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.**
Dates of Hearing:	**26th and 27th July 2023; 12th, 27th and 29th September 2023.**
Date of Delivery:	**13th October 2023**

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UNLAWFUL SEXUAL INTERCOURSE- JUDGE ALONE TRIAL-DECISION

JUDGMENT

[1] PILGRIM J.: Jeffery Gillett (hereinafter referred to as "the Accused") was indicted on 26th September 2022 for two counts of rape of a child, contrary to section 47A of the **Criminal Code**[1] (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 21st August 2021. The Accused was arraigned on 26th July 2023 and pleaded not guilty to both counts and a trial began before this Court,

[1] Chapter 101 of the Substantive Laws of Belize. Revised Edition 2020

by judge alone, pursuant to section 65A(2)(g) of the **Indictable Procedure Act**[2] (hereinafter referred to as "the IPA").

[2] J testified before the Court on 12th 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.

[3] As a result of there being no evidence of the absence of consent the Court of its own motion after hearing arguments on both sides amended the indictment, without objection by the Accused, to substitute the charges of unlawful sexual intercourse, contrary to section 47(1) of the Code, for that of rape of a child. The Court delivered written reasons for this amendment to the parties on 27th September 2023. The Crown sought, and was granted, an adjournment to consider the amendment as the Court noted that fairness was for both sides following the dicta of our apex court the Caribbean Court of Justice (hereinafter "the CCJ") in **Bennett v R**[3]**.** The Accused was re-arraigned on 29th September 2023 and pleaded not guilty to both charges of unlawful sexual intercourse.

The Evidence

[4] The Crown led the evidence of 12 witnesses. There were 4 live witnesses, namely J; his mother, JA; his sister, JG; and Dr. Luis Chulin. There were 8 agreed witnesses whose evidence was read into the record, namely, Miguel Sarceno, Rudel Pau, Eyon Valerio, Rocael Casanova, Brian Flowers, Aldo Castillo Sr., Angella Wiltshire, and Lorraine Herrera.

[2] Chapter 96 of the Substantive Laws of Belize. Revised Edition 2020
[3] (2019) 94 WIR 126 at para. 4

[5] In terms of the content of the agreed evidence it is as follows: Eyon Valerio detained the Accused for the matters under indictment; Miguel Sarceno and Rudel Pau escorted the Accused to different police stations; Angella Wiltshire processed the scene of the alleged penetration and took photographs which were admitted without objection; Brian Flowers extracted WhatsApp conversations from JA's cellular phone which were admitted without objection as BF1; Aldo Castillo received BF1 and handed it over to Rocael Casanova, who conducted the investigation in this matter; and Lorraine Herrera witnessed an interview with the Accused where the latter chose to remain silent as was his constitutional right.

[6] J testified in evidence in chief that on the morning of 21st August 2021 he woke up to some text messages from the Accused. The text messages asked if he was ready. J was confused so he told the Accused no. J ignored the messages and about 15 minutes later the Accused showed up at his house. The Accused told J to let them both go to his house. J felt pressured but still went. When they got there, it was about 10 a.m. J went into the house and into the bedroom of the Accused. J sat on the bed for about 30 minutes. The Accused came up with an offer for J to have intercourse with him for "gems" on a game called "Freefire". The way the game worked was that a person would have to spend money to purchase "gems" which could then be used to obtain characters, gun skins, and other items in the game. J wanted the "gems", so he took the offer. J came up with the idea of setting a timer on his phone for the intercourse which would set a limit of 2 minutes.

[7] J pulled down his own pants and felt the erect penis of the Accused inside his, J's, anus. J turned around and saw the Accused from his abdomen to his face. The Accused was about an arm's length from him. J was flat on the bed with his chest on the bed and his feet were on the ground. J did not feel any pain from the penetration while the penis was inside for 2 minutes. J testified that he felt the penis of the Accused go halfway into his anus.

[8] After this first occasion J and the Accused went outside into the yard. The Accused's sister then came out. The Accused then ordered food. J and the Accused then went

to the park for a stroll and then came back to the house. The Accused's sister came back with the food. J went to the park to eat the food and after eating J and the Accused went back to the house.

[9] The Accused brought another deal to J of "gems" for the Accused to have intercourse with J. J took the offer again and went in the Accused's room. J pulled down his own pants and felt the erect penis of the Accused inside his, J's anus. J again turned around and looked at the Accused. J set a 3-minute timer during the second occasion. J adopted the same position, and similarly the penis of the Accused only went in halfway, but this time for 3 minutes.

[10] After the second occasion J went home around 2:30 p.m. J wanted the "gems" because for all the years he had played "Freefire" he had never been able to get them. After the intercourse J received the "gems" from the Accused.

[11] J was cross-examined. He accepted that in his statement to the police he said that the Accused gave him two options, either to suck his penis or go in the bathroom and that evidence was not mentioned in his evidence in chief at trial. He accepted that he did not mention "gems" for sexual intercourse in either of his two police statements. He accepted that he had told the police in his statement that the Accused had pushed him on the bed, and that that evidence was a lie. He accepted that he had told the police in his statement that the Accused forcefully pulled down his pants and that that was a lie. He said that he had lied because, "At the time I was afraid of telling the truth but now I know it's not my fault." J accepted that he lied when he told the police that the Accused had set three timers before the intercourse and it was he, J, that set the timers. J said he had lied in that statement, but he is telling the truth now. J accepted that at the time he was addicted to the "Freefire" game. He denied the suggestion that he fabricated this report because the Accused told him that he was not going to give him any more credit for games.

[12] J accepted that the Accused's home was a small board house with the rooms close together. J denied that the Accused's sister always remained at the house, saying she left and came back.

[13] J was re-examined and when asked to clarify his evidence in cross-examination about why he lied to the police he testified, "I mean I was a child at the time that didn't know right from wrong. I didn't think anything of it."

[14] J in his evidence had identified BF1 as chats between himself and the Accused spanning 5th July 2021 to 21st August 2021. The Court had admitted that evidence as background evidence of the relationship between J and the Accused which could provide context for the alleged penetration on 21st August 2021 on the authority of a decision of our Court of Appeal in **FW v R**[4]. In that case that Court held that the evidence of rapes with the same virtual complainant not covered by the indictment against FW were properly admitted as background evidence to contextualise the offending in the indictment, per Sosa P:

> *[29]…The majority of this Court is of the view that, similarly, in the instant case, there can be no valid complaint against the giving by CW of evidence of alleged sexual abuse during periods other than those referred to in the ten counts of the indictment**. It would not have been right for the judge to restrict her testimony to the periods the subject of those counts and thus permit the jury to form a false and misleading impression that the only episodes of alleged rape were those singled out in the indictment.** As in R v W, **an absence of background evidence would have militated in favour of a lack of understanding of the true relationship and real situation by the jury**." (emphasis added)*

[15] The Court also relies on the Jamaican Court of Appeal authority of **Blake and Anor. v R**[5].

[16] BF1 contains over 30 pages of text and hundreds of messages between J and the Accused from 5th July 2021 to 21st August 2021. The background evidence contains

[4] Criminal Appeal No 18 of 2011
[5] (2017) 91 WIR 463 at paras. 104-109

the following exchanges between the Accused, also known as Dan, who on the agreed evidence of Lorraine Herrera was 32 years old at the time, and J, who on JA's evidence was 12 years old:

> *"8/5/21, 3:26 PM - Dan: Nothing bra**, I just hate the way I feel about u and u don't feel the same. It's like am forcing u and that's the last thing I'd want u to think am doing.***
> *8/5/21, 3:27 PM - Dan: So ama just let go bro. I don't want it to seem wired for u anymore*
> *8/5/21, 3:27 PM - J: Your not forcing me bro*
> *…*
> *8/5/21, 3:27 PM - Dan: Am sorry for making to feel uncomfortable*
> *8/5/21, 3:28 PM - J: You did not*
> *8/5/21, 3:28 PM - Dan: **Am sorry for been to attached to u.***
> *8/5/21, 3:28 PM - J: Bro I loved it like that*
> *8/5/21, 3:28 PM - Dan: Am sorry for whatever made u feel weird or uncomfortable.*
> *8/5/21, 3:29 PM - J: Bro I loved you the way you are*
> *…*
> *8/5/21, 3:37 PM - J: Not a single day missed cause I was thinking about you everyday*
> *8/5/21, 3:37 PM - Dan: As I was , . J.*
> *8/5/21, 3:37 PM - J: And I love you bro from the bottom of my heart*
> *8/5/21, 3:37 PM - J: And I not just saying that for top up*
> *8/5/21, 3:38 PM - J: I really mean it*
> *8/5/21, 3:38 PM - J: Top up is nothing compare for my love to you*
> *8/5/21, 3:38 PM - J: I really mean it dan please dont act different I beg*
> *8/5/21, 3:39 PM - Dan: **Am mean. U may love me but not like I do to u.***
> *…*
> *8/5/21, 4:48 PM - Dan: **The part I couldn't handle is the part where I wanted to be more than your friend n u didnt.***
> *8/5/21, 4:49 PM - J: Because you the teller about I nuh wa be long 2 minutes*
> *8/5/21, 4:52 PM - J: **You want to do all kinds of stuff to me***
> *8/5/21, 4:53 PM - Dan**: Ñ that's why I am feeling this way***

8/5/21, 4:53 PM - J: ***<u>But dan you have to understand I don't do those stuff with boys</u>***

8/5/21, 4:54 PM - Dan: Yes I do.

8/5/21, 4:54 PM - Dan: Neither do I.

8/5/21, 4:55 PM - J: That's why I was telling let's block that out from our friend ship

8/5/21, 4:56 PM - Dan: Yes

8/5/21, 4:56 PM - Dan: We will

…

*8/5/21, 11:41 PM - Dan****<u>: Goodnight j. Remember save yourself up for me . I will for u.</u>***

8/5/21, 11:41 PM - J: Same

…

8/5/21, 11:42 PM - J: Ehehe

8/5/21, 11:42 PM - Dan: Love u bro

8/5/21, 11:42 PM - Dan: Night

8/5/21, 11:42 PM - J: Love you to night" (emphasis added)

[17] Dr. Luis Chulin testified in evidence in chief that he medically examined J on 23rd August 2021, two days after the alleged penetration. He did not observe any trauma to J's anus but noted that in his opinion if the penetration was not violent or if it was not full penetration, he would not expect to see trauma. Dr. Chulin also testified that the passage of time would also account for the absence of trauma after penetration and that minor injuries could heal in 48-72 hours. He also opined that healing depends on the level and force of the penetration.

[18] Dr. Chulin was cross-examined. He opined that if there was full penetration by an erect penis there would be tears in the anus and if there was partial penetration or no penetration, there would not be any tears. He defined full penetration as when the whole penis was inserted into the anus. Dr. Chulin opined that if it was just the gland of the penis there can be penetration without tears or trauma, and that, "only in forcible rape then we would see trauma". He also noted that there are different sizes of penis.

[19] Dr. Chulin was re-examined and testified that the smaller the penis and the less thick it is, it is less likely that there would be trauma. He opined that for a small child there would more likely be trauma more so than an adolescent.

[20] JA testified that she was J's biological mother and that he was born on 20th June 2009. She met the Accused at her home on 2nd June 2021 and knew him as Dan. He played video games at her home with J, including the game "Freefire". In July 2021 the Accused asked JA to have J come over to his house and she refused. The Accused then offered to tutor J in English which he was failing, and JA relented and permitted J to go for tutoring. The tutoring took place on Saturdays at the home of the Accused in Belama Phase 4, Belize City. On Saturday 21st August 2021 JA's daughter JG came to her crying and showed her "text messages" on her, JG's phone between J and the Accused. JA confronted J about the messages and he appeared to her, afraid. JG sent the messages to JA's phone. JA then sent those messages to Brian Flowers who extracted them and produced BF1. JA made a report to the police the next day.

[21] JA was cross-examined. She testified that the last time J went for tutoring was the ending of August. She also said that when she confronted J about the text messages J did not say that the Accused did anything sexual to him.

[22] JA was re-examined. She clarified that J did not go to the home of the Accused after she had discovered the text messages.

[23] JG testified that she was J's sister. She also recalled seeing the Accused at the family home playing basketball with J and the video game "Freefire". On 21st August 2021 JG saw J's phone unattended and having had certain suspicions went into WhatsApp chats on J's phone between J and the Accused. She became concerned by certain messages and later sent them to her phone. JG spoke to her mother, JA, and sent the messages to the latter's phone. JG was not cross-examined.

[24] At the close of the Crown's case and after being given his three options, the Accused called no witnesses but made a statement from the dock.

[25] The Accused stated that he is 34 years old, employed and married to a woman with a child. He said that he was not homosexual and had no interest in males. He stated that he had no previous convictions. He said that on 21st August 2021 he tutored J at a table with his sister, Shyla Gillett, and her friend, Carly Lino. He denied going into the bedroom with J and having sexual intercourse with him. The Accused said he dropped off J at home and went to Dangriga to visit his family. He was later apprehended on 23rd August 2021 by the police. The Accused stated that he is innocent of all charges in the indictment.

[26] The Crown and the Accused made closing addresses which were carefully considered by the Court.

The Law

[27] The statutory matrix surrounding the offence of unlawful sexual intercourse as found in the Code is as follows, where relevant:

> *"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.*
>
> *…*
>
> *73. Whenever, upon the trial for any crime punishable under this Code, it is necessary to prove carnal knowledge, the carnal knowledge shall be deemed complete upon **proof of any or the least degree of penetration only**.*
>
> *53A (5) For the purposes of this Part–…**"penetration" includes the continuing act from entry to withdrawal of the penis into the anus** …" (emphasis added)*

[28] The Court interprets the plain words of those provisions to require the Crown to establish beyond reasonable doubt:

(i) That the Accused penetrated the anus of J, if even slightly.

(ii) That penetration was done with the penis of the Accused.

(iii) That J was under the age of 14 when that penetration took place.

Analysis

[29] The Court has directed itself that the Accused is presumed innocent with regard to both counts and has absolutely nothing to prove. The Court has directed itself in relation to both counts that the obligation is on the Crown to satisfy it so that it is sure of the guilt of the Accused, and if there is any reasonable doubt the Court is duty bound to acquit him. The Court has warned itself in relation to both counts that it should not be prejudiced by the mere allegation of sexual offences involving children.

Count 1

[30] The evidence which has been led by the Crown to establish the elements of the offence of unlawful sexual intercourse is as follows:

a. **That the Accused penetrated the anus of J**- The evidence of J is that the Accused penetrated his anus.

b. **That penetration was done with the penis of the Accused**- There is no evidence that J saw the Accused's penis go into his anus. However, the Court finds on all the evidence that it is a reasonable inference, if J's evidence is accepted, that the penetration was by the Accused's penis. This inference is based on (i) the terms of the deal of intercourse for "gems" proposed by the Accused which would be suggestive of penile intercourse; (ii) the Accused was an arm's length behind J and there was no evidence of the Accused being seen with any other device conducive to penetration; and (iii) J felt what appeared to him to be a penis in his anus.

c. **That J was under the age of 14 when that penetration took place** - JA's uncontroverted evidence establishes that J was 12 years old at the time of the alleged penetration.

[31] The Court begins firstly with analysing the evidence on the Crown's case and **if** the evidence seems strong enough to consider a conviction it would consider the case for the Accused, as is the required reasoning process noted by the CCJ in **Dionicio Salazar v R**[6].

[32] The Court is of the view that the consideration of the Crown's case against the Accused revolves largely around its finding as to the credibility of J's account.

[33] The Court, in assessing credit and reliability, must examine inconsistencies, discrepancies, and any implausibility in the evidence of witnesses. The Court notes however, on the authority of the Belizean CCJ decision of **August and Anor. v R**[7] that it need not comb the record for inconsistencies or contradictions. The Court directs itself that if there are inconsistencies and discrepancies the Court must look to see if they are material and if they can be resolved on the evidence. The Court must consider whether inconsistencies or discrepancies arose for innocent reasons, for example through faulty memory or lack of interest in what is transpiring, or if it is because the witness is lying and trying to deceive the Court. Unresolved inconsistencies or discrepancies would lead the Court to reject that bit of evidence or all of the witness's evidence entirely. The Court must also consider the cumulative effect of those inconsistencies or discrepancies on a witness's credit and reliability. If the Court finds the evidence of a witness implausible it will reject either that witness's evidence entirely or that bit.

[34] The Court also directs itself that the credibility of a witness is not a seamless robe where one lie, or even several, strips the witness of all believability. The Court in

[6] [2019] CCJ 15 (AJ) at para. 35
[7] [2018] 3 LRC 552 at para. 60

this regard relies upon the decision of the English Court of Appeal of **R v Fanning and Ors.**[8] The Court notes that if a witness has lied about some bit of evidence, the evidence must be properly evaluated, taking into account the fact that the witness told the untruth and the reason for the lie. The Court may still convict if the Court is sure that the material parts of that evidence are true. The Court in this regard relies upon the Trinidadian Court of Appeal decision of **Minott and Ors. v The State**[9].

Is J's evidence credible and reliable?

[35] The Court notes that at several points J admitted to telling lies in his statement to the police. On that basis the Court exercises its discretion to warn itself that there is a special need for caution before it acts on J's evidence, who is a self-confessed liar. However, the Court notes that if it is sure that the material parts of J's testimony are true, even after it exercises that special caution, and even without support it can still convict the Accused[10].

[36] The Court also directs itself that the circumstances in which a witness gives a police statement ought to be considered in resolving inconsistencies on the authority of a decision of the Guyanese Court of Appeal in **Anand Mohan Kissoon and Anor. v The State**[11].

[37] The Court is of the view that J's evidence as is material to prove the charge is in fact true even though he told lies, having regard to the reason J told the lies. The Court is also of the view that the credibility of material portions of J's evidence is supported by the independent and uncontroverted electronic evidence contained in BF1 and the statements both made and adopted by the Accused therein.

[38] There are three major areas of focus on J's evidence to resolve the question of whether his evidence is credible and reliable. The first is the admitted

[8] [2016] 2 Cr. App. R. 19 at para. 27
[9] (2001) 62 WIR 347 at p. 362 n. 4
[10] **Supreme Court of Jamaica, Criminal Bench Book** p. 120
[11] (1994) 50 WIR 266 at ps. 272-273

inconsistencies surrounding how the penetration occurred. The second is whether there is any discrepancy between J's account of the penetration and the expert evidence of Dr. Chulin. The third is what to make of the conversations between J and the Accused in BF1.

[39] J's account of the penetration in his evidence before the Court and to the police are different in several material respects. In his police statement he said that the penetration was essentially forced but at trial he indicated that it was part of a deal for video game credit. He accounted for this difference by accepting that he lied to the police and saying that (i) he was afraid to tell the truth; and (ii) that he now knows that it was not his fault.

[40] The Court analyses the last two explanations and finds on all the evidence that what J means, in the first part of the explanation, is that he was fearful of telling adults the truth that he was having sex with a man for money. In analysing J's evidence, the Court considers that two major Caribbean taboos may have been operating on J's 12-year-old mind when considering whether to give the police a true account, homosexuality, and prostitution. It would have been easier for J, after BF1 was revealed to his mother to say that the Accused had forced him, as it may have saved J from self-reflection regarding his own sexuality as well as potential ostracism.

[41] The second part of the explanation that he "now knows it is not his fault" brings into sharp focus the WhatsApp chats in BF1. It is to be noted that there was absolutely no challenge to BF1 as to its accuracy and content The Court finds on the evidence from BF1 extracted at paragraph 16 that the Accused was, at best, clearly having inappropriate conversations with a 12 year old boy based on their content, the sheer volume of messages which could be seen as bombarding the child, and the times of night and early morning he would message J. At worst he was grooming J for sexual intercourse for instance (i) when he said that he was sorry for being too attached to J; (ii) when he implicitly accepted J's comment that, "You want to do all kinds of stuff to me", by replying, "Ñ (sic) that's why I am feeling this way". J then had to warn the Accused that he does not do that stuff with boys; and (iii) when the

Accused said "The part I couldn't handle is the part where I wanted to be more than your friend n u didnt.(sic)" BF1 is littered with expressions of love and feelings between the Accused and J, which speak to an inappropriate relationship between them.

[42] The Court finds that what J is saying in the second part of the explanation is a realization that at the time of his testimony he is now aware that he is not to blame for the sex for credit arrangement or the nature of his relationship with the Accused.

[43] The Court accepts both parts of J's explanation for his lies as credible and truthful. The Court finds that as a matter of human experience the fact that a male child, J, "willingly" engaged in sex with a male adult would have been a source of extreme shame and a legitimate sense of fear for J which could have been more palatable for him to rationalise in his mind if he told persons he was forced. The Court recalls the dicta of the CCJ in **McEwan and others v Attorney General of Guyana**[12] when recalling the experience of some persons engaging in homosexual acts in the Caribbean, per Saunders PCCJ:

> *"[70] … The hostility and discrimination that members of the LGBTI community face in Caribbean societies are well-documented. They are disproportionately at risk for discrimination in many aspects of their daily lives, including employment, public accommodation, and access to State services."*

[44] The Court finds on all the evidence and as a matter of human experience that in J's mind he may also carry the stigma of accepting that he did the acts for money which could also cause a sense of shame and fear of ostracism which would cause him to lie to the police about how the penetration happened. The Court also recalls the dicta of the CCJ in **Ramcharran v DPP**[13], per Jamadar and Rajnauth-Lee JJCCJ:

> *"[158] There is compelling research that transactional sex and sexual abuse (sex for money, services, material goods, security) is a feature of Caribbean societies where money is used to legitimize sex."*

[12] (2019) 94 WIR 332
[13] 2022 CCJ 4 AJ 1

[45] The Court understands J's evidence he "didn't think anything of it" as speaking to, at the time, his acceptance of transactional sex as an acceptable price to pay to feed his addiction to video games. He now seems to be in a place where he accepts that was not something he should have done.

[46] The Court finds that the inconsistency about who set the timers, that he set them and not the Accused, is also resolved by attributing it to J's unwillingness to reveal that he was part of the gem deal for the penetration and avoiding the internalized guilt and shame over the penetration. The Court finds that the failure by J to tell his mother about the Accused doing anything sexual to him after BF1 was revealed can be similarly explained by shame and fear. This is consistent with JA's evidence that J appeared afraid when confronted about the messages in BF1.

[47] The Court finds that the reasons for the lies told by J are understandable and do not destroy the overall credibility of his evidence at trial. The Court finds that the lies did not mean that the penetration did not happen but were caused by J avoiding saying how the penetration actually happened. The inconsistencies, neither singly nor cumulatively, do not destroy the credit of J at trial, in the Court's view.

[48] The Court finds that there is no discrepancy between J's account and the evidence of Dr. Chulin. Dr. Chulin said that he found no trauma to J's anus. He said that he would not expect to find trauma if the penetration was not forced. J's evidence was that the penetration was not forced, and that he allowed himself to be willingly penetrated. There is no evidence that J moved about or that the penetration was done in a rough manner. J's evidence was in fact that the penetration did not hurt.

[49] Dr. Chulin also testified that he would not expect to see trauma if the penetration of the penis into the anus was partial. J's testimony was that the Accused's penis was only halfway into his anus. There was therefore no full penetration which would result in trauma. This case is distinguishable from that of **Evan Reynolds v R**[14]

[14] Criminal Appeal No. 9 of 2006

submitted by Mr. Banner for the Accused as in that case the absence of trauma clearly contradicted the virtual complainant's account that the intercourse was forced, and the penetration was not partial but full.

[50] The Court finds that BF1 supports the allegation on indictment in that the statements made and adopted by the Accused demonstrate an unnatural sexual interest in J which would make it more probable that J had sexual intercourse on the 21st August 2021. The Court in this regard is not relying on BF1 to demonstrate propensity generally, but that the conversations are relevant to the allegation of penetration in the indictment by the definition provided by the Privy Council in the Trinidadian case of **Jairam and Another v State**[15]**:**

> *"[11] It is accepted that, to be admissible, evidence must be relevant to some issue of fact that is in dispute in the trial. In his Digest of the Law of Evidence (12th edn, 1936), p 3, art 1, Stephen gives a definition of relevance which has been widely accepted:*
> ***'The word "relevant" means that any two facts to which it is applied are so related to each other that according to the common course of events one, either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the other**.'" (emphasis added)*

[51] The Court is of the view that, as the editors of **Blackstone Criminal Practice 2024** opined about identification evidence, that "supporting evidence" in the context of care warnings, which the Court has given itself in this case, include evidence of any admissible form that makes the allegation more probable[16].

[52] The electronic evidence produced in BF1 is also independent of J.

[53] The Court also relies on the provisions of the **Electronic Evidence Act 2021**, as to proof of the dates and times of the conversation:

[15] [2006] 1 LRC 429
[16] F19.13

"5. The hearsay rule does not apply to a representation contained in a document recording an electronic communication so far as the representation is a representation as to–…(b) the date on which or the time at which the communication was sent;"

[54] The Court finds that the messages in the days before the 21st August 2021, the 18th to the 20th, smack of a desperation by the Accused to get J to his house, bombarding J with unrequited messages near midnight; as well as a threat by the Accused to J not to reveal the nature of their relationship to others:

"8/18/21, 11:07 PM - Dan: Sound like u give up on me.
8/18/21, 11:07 PM - Dan: U tell me
8/18/21, 11:08 PM - Dan: U always have mixed emotions
8/18/21, 11:09 PM - Dan: 😌
8/18/21, 11:09 PM - Dan: Yeewaaah
8/18/21, 11:15 PM - Dan: I know I said I'd come nex time but y u found it difficult to come again . Made me think I force u to come
8/18/21, 11:16 PM - Dan: Ah know
8/18/21, 11:16 PM - Dan: ***So how long ama have to wait ?***
8/18/21, 11:17 PM - Dan: ***For u to come again ?***
8/18/21, 11:18 PM - Dan: ***Ah mean I could make u come again but am not sure u want***
8/18/21, 11:18 PM - Dan: Cuz your mom would ask u if u want
8/18/21, 11:18 PM - Dan: And what would u say?
8/18/21, 11:19 PM - Dan: Let me c how it works out
…
8/20/21, 9:10 AM - Dan: What u doing ?
8/20/21, 9:11 AM - Dan: Really
8/20/21, 9:11 AM - J: Roblox
8/20/21, 9:11 AM - Dan: Seriously
8/20/21, 9:11 AM - J: Ya
8/20/21, 9:11 AM - Dan: Ya
8/20/21, 9:12 AM -J : Playing with r
8/20/21, 9:14 AM - Dan: Ok bro
8/20/21, 9:15 AM - Dan: Batty bwi r

8/20/21, 9:15 AM - Dan: Huh
8/20/21, 9:16 AM - Dan: Least he your age
8/20/21, 9:17 AM - Dan: ***Whatever u do dra don't trust to tell him about u and me***
8/20/21, 9:17 AM - Dan: Trust me
8/20/21, 9:17 AM - Dan: Don't" (emphasis added)

[55] J testified that on the 21st he awoke to some messages from the Accused. BF1 reveals 8 unanswered messages from the Accused from the day before from 4:39 p.m. to 8:50 p.m. J testified that the messages said the Accused was ready and that he, J, said no. BF1 on the 21st, between 9:15 a.m. and 9:27 a.m. shows messages where J said he did not want to go and the Accused telling him to be ready when he comes. Though there is a discrepancy in that J did not ignore the messages as he testified in evidence in chief, the Court resolves that as a matter of faulty memory as there were very many conversations between J and the Accused in the chats and he may have innocently been confused. There is also this exchange which the Court finds telling:

"8/21/21, 9:27 AM - J: No
8/21/21, 9:27 AM - J: I dont to comd
8/21/21, 9:27 AM - J: Come
8/21/21, 9:28 AM - Dan: Really j
8/21/21, 9:28 AM - J: Plsssss
8/21/21, 9:28 AM - Dan: I just tell u about this change of mind thing
8/21/21, 9:28 AM - J: I said tomarrow
*8/21/21, 9:28 AM - Dan****: I done tell u nothing will happens***
8/21/21, 9:28 AM - Dan: I won't be here tmrw
8/21/21, 9:28 AM - Dan: Bro
8/21/21, 9:28 AM - J: Ok
8/21/21, 9:29 AM - J: ***If that's the case dont ask me to come to your house cause of my mind***
8/21/21, 9:29 AM - Dan: I done tell u
8/21/21, 9:29 AM - Dan: It's the new me
8/21/21, 9:30 AM - Dan: Not old
8/21/21, 9:30 AM - Dan: ***The old will not come back***

8/21/21, 9:30 AM - J: Is it ok to stay
8/21/21, 9:30 AM - Dan: Say what bro ?
8/21/21, 9:31 AM - J: I dont want to come" (emphasis added)

[56] The Court finds that in the context of previous statements by the Accused that (i) he wanted to be more than friends with J; (ii) that he was getting too attached to J; and (iii) the need for the Accused to say after J repeatedly indicates that he does not want to go with the Accused that "nothing will happen" are combined facts which are indeed very instructive as to the state of their relationship and the likelihood that J was penetrated on the 21st.

[57] The Court also notes that there is a conversation between J and the Accused about someone else getting a "top up", at 9:36 a.m. while the Accused is insistent that J come to his house. The Court finds that this evidence is supportive of the allegation by J of sex for "gems".

[58] The Court having formed the view that there is evidence upon which it may convict looks to the defence case.

[59] The Court directs itself that the Accused is a man of good character and that a person of good character is less likely to commit a crime, especially one of the nature with which he is charged, than a person of bad character[17]. The Court does not apply the credibility direction to the dock statement of the Accused as it is unsworn and untested pursuant to the CCJ authority of *August*[18].

[60] The Court finds that it can place little reliance on the statement of the Accused based on the significant inconsistency between his statement of having "no interest in males" and BF1 where he told J that he wanted to be more than friends with him, among other things.

[17] **Hall v R** (2020) 95 WIR 201 at para. 42
[18] Para. 49

[61] The Court does not find it implausible that the Accused may have had intercourse while his sister may be home as there was no evidence of any loud noises being made and indeed J said the penetration did not hurt. Also, the desperation which comes across in BF1 from the Accused to J to get J to his home on the day of the alleged penetration in the Court's mind may be indicative of a state of mind of the Accused that was reckless enough to penetrate J even if his, the Accused's, sister was at home.

[62] The Court is not moved by the issue of the mattress not being on the bed in the photo, AW5, and the supposed implausibility of the sex act if the mattress was not there, as that photo was taken 3 days after the incident.

[63] The Court is of the view that the good character of the Accused is displaced by the strength of the evidence against him[19]. The Court rejects the dock statement of the Accused.

[64] The Court must also add that it was impressed by J's manner and demeanour while giving evidence. He appeared forthright and ready to admit his untruths and mistakes.

[65] The Court now looks at the totality of the evidence to reach a final decision. The Court is satisfied so that it is sure, for the reasons given above, that J's evidence on the material issues is truthful and credible despite the special caution with which the Court approached his evidence. The Court also finds his evidence is independently supported by BF1. The Court has rejected the case for the Accused, for the reasons given above. The Court is satisfied so that is sure and accepts J's evidence that:

A. The Accused penetrated his anus.
B. The Accused penetrated his anus with his penis.

[19] See *August* at para. 50

[66] The Court is satisfied so that it is sure and accepts the uncontroverted evidence of JA that J was under 14 years old at the time of penetration.

Decision

[67] The Court consequently is satisfied so that it is sure of the guilt of the Accused on the first count of the indictment and finds him guilty as charged of unlawful sexual intercourse.

Count 2

[68] The second count of the indictment refers to the post stroll 3-minute penetration. The Court finds that the evidence to make out this allegation is as follows:

a. **That the Accused penetrated the anus of J**- The evidence of J is that the Accused penetrated his anus on the second occasion.

b. **That penetration was done with the penis of the Accused**- J did not testify to seeing the Accused's penis go into his anus. However, the Court finds on all the evidence that it is a reasonable inference, if J's evidence is accepted, that the penetration was by the Accused's penis. This inference is based on (i) the terms of the second deal of intercourse for "gems" proposed by the Accused which would be suggestive of penile intercourse; (ii) the Accused was an arm's length behind J and there was no evidence of the Accused being seen with any other device conducive to penetration; and (iii) J felt what appeared to him to be a penis in his anus.

c. **That J was under the age of 14 when that penetration took place** - JA's uncontroverted evidence establishes that J was 12 years old at the time of the alleged penetration.

[69] The Court directs itself in the same terms in relation to the special need for caution in assessing J's evidence for the reasons given in count 1. The Court has found J a credible witness on this count for the reasons given in count 1 after considering the

identical inconsistencies which arose under that count. The Court has considered the inconsistencies under count 2 both singly and cumulatively and believed J's account, with the support of BF1 used in the same way as in count 1.

[70] The Court rejects the dock statement of the Accused on the same basis as in count 1.

[71] The Court now looks at the totality of the evidence to reach a final decision. The Court is satisfied so that it is sure, for the reasons given under count 1, that J's evidence on the material issues is truthful and credible despite the special caution with which the Court approached his evidence. The Court also finds his evidence is independently supported by BF1. The Court has rejected the case for the Accused, for the reasons given above. The Court is satisfied so that is sure and accepts J's evidence that:

A. The Accused penetrated his anus.

B. The Accused penetrated his anus with his penis.

[72] The Court is satisfied so that it is sure and accepts the uncontroverted evidence of JA that J was under 14 years old at the time of penetration.

Decision

[73] The Court consequently is satisfied so that it is sure of the guilt of the Accused on the second count of the indictment and finds him guilty as charged of unlawful sexual intercourse.

[74] The matter is adjourned for a separate sentencing hearing as advised by the CCJ in **Linton Pompey v DPP**.[20]

[20] [2020] CCJ 7 (AJ) GY11 at para. 32

Dated 13th October, 2023

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