first of all, that the indictment may be defective if it fails to allege an offence disclosed by the depositions, or alternatively it alleges an offence not disclosed by the depositions, and furthermore from the words used by Humphreys J. ( supra ) I take the point that, in view of the fact that justice lies at the back of all these considerations and that no amendment is to be made if it cannot be made without injustice, one ought to give a fairly liberal meaning to the language of section 5.***<sup>12</sup> (emphasis added)

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<sup>11</sup> (1974) 58 Cr. App. R. 394

<sup>12</sup> Ps. 400-402

[20] The Court is of the view that this indictment is defective in that it both alleges an offence not made out on the evidence, rape of a child, and it fails to allege an offence disclosed on the evidence, unlawful sexual intercourse.

[21] In terms of the timing of this amendment the Court notes that pursuant to section 77 of the IPA, it can be made at “any stage of a trial”, and indeed in the English Court of Appeal decision of **R v Cash**<sup>13</sup> an amendment made by a trial judge during the closing speech of the Prosecution, was upheld. The Accused has cited no prejudice with an amendment at this stage and indeed submits that it is in the interests of justice to do so. The Court agrees and recalls the guidance of the CCJ in **Bennett v R**<sup>14</sup>, per Wit JCCJ:

*“[4] We note that fairness in this context is not limited to the defendant; the trial should be fair to all: defendant, victims, witnesses and society as a whole. As s 6(2) of the Belize Constitution puts it: ‘If any person is charged with a criminal offence, then ... the case shall be afforded a fair hearing ...’ Procedural fairness is therefore an overriding objective of the trial. **Verdict accuracy, however, is equally important and must also be considered.** Although it is possible (but surely not proper) to reach an accurate verdict through an unfair process, a procedurally fair process leading to an obviously inaccurate result can hardly be called fair, especially if the verdict is a conviction of a possibly innocent person. **It is therefore obvious that the judge’s duty to ensure a fair trial must also include safeguards against reaching an inaccurate or wrong conviction.**” (emphasis added)*

[22] The Court, in these premises, orders that the two counts on the indictment be amended by substituting two counts for unlawful sexual intercourse contrary to section 47 of the Code, with the appropriate particulars.

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<sup>13</sup> [1985] QB 801

<sup>14</sup> (2019) 94 WIR 126

**Dated 27<sup>th</sup> September, 2023**

**NIGEL C. PILGRIM  
JUDGE OF THE HIGH COURT OF BELIZE  
CENTRAL DISTRICT**