BARBADOS

IN THE SUPREME COURT OF BARBADOS

COURT OF APPEAL

Magisterial Criminal Appeal No. 7 of 2019

BETWEEN:

COMMISSIONER OF POLICE **APPELLANT**

AND

STEPHEN ALLEYNE **RESPONDENT**

Before: The Hon. Rajendra Narine and The Hon. Francis Belle, Justices of Appeal and The Hon. William Chandler, Justice of Appeal (Acting).

Ms. Krystal Delaney Attorney-at-Law for the Appellant

Mr. Arthur Holder Attorney-at-Law for the Respondent

2020: February 26

2021: April 15

DECISION

CHANDLER JA (Acting):

INTRODUCTION

[1] Before this Court is a Notice of Appeal filed 26 July 2019 against the decision of His Worship Mr. Elwood Watts, the Learned Magistrate for District B Magistrate's Court, Oistins, to dismiss the charge of rape of a male complainant against the Respondent. The Appellant asks this Court to set a side that decision.

BRIEF BACKGROUND

[2] The respondent was charged with the offence of having sexual intercourse with H N without his consent on the 2 August 2015 knowing that the said H N did not consent to intercourse or being reckless as to whether he consented contrary to **section 3(6)** of the **Sexual Offences Act, Cap. 154 (Cap. 154)**.

[3] On 17 February 2019 when the respondent appeared in the Magistrate's court, the Learned Magistrate enquired of the virtual complainant whether he was male or female, he responded that he was male. A similar enquiry of the then accused, now the respondent, revealed that he was also male. The Learned Magistrate spoke with the Prosecutor and indicated that there was incongruity between the charge and the persons presenting before the court. He invited Mr. Arthur Holder, counsel for the respondent, and the police prosecutor to make submissions on whether the charge of rape was appropriate where the virtual complainant was male.

[4] The Magistrate's reasons for decision indicate that Mr. Holder submitted that **section 3(6) of Cap. 154 (sec 3(6))** defined the offence of rape and that it was pellucid in its import that rape in so far as it involved penetration of the anus required compliance with that subsection which reads "… in circumstances where the introduction of the penis of a person into the vagina of another would be rape." The circumstances where a penis penetrates a vagina, Mr. Holder submitted, was where, in the ordinary course of things, a male and a female were concerned and not a male and a male.

[5] Assistant Superintendent of Police Blackman submitted that **section 3 (1)** of **Cap. 154 (sec 3(1))** spoke specifically to rape being committed where "a person" had sexual intercourse with another person. The offence, in his submission, was gender neutral and therefore rape could be committed by a male on a male.

[6] We deem it appropriate to now set out the applicable law, the provisions of which are not disputed save and except for the varying interpretations which counsel have sought to place on them.

THE LAW

[7] There is no divide between the parties that the applicable law is found in **sections 3(1)** and **(6) of Cap. 154** and **section 9 (sec 9) of Cap. 154** which we now reproduce:

> **Sec 3(1) "(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 *(emphasis added)*.

(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."

Sec 9 of **Cap. 154** provides that:

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

THE GROUND OF APPEAL

[8] The single ground of appeal under **section 243 (g)** of the **Magistrate's Court Act Cap. 116A** is that the Magistrate's decision is erroneous in point of law.

THE ISSUE

[9] The sole issue for our determination is whether **sec 3** creates the offence of rape where a male has sexual intercourse with another male by the penetration of the anus by the penis without consent or is reckless as to whether the other person consents to the intercourse.

THE SUBMISSIONS

[10] Ms. Krystal Delaney, counsel for the appellant, referred to the preamble of **Cap. 154** which was intended "to revive and reform the law relating to sexual crimes" and submitted that **sec 3** was intended to reform the law relating to sexual crimes and broaden the scope of the offence of rape beyond its previous definition. She submitted, therefore, that the reference to "any person" and "another person" in **sec 3(1)** does not differentiate between male and female.

[11] Counsel submitted that **sec 3(6)** is intended to provide that rape is committed in circumstances where the introduction of the penis into a vagina would be rape; namely, where the complainant did not consent and with the knowledge or belief that the complainant was not consenting. Therefore, the introduction of a penis or objects into the anus or vagina of another person or into the mouth of another person would also amount to rape.

[12] Ms. Delaney also submitted that **sec 3** was not intended to confine the gender of the complainants to only female, as the Learned Magistrate held. Such an interpretation would result in situation where a person convicted of penetration of a woman's vagina with an object with the requisite *mens rea* would be liable to imprisonment for life contrary to **sec 3(2)**, whereas, a person who is convicted of penetration of a man's anus with an object would be liable to imprisonment for only 10 years for serious indecency contrary to **sec 12(1)**. Such an interpretation, counsel argued,

would lead to arbitrary discrimination on gender where offences against women would be punished more harshly than similar offences against men. This she submitted would give the appearance that the law views offences against women as more serious than similar offences committed against men. Accordingly, counsel urged upon us that the offence of rape is now defined in gender neutral terms.

[13] Counsel further submitted that the interpretation which the Learned Magistrate placed on **sec 3(6)** namely, that a complainant of rape could only be female and an accused could only be male, would be a regression and would not have "reformed the law relating to sexual crimes as intended by **Cap. 154**".

[14] Counsel referred to the 1994 the amendments to the offence of rape occasioned by section 142 of the *Criminal Justice and Public Order Act 1994* of the United Kingdom which reads as follows:

> "It is an offence for a man to rape a woman or another man."

This section, Ms. Delaney opined, "redefined the offence of rape to include non-consensual anal intercourse with a man or a woman". She relied upon paragraph 20-*2a of Archbold Criminal Pleading, Evidence and Practice 1996 Sweet & Maxwell, London Volume 2* (Archbold).

[15] It was Ms. Delaney's contention that the amendments to **Cap. 154** and the *Criminal Justice and Public Order Act 1994 (UK)* constituted a shift in the law as it relates to rape to offer protection to both male and female complainants.

[16] In addition, counsel argued that *section 4* of the *Crimes (Sexual Offences) Act 1980* which amended *section 2A* of *the Crimes Act 1958 (The 1958 Act)* of the Australian state of Victoria was similar to **sec 3(6)** and was inserted into the 1958 Act by the *Crimes (Sexual Offences) Act 1980*. The Court of Appeal of Victoria in her view stated that this amendment significantly changed the pre-existing common law definition of rape. Amongst other things the amendments were intended to make the crime of rape "gender neutral" so as to render it capable of being committed by man or woman and by the use of penis or objects. *R v Jon Edgar Hewitt [1996] VSC* 26 (Hewitt) at paragraph 5 per *Winneke P*.

[17] It was Ms. Delaney's further submission that, since **sec 3(6)** is drafted similarly to the Victoria legislation, this court should place an interpretation similar to that of the Australian court on **sec 3(1)** and **(6)** so that the offence of rape could be committed against a male or female. Such an interpretation, she finally submitted, would "reform the law relating to sexual offences" and would ensure that the law does not discriminate against persons on the basis of sex.

THE RESPONDENT'S SUBMISSIONS

[18] Mr. Arthur Holder, counsel for the respondent, submitted that the definition of rape in **sec 3(1)** is confined to vaginal sexual intercourse. **Sec 3(6)**, he argued, expands the definition of rape to include the insertion of objects into the vagina or anus of a woman. Counsel urged us to apply the ordinary interpretation to the words used in

sec 3(1) which would confine rape to the insertion of a penis into the vagina of a woman.

[19] Counsel further submitted that the appellant was incorrectly charged with the offence of rape since the offence of buggery is defined in **sec 9** of **Cap. 154**. We take this submission to infer that the charge of buggery was the more appropriate charge. Accordingly, counsel submitted that the Learned Magistrate was correct in law in dismissing the charge of rape against the appellant.

DISCUSSION AND ANALYSIS

[20] I think it important to start my analysis with a brief excursus into the common law relating to rape and buggery and the transition to **sec 3(6)**. It is not denied that, prior to the passage of **Cap. 154** in 1992, the offence of rape could be committed only by the insertion of the penis into the vagina. The common law defined rape as consisting in "having unlawful sexual intercourse with a woman without her consent by force, fear or fraud. *1 East PC 434*: and…1 *Hale* 627 et seq. *Archbold, Pleading, Evidence and Practice in criminal cases 35th Edn, 1962, London, Sweet & Maxwell*. Sexual intercourse was proved by the slightest degree of penetration of the vagina by the penis and there was no need to prove the emission of seed. It follows therefore that, at common law, rape could only be committed by a man on a woman.

[21] Buggery, on the other hand, was defined as consisting of "sexual intercourse (a) committed against the order of nature (i.e.) per anum by man with man or in the same

unnatural manner by man with woman, or (b) by man or woman in any manner with beast." *Archbold 35th Edn, 1962, Sweet & Maxwell, London*.

[22] It has been argued on behalf of the Crown that the definition in **sec 3(1)** is designed to make the offence of rape gender neutral. That is, that it is the intention of Parliament to make rape an offence which could be committed by a male upon another male. The resolution of this matter depends upon the interpretation to be placed upon **sec 3(6)** in the total context of **Cap. 154**. Statutory interpretation is the ascertainment of the intention of Parliament as used in an act of parliament.

[23] What then is the intention of Parliament?

[24] This resolution of this issue revolves around the use of the word "person" in **sec 3(6)**. Support for the interpretation placed on the word "person" in **sec 3(6)** by Ms. Delaney may be found in section **36(1)** of **the Interpretation Act Cap. 1** (**Cap. 1**) which 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."**

This section must be read subject to the rule that the context in which the word "person" is used must admit of such an interpretation.

[25] **Sec 3(6)** creates an offence in circumstances where the complainant does not consent or where the accused is aware that there is no consent or is reckless whether the complainant consents or not. Herein lies the rub.

[26] The offence of buggery is set out in **sec 9** of **Cap. 154**, however, it is not defined in the act. It has already been established that, at common law, buggery was committed where a man had sexual intercourse with a man, a woman or an animal per anum, that is, through the anus. Consent was no defence to buggery at common law.

[27] The common law of Barbados including the offence of buggery was inherited from the United Kingdom at the date of settlement; see **Blades and Another v Jaggard and Others (1961) 4 WIR 207**. I am of the view that in order to resolve this issue we must look at the historical legislative developments in the criminal law in relation to the offences of rape and buggery. It is within the context of the development of the law on sexual relations that the concept of gender neutrality must be placed. In the United Kingdom, homosexual acts between male consenting adults in private were decriminalised by virtue of the *Sexual Offences Act 1967*. No similar legislation has been passed in Barbados.

[28] One presumption of statutory interpretation is that the common law is not altered except by express statutory intervention. Thus in *R v Miller [1983] 2 AC 161 at 174 Lord Diplock* observed that criminal enactments "…fall to be construed in the light of general principles of English law so well established that it is the practice of

parliamentary draftsmen to leave them unexpressed in criminal statute on the confident assumption that a court of law will treat those principles as intended by Parliament to be applicable to the particular offence unless expressly modified or excluded."

[29] In restating this presumption, I am not unmindful of **section 22(1)** of **Cap. 1** which provides that:

> **"Where any act or omission constitutes an offence under two or more than two enactments or under an enactment and at common law, the offender shall be liable to be prosecuted and punished under either or any of those enactments or at common law, but shall not be liable to be punished twice for the same offence."**

This section, however, contemplates the situation where one offence is constituted under two or more enactments and at common law. In relation to **Cap. 154**, the appellant's submission involves an acceptance that rape committed by a man on a man is constituted under both **sec 3(6)** and **section 9** of **Cap. 154**. I have found tremendous difficulty accepting this submission for the following reasons. Firstly, **sec 3** creates the offence of rape where consent is a defence to the charge. Secondly, the **sec 9** offence of buggery has not been redefined in **Cap. 154** to allow for the defence of consent. This creates the situation where, if one accepts the argument of counsel for the appellant with respect to gender neutrality in **sec 3**, Parliament must

be taken to have intended to create two offences out of the same set of circumstances, namely:

(i) Under **sec 3** requiring proof of lack of consent; and

(ii) Under **sec 9** requiring no evidence of consent or lack thereof but merely penetration of the anus by the penis.

I do not think that was Parliament's intention.

[30] We previously referred to the decriminalization of homosexual acts between male consenting adults in private in the United Kingdom. Ms. Delaney relied upon case law emanating from the state of Victoria in Australia, that state, like the United Kingdom, has also decriminalized homosexual acts between male consenting adults in private by virtue of the *Criminal Law (Sexual Offences) Amendment Act 1975*. In the spirit of law reform, same sex marriages were statutorily permitted in Australia by virtue of the *Marriage Act 2018*. It is this context which informs the concept of gender neutrality in Australia.

[31] Barbados has not yet decriminalized homosexual acts between male consenting adults in private nor has it legislated to allow same sex marriages, therefore, the contextual matrix which applies in Australia and provides the context in which the Australian courts interpret their law does not apply to Barbados.

[32] Whatever the intention of parliament, it must be translated into action by statutory means. I am not convinced that there is the parliamentary intent that Ms. Delaney asks

us to accept in her interpretation of **sec 3(6)** and none can be found in the debates hereinafter mentioned.

[33] I now turn to **sec 3** and the concept of gender neutrality. **Sec 3(1)** seems, on a literal interpretation, to permit an interpretation that any person, male or female, can commit rape on another person, male or female, where the perpetrator has sexual intercourse with the victim without consent or being reckless as to whether or not consent has been given. **Sec 3(6)** defines penetration as occurring where the penis is introduced into the vagina "to any extent". Thus under **sec 3(6)** if the penis of one person is introduced into the anus of another rape is committed if Ms. Delaney's submission is accepted. It must be remembered that buggery was also committed where a man had anal intercourse with a woman or with an animal. Consent was no defence. Even a husband committed buggery if he had anal sexual intercourse with his wife with or without her consent; See *R v Greenwood 21 Cr. App. R. 186* and *R v Jellyman 8 C. & P. 604*. These acts were regarded as "unnatural."

[34] Provided that the complainant was made to experience fear, the insertion of objects into a person's vagina or anus could have constituted a species of indecent assault or assault by penetration, otherwise it was doubtful whether any criminal act had been committed where these acts were consensual; see *R v Jacobs, R. & R. 331*. The insertion of objects into the vagina of a woman was not a specific criminal offence prior to the passage of **Cap. 154**. This latter offence was created statutorily in the

United Kingdom under the *Sexual Offences Act 2003 (UK)* but had no statutory equivalent in Barbados until the passage of **sec 3(6) of Cap. 154**. Section 2(1) of the Sexual Offences Act 2003 (UK) provides that:

> "A person (A) commits an offence if -
>
> (a) he intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else,
>
> (b) the penetration is sexual,
>
> (c) B does not consent to the penetration, and
>
> (d) A does not reasonably believe that B consents."

[35] What then was the intention of Parliament in passing **Cap 154**? It was to revise and reform the law relating to sexual crimes as recited in its preamble. The extent of that revision is the issue.

[36] The law of Barbados is a patchwork of common law principles as well as statutory legislation passed over the years. We agree with Ms. Delaney's submission that **Cap 354** was intended to modernize the law in relation to sexual crimes. Law revision has its genesis in changing societal attitudes to forms of conduct which have at various times been seen as deviant leading to their criminalisation and which subsequently have been regarded in a different light having regard to changing attitudes to sexuality. **Cap 354** is no exception. We take as an example, marital rape which was previously not an offence in the United Kingdom unless the circumstances set out in **sec 3 (4)** of **Cap 354** existed. In *R v R [1991] 1 A.C. 599*, the House of Lords held

that there was no justification for the long accepted opinion that a woman, on marriage, had given herself up to her husband sexually and had thereby given her irrevocable consent to marital sexual intercourse. Despite this, **sec 3(4)** of **Cap 354** continues to maintain the following defined situations in which marital rape statutorily occurs. For completeness we set out the full text of **sec 3(4)**:

> "(4) 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
>
> *(a)* a decree nisi of divorce;
> *(b)* a separation order within the meaning of section 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".

[37] We note that the **Sexual Offences (Amendment) Bill 2016** is designed to correct this incongruity by amending **sec 3** of **Cap 354** by deleting **subsection 4** and substituting the following:

> "(4) A husband commits the offence of rape where he has sexual intercourse with his wife without her consent by force or fear, where he knows that she does not consent to the intercourse or is reckless as to whether she consents to the intercourse."

This highlights the fact that, despite its intention to reform the law relating to sexual offences, the reforms contained in **Cap 354** have not been comprehensive.

[38] In this regard, we look to examine the extent to which Parliament reformed the law. In **sec 3(6)** rape is defined as including "… the introduction, to any extent, in circumstances where the introduction of the **penis of a person** into **the vagina of another** would be rape (emphases added). It is within this context that the introduction of the penis of a person into the anus or mouth of another so as to constitute rape in **sec 3(6)(a)** of **Cap 354** must be interpreted.

[39] I am of the view and hold that "person" in **sec 3(6)** is constrained by the word "penis" and therefore refers to a male and that "another" which contextually is circumscribed by "vagina" means a female. **Cap 354** differs substantially from the *Crimes Act* of Australia, which is discussed later in this decision, and which clearly defines "another person" as being either male or female unlike **sec 3(6)**. Therefore the "introduction of the penis into the mouth or anus of another" when read in context refers to the introduction of the penis into the anus or mouth of a woman and not a man. In consequence, I am of the opinion that the intention of **sec 3(6)** when read in context, is to redefine anal and oral intercourse by a man with a woman as rape and to define as rape the insertion by a man of objects into the anus or vagina of a woman unlike the United Kingdom where a separate offence was created under *section 2(1)* of the *Sexual Offences Act 2003.*

[40] It is my view that Parliament intended to create a statutory offence where a person penetrated the anus of another with an object without that person's consent. It is also

my view that Parliament did so by including the offence in the definition of rape unlike the United Kingdom where a separate offence was created under *section 2(1)* of the *Sexual Offences Act 2003*. To this extent only did Parliament, in my view, intend to revise and reform the law relating to sexual crimes.

[41] Support for this view may be found in the debates previously referred to where Mr. Maurice King QC, now Sir Maurice, the then Attorney General of Barbados, commented thus:

> *"The position of the Bill before us now, Mr. Speaker. The Sexual Offences Bill, is that whereas rape was a common law offence before with the penalty provided for in the Offences against the Person Act, rape is now being made a statutory offence. The proposal in the new Bill is to make rape a statutory offence. The new Bill restates much of the old common law position in relation to rape so that it is not introducing rape as a new offence. It is restating a lot of the common law principles, but in addition to that there are some significant changes in the law relating to rape and it will be in relation to the changes which this new Bill introduces that 1 will dwell on in the course of this presentation.*
>
> *One of the first things to note, Mr. Speaker, is that this new Bill will make rape what we call a neutral gender offence. At common law, rapes would only be committed by a man. The proposal in the new Bill … makes rape a neutral gender offence…*
>
> *…The point I am making, Mr. Speaker, is that under the new Provision ... There seems to be some doubt, Mr. Speaker, as to whether women can be charged for rape under the law. I, myself, don't think I have any difficulty in understanding the existing law that women can't be charged with rape, but some people seem to be of the view that it is part of the criminal law today and I really don't know … Let me confess my ignorance of that state of the law.*

> *What this new Bill is proposing, Mr. Speaker, is that it may be committed by either sex and I will just explain briefly. For instance, one of the provisions of the Bill says any person, whether it is a man or woman, manipulating a foreign object in the sexual organs of females, where such acts amount to rape if the sexual organs had been the organs of a man then in those circumstances that would be rape. So that if a woman manipulates an object into the sexual organ of another woman without her consent, where that would be read if the organ used was a penis of a man, then under the provisions of this new Bill that would be rape by a woman. So, we are saying that in either case. Rape becomes a neutral gender offence and may be committed by man or woman, the essence being that the act which is being done is being done without the consent of the victim and being forcibly done against the wishes and consent of the person who is being attacked."*

[42] Though the views of Mr. King QC are not determinative of the interpretation to be placed on **sec 3**, I am of the view that they support my opinion that Parliament did not intend to make rape an offence which a man could commit on another man. I am also of the opinion that Parliament, by not expressly repealing **sec 9**, intended, subject only as above described, to retain the offence of buggery as defined by the common law.

[43] With respect to gender neutrality in relation to the language of **sec 3(1)**, Ms. Delaney referred us to *R v Hewitt (Hewitt)* where *Winneke P* opined that the result of *section 2A* of the *Crimes Act*, which is in pari materia with **sec 3(1)**, was that rape and other sexual offences lost their gender specificity and that either a male or female could commit them as principal in the first degree and the victim could be of either sex. *In Hewitt, Winneke P*, in respect of the *Crimes Act*, opined that "all the drafting was gender neutral." This case must be understood in the context of the law of Australia.

[44] In order to fully appreciate the concept of gender neutrality which *Winneke P* was speaking about, we have to contextualize this opinion. The learned Judge was interpreting the amendment to the *Crimes Act* against the background of legislative changes in Australia where homosexual acts between male consenting adults in private had been legalised by statute. Barbados has thus far not passed similar legislation.

[45] Having set the context, we now set out the definition of rape in the Australian act:

> "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 or 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." (**emphasis added**)

The words in parenthesis make it clear that the victim of rape can be male or female in Victoria. These words are omitted from **Cap. 154**. It cannot be said therefore that the words used in **sec 3(6)** in their contextual interpretation, without more, define rape in gender neutral terms as *Winneke P* found in *R v Hewitt.*

[46] I am also of the view that if Parliament intended to render rape a gender neutral offence otherwise than I have already found namely, an offence which could be committed by a man on another man, it would have used express language so to do. To hold otherwise would mean that Parliament, by making rape an offence which a man could commit against another man without consent, would have impliedly legalised consensual sexual intercourse between consenting males. I do not believe that this was Parliament's intention.

CONCLUSION

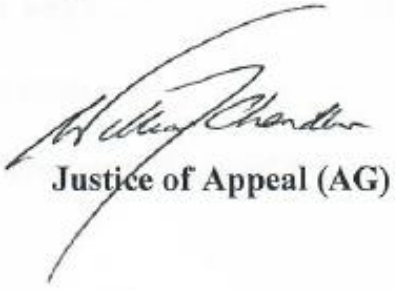
[47] It is my view therefore that the offence of rape cannot be committed by a man on another man under **sec 3** but the alleged offence may be charged as buggery under **sec 9**.

DISPOSAL

[48] In consequence, it is ordered that:

1. The appeal is dismissed, and

2. The order of the learned magistrate is affirmed.



Justice of Appeal (AG)

NARINE JA:

INTRODUCTION

[49] I wish to express my profound apologies for the late delivery of this decision. The delay was caused to some extent by the advent of the covid-19 pandemic shortly after we heard this matter and by our attempts to arrive at a consensual position. Each member of the panel has expressed a different view.

[50] Although my reasons differ slightly to those of **Chandler JA** (Acting), I agree with him that this appeal must be dismissed.

[51] This appeal involves the interpretation of **section 3(6)** of the **Sexual Offences Act, Cap. 154** of the Laws of Barbados (the Act), which reads:

> ***(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.***

[52] The intention of **section 3(6)** was quite obviously to extend the definition of rape, which traditionally involved the slightest penetration of the vagina by the introduction of a penis without consent of or with recklessness as to whether there was consent.

[53] The new definition of rape as contained in **section 3(1)** of the Act uses language that is gender neutral. The act of rape may be committed by "any person", which clearly includes a man or a woman on "any person", which again includes a man or a woman.

[54] Under **section 3(6)** the instrument used to commit the act of rape is no longer limited to a penis. It can be any object. The receptacle into which the penis is inserted is no longer limited to a vagina, it now includes the anus or mouth of the victim. If an object (as opposed to a penis or other part of the body) is used, rape may be committed by introducing the object into the vagina or anus of a person.

[55] The clause "in circumstances where the introduction of the penis into the vagina or anus of another would be rape" obviously refers to the mens rea that accompanies the act, that is knowledge that the other person is not consenting to the act, or recklessness as to whether that person is consenting or not.

[56] It is clear that **section 3(6)** has considerably expanded the traditional definition of rape by introducing new forms of conduct involving the use of objects, and new sites of penetration including the mouth and anus.

[57] Applying a purely literal interpretation of **section 3(6)**, the following acts would amount to rape if accompanied by the requisite mens rea:

> (1) "the introduction of the penis by a man into the mouth of a woman;
> (2) the introduction of the penis by a man into the mouth of a man;
>
> (3) the introduction of the penis into the anus of a woman;
>
> (4) the introduction of the penis into the anus of a man;
>
> (5) the introduction of an object (not being part of the body) by a man or a woman into the vagina of a woman;

(6) the introduction of an object by a man or a woman into the anus of a man or a woman."

[58] The conduct noted at (1), (2), (5) and (6) constitute essentially new offences, now to be regarded as within the definition of rape.

[59] However, the conduct noted at (3) and (4) are not new offences. This conduct is already proscribed by **section 9** of the Act, which deals with the offence of buggery, that is the insertion of the penis into the anus of a man or a woman. The issue of consent does not arise in the offence of buggery. The act is prohibited whether the person who is penetrated consents or not.

[60] The Act describes itself as "An Act to revise and reform the law relating to sexual crimes". The date of commencement of the Act was 13 February 1992. As we have seen, the Act expanded the definition of rape, using gender neutral language. It is now legally possible for a woman to rape a man by introducing an object into his anus without his consent. It is also legally possible (though perhaps less probable) for a woman to force a man to have sexual intercourse without his consent. It is now also possible for a woman to rape another woman by the introduction of an object into the vagina or anus of the woman. It is also possible for a man to rape another man by the introduction of an object into the anus of the other man.

[61] However in enacting these new provisions Parliament took no steps to repeal or amend the existing law as it pertained to the offence of buggery. In fact, it expressly retained the existing law by enacting **section 9** of the Act:

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

[62] Clearly, by enacting **section 9** as part of the Act, Parliament could not have intended to introduce a new offence of rape in relation to the same conduct, providing a defence of consent, while absolutely proscribing the same conduct in the same Act under **section 9**.

[63] Ms. Delaney, for the Crown, has argued that Parliament intended to redefine the offence of rape to include non consensual anal intercourse by a man with a man or a woman. As noted earlier, this interpretation may be available, applying the literal rule of interpretation to **section 3(6)** of the Act.

[64] However, this interpretation results in the absurd result where anal intercourse is absolutely forbidden under **section 9**, attracting a sanction of life imprisonment but permitted under **section 3(6)** where the act is consensual.

[65] Further, the literal interpretation leads to another absurdity. There would be two offences that may be charged to prosecute the offender for the same conduct: rape under **section 3**, and buggery under **section 9**. The question that arises, is why would the prosecuting arm of the state undertake to prosecute the offence of rape, which involves proof of an additional ingredient, absence of consent, when it may prosecute the offence of buggery which simply requires proof of the act?

[66] This unfortunate situation has arisen because of Parliament's express intention to revise and modernise the law as it relates to the sexual behaviour of the members of

this society. Concepts of gender neutrality and recognition of changing attitudes towards certain kinds of sexual activity and sexual identity, have long been recognised in other jurisdictions. It is laudable that Parliament has taken cognizance of these matters, and has sought to bring this society in line with evolving international developments.

[67] We have been referred to legislation and case law from the United Kingdom and the State of Victoria in Australia, both of which have long taken steps to decriminalize homosexual acts between consenting adults. This has not yet occurred in Barbados, and we assume for present purposes that this is not a case of mere oversight but represents a deliberate intention to preserve the status quo having regard to the inclusion of **section 9** in the Act.

[68] We do not express a view as to whether steps should be taken to bring this country in line with more liberal attitudes with respect to homosexuality or other gender identity issues. That is a question for Parliament, as informed by the will of the citizenry.

[69] However, as long as **section 9** of the Act remains the law of Barbados, **section 3(6)** must be construed so as to be consistent with its meaning and intent.

[70] Accordingly, I hold that the Magistrate was correct in deciding that the charge of rape could not be maintained, and that the appropriate charge was for buggery under **s. 9** of the Act.

DISPOSAL

[71] It follows that the appeal is dismissed and the decision of the Magistrate is affirmed.

Justice of Appeal

BELLE JA:

INTRODUCTION:

[72] The respondent in this appeal was 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 H N without his consent and knew that H N did not consent to the intercourse or was reckless as to whether he consented to the intercourse contrary to **section 3(1)** of the **Sexual Offences Act Chapter 154** of the Laws of Barbados.

[73] This language under **section 3(1)** of **Cap. 154** means that Mr. Stephen Alleyne was charged with rape.

[74] The learned magistrate dismissed the charge of rape against the respondent on the basis that the offence of rape cannot be committed against a male complainant. Indeed the complainant in this case was male. The learned magistrate relied on **sections 3(6), 23,** and **4 (2)** of **Cap. 154** to support his view.

[75] The appellant, Commissioner of Police has appealed against the magistrate's decision on the basis that the decision of the magistrate is erroneous in point of law, see: **section 243 (g)** of the **Magistrate's Court Act Cap. 116A** of the Laws of Barbados.

[76] The appeal is brought on the basis that **Cap. 154** allows for the complainant of rape to be either male of female and as such, the magistrate's decision to dismiss the charge against the respondent was erroneous.

THE HISTORY

[77] The statutory offence of rape goes back to the **Sexual Offences Act 1956** which provided that rape was an offence. The said **Act** applied to Barbados after Barbados gained independence on 30 November 1966.

[78] The offence of rape was confined to the act of a man on a woman based on the use of the language:

> *(1) It is a felony for a man to rape a woman.*
> *(2) A man who induces a married woman to have sexual intercourse with him by impersonating her husband commits rape.*

[79] Under the comparable *UK legislation of 1956* rape could only be committed by a male accused against a female complainant.

[80] The appellant in this appeal is arguing that by virtue of **Cap. 154** of the Laws of Barbados, the law changed in Barbados. A similar change took place in the UK where the *Sexual Offences Act 1956* was amended by virtue of *section 142* of the *Criminal Justice and Public Order Act 1994*.

THE BARBADOS PROVISIONS

[81] **Section 3 (1)** of **Cap. 154** defines the offence of rape in the following terms:

> "*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."*

[82] **Section 3(6)** of **Cap. 154** reads:

> *"For the purpose 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 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"*

COUNSEL'S ARGUMENTS

[83] Addressing the phrase used in **section 3(6) of Cap. 154** "in circumstances where the introduction of the penis of a person into the vagina of another would be rape", counsel for the appellant argues that it speaks to the issue of consent and *mens re*a. Counsel submitted that the intention of the **section** is to provide that, in circumstances where the introduction of the penis into the vagina of another would be rape, that is, without the consent of the complainant and with the knowledge that the complainant was not consenting, then the introduction of a penis or object into the anus or vagina

of another person or introduction of a penis into a mouth of another would also amount to rape as would the introduction of an object not being a part of the body in the vagina or anus of a person.

[84] Counsel emphasize that the **section 3(6)** was not intended to confine the gender of the complainants to only female, as the learned magistrate has held. Indeed counsel insisted that the result of such an interpretation would be that a person convicted of penetration of a woman's vagina with an object with the requisite *mens rea* would be liable to imprisonment for life for rape contrary to **section 3(2)**. However, a person that is convicted of penetration of a man's anus with an object would be liable to imprisonment for only 10 years for serious indecency contrary to **section 12(1)**. But this interpretation would lead to arbitrary discrimination on the basis of gender where offences against women would be punished more harshly than similar offences against men. That would give the appearance that the law views offences against women as more serious than similar offences committed against men.

[85] Counsel submitted further that the interpretation which the learned magistrate has applied to the **section** that (a complainant of rape could only be female and an accused could only be male) would be a regression and would not have "reformed the law relating to sexual crimes."

[86] Counsel then referred to examples of similar legislation in the UK and Australia to illustrate the trend toward gender neutral legislation. In the UK this trend was

exemplified in *section 142 of the Criminal Justice and Public Order Act 1994*, where *section 1* of that legislation read:

> *"(1) It is an offence for a man to rape a woman or another man.*
> *(2) According to counsel the section "redefined the offence of rape to include non-consensual anal intercourse with a man or a woman."*

[87] In Australia in the state of Victoria a similar provision almost word for word with **Cap. 154** emerged in the 19*58* ***section 2A*** **of the** ***Crimes (sexual offences) Act 1958*** and provided as follows:

> *"Rape" includes the introduction (to any extent) in circumstances where the introduction of the penis into the vagina of another person would be rape, of:*
>
> *(a) The penis of a person into the anus or 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."*

[88] It is noted that the words "whether male or female" could only have been inserted for the purpose of emphasis.

[89] Counsel submitted that this section was inserted into the **1958 Act** by the ***Crimes (sexual Offences) Act 1980*****.** In the case of **R v John Hewitt [1996] VSC 26** the Court of Appeal of Victoria stated (at paragraph 5 per Winneke P) that "these amendments [section 2A] along with other amendments] significantly changed the

pre-existing common law definition of rape. These amendments in the Victoria 1980, UK 1994 and Barbados 1994 legislation were intended to make the crime "gender neutral" so as to render it one capable of being committed by a man or woman and by use of penis or objects".

[90] In conclusion, counsel for the appellant argued that the Barbadian legislation is drafted very similarly to that of the Victorian legislation. Counsel submits that the court should interpret **section 3(1)** and **(6)** in a similar manner so that the offence of rape could be committed against a male or female.

[91] Such an interpretation counsel submitted would "reform the law relating to sexual offences" and would ensure that the law does not discriminate against persons on the basis of sex.

[92] Based on these submissions counsel submitted that the learned magistrate erred by holding that the offence of rape cannot be committed against a male complainant.

[93] On the other hand, counsel for the respondent argued that the magistrate's interpretation of **section 3(6)** of **Cap. 154** should be upheld since the legislation provides for buggery in **section 9** which carried the same maximum penalty and there was no need for the interpretation argued by the prosecution. Why the Crown would prosecute and charge a man for raping another man when the offence of buggery still existed, he asked?

THE LEARNED MAGISTRATE'S REASONS

[94] *"The learned magistrate gave the following reasons for his decision to dismiss the charge that Stephen Alleyne on 2 August 2015 had sexual intercourse with H N without his consent and knew that he did not consent to the intercourse or was reckless as to whether he consented to the intercourse:*

> *On presentation to the court on 17 February 2019, in response to my invitation, after the case had been before me since 11 July 2017, I inquired of the virtual complainant (hereinafter referred to as the V/C) whether the person presenting was a male or female. He indicated that he was male. On similar inquiry, the accused indicated that he too was male. These admissions prompted me to consider the charge which was before the court. I drew my concern to the Police Prosecutor, which was that the parties before the court and the charge appeared to me to be incongruent. I drew* ***section 3, subsection 6*** *of the* ***Sexual Offences Act*** *to the attention of both the Police Prosecutor and counsel for the accused, Mr. Arthur Holder. I invited them to make submissions on the point at a future date.*
>
> *On 13 May 2019 Mr. Arthur Holder submitted that in his view* ***section 3 subsection (6)*** *was part and parcel of the definition of rape and it was pellucid in its import that rape in so far as it involved penetration of the anus, required compliance with the clause in the same* ***subsection 6*** *that said "… In circumstances where a penis penetrates a vagina, of another would be rape." The circumstances where a penis penetrates a vagina, he submitted, was here, in the ordinary course of things, a male and a female were concerned not a male and a male.*
>
> *The learned magistrate proceeded to give the following reasons for his decision. He opined referred to the words of* ***section 23*** *of the* ***Act*** *to*

the effect that sexual intercourse does not require the emission of seed, but proof of penetration only. In the ordinary course of life, the male emits seed and penetrates. Receptacles, or organs deemed penetrated are either the vagina, the anus or the mouth for proof or rape. In short, rape in the primary commission of the offence, must of necessity involve a male. In the absence of ***subsection (6)*** *in* ***section 3****, the other party to the sexual intercourse is clearly female. I say all this to blunt and nullify the mistaken view that though* ***section 3 subsection (1)*** *speaks of "person" and appears gender neutral is not to be construed as such.*

Consider ***subsection (4)*** *of* ***section 3*** *which addresses rape in the context of husband and wife. In Barbados, this is a man and a woman. Consider* ***section 4 subsection (1)*** *of the* ***Act*** *where sexual intercourse is with a person who is under the age of 14 years and is not the person's spouse. Two males do not have spousal relations in Barbados. If it is the male that penetrates for sexual intercourse to take place, and the other party is a "spouse", then that person under Barbadian law, is a female. This view is further buttressed in* ***subsection (2)*** *of the same* ***section 4****; the parties to the marriage are in terms of husband and wife, again man and woman. It is very noteworthy that* ***section 4*** *of the* ***Act*** *speaks in terms of "a person."*

Again ***section 8*** *of the* ***Act*** *is to be read similarly to* ***section 4*** *of the* ***Act*** *where there is use of the term spouse. As earlier stated all sexual intercourse involves penetration. If the other party to the sexual intercourse is not a spouse, an offence is committed. Spousal relations are, in Barbados between a man and a woman.*

Since ***section 3*** *of the* ***Act*** *must be read as a whole,* ***subsection (6)*** *has to be regarded as expanding the definition of rape. Having been defined in the forgoing* ***subsections*** *another dimension is added. The expansion of the definition however has a pre-condition; therefore, for the other sub-clauses to be operative, the pre-condition must be satisfied. The* ***subsection*** *states in plain language that "in*

circumstances where the introduction of the penis of a person into the vagina of another would be rape." The question arises: in what circumstances would the introduction of the penis into the vagina of another take place? Where the parties are both male? Where the parties are both female? In neither case is this possible. Only where there is a male and a female or penis and vagina can the circumstances take place.

I reasoned that the language of the subsection was plain and incapable of ambiguity. Rape therefore, as defined in ***section 3 subsection (6) (a)*** *bringing the penis into penetration of the anus or mouth, requires that the circumstances must be the same as those when a penis comes into penetration of a vagina. I reasoned that this required a man and a woman.*

When the ***sexual offences Act*** *is read as a whole,* ***section 9*** *appears to capture the penetration of the anus by the penis outside of the circumstances as outlined in* ***section 3 subsection (6)****. When this happens it is called buggery not rape.*

For the above reasons, the court held that the charge before the court could not stand as it pertained to the accused and virtual complainant both of whom were male in gender.

Respectfully Submitted*"*

DISCUSSION

[95] It is important to refer to the precise terms of the charge which was before the learned magistrate. The charge read:

"That the said accused 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 H N did not consent to the intercourse or was reckless as to whether he consented to the intercourse".

Refer to **section 3 subsection (1)** of the **Sexual Offences Act Chapter 154**."

[96] The court wants to indicate that the best way to fully understand a statute is to first read it from beginning to end. For the purpose of this decision it would be necessary only to analyse the way in which the definition of "rape" is presented in **Cap. 154**.

[97] It is also important to indicate that interpretation of statutes should be guided by rules of construction, and indicators such as the description of the purpose of the legislation which in the case of **Cap. 154** has been set out in the introductory note.

[98] It should also be of some significance to any person interpreting **Cap. 154** that **Section 3** of **Cap. 154** provides a definition of "rape" with no reference whatsoever to gender. In that definition all of the ingredients of the offence are present. This should be sufficient to establish once and for all that there is no established ingredient of the offence of rape which requires that there be a man and a woman involved in the act of rape.

The Mental Element of Rape and capacity to commit Rape

[99] Since knowledge of lack of consent is the most important mental ingredient in the act of rape, the legislation in **section 3 (2)(a)** to **(f)** goes on to describe the acts which would be inconsistent with consent and would indeed demonstrate that there is no

consent. The learned magistrate ignores this aspect of the "circumstances" of rape in his analysis.

[100] **Section 3 (3)** goes to capacity to commit the offence of rape and eliminates a person under the age of 14 years from being capable of committing the offence. **Section 3 (4)** deals with the circumstances in which a husband can commit an act of rape. These provisions require nothing more than a literal construction.

[101] **Section 3(5)** deals with the maximum penalty for the offence of rape committed by a husband. **Section 3(6)** consistent with the scheme of the act, sets out the various acts which may constitute rape if there is no consent. Again there is no reference to gender except by inference in the part of **subsection 3(6)** which speaks to circumstances in which a man **may** rape a woman, being the penis penetrating the vagina of another person, but the act continues to use the term person.

[102] **Cap. 154** then goes on to illustrate *where apart from* (my emphasis) the circumstances of the use of a penis penetrating a vagina, inserting the penis into the mouth or anus again *without consent* (my emphasis), would be an act of rape. Then to crown it all, **Cap. 154** introduces inserting an object not being part of the human body into the vagina (if it is a female organ) or the anus (both male and female organ).

[103] It is therefore clear that an object, not being part of the human body is neither male nor female and an anus is both male and female. In other words, there is no ambiguity at all. The human organs used to commit the rape may be male or an object and the

receptacles may be either male or female. Hence the use of the word person is the most appropriate language for the legislation's purpose of achieving gender neutrality.

RULES OF CONSTRUCTION

[104] The introductory note of the legislation **Cap. 154** declares that it is "[A]n act to revise and reform the law relating to sexual crimes". The commencement date of **Cap 154** is 13 February, 1992. It is therefore logical to presume that the legislation was intended to reform the law relating to sexual crimes, including to broaden the scope of the offence of rape beyond what previously existed under the **Sexual Offences Act, 1956**, therefore, providing a wider range of offences beyond vaginal penetration of a female.

[105] The language used in **Section 3 (1)** speaks to "any person" and "another person" and does not provide for "male" and "female."

CONSTRUING "IN THE CIRCUMSTANCES"

[106] In order to find the literal meaning of **section 3 of Cap. 154** the reader must also construe the language in the relevant subsections and not pick and choose those words which may lead to a convenient interpretation of the statute. **Section 3(6)** importantly uses the words "includes" and "would be" in reference to circumstances in which penetration of the vagina by the penis would be rape and then lists alternative circumstances as **(a)** and **(b)** in the same **subsection**. The question is, to what do the

words “in the circumstances” refer in the legislation. To arrive at an answer to this question the reader has to pay some regard to the expression “would be” which is conditional and descriptive of the word rape. This means that the circumstances referred to here are not the introduction of a penis into a vagina alone, which describes **mere sexual intercourse** but also the circumstances in **subsection (2)** which are **where there is no consent** because of:

> *(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;*
>
> *(e) the use of the accused’s position of authority over the complainant; or*

[107] Again construing the words literally and inferring the meaning that in those circumstances where there is no consent, introduction of the penis of a person into the vagina of another would be rape, one then includes:

> *(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.*
>
> All of these are acts of “rape.”

[108] The aforesaid interpretation gives meaning to all of the words in **subsection (6)** and indeed to **section 3** as a whole. The circumstances also include the insertion of the penis into the mouth, which again if done consensually, is not an offence but **only becomes an offence where there is no consent**. These **subsections** establish that rape no longer refers only to a penis entering a vagina but include the circumstances of the entry of an object not being part of the human body, which again include the vagina or anus. Clearly not only a man can insert an object not being part of the human body into a woman's vagina and not only a woman has an anus.

[109] It would be totally contradictory to repeatedly use the term "person" but then mean in this particular instance, that rape can only be committed by a man on a woman. Hence such an interpretation would only be useful if there were no other possible interpretation. But neither counsel nor the learned magistrate has been able to refer to provisions with similar wording that have been construed in the way they argue **section 3(6) of Cap. 154** is to be construed. Hence the reference to "plain language" by the learned magistrate in relation to **subsection 3(6)** where the learned magistrate must be applying a literal construction implying that the language could only refer to a man and a woman, appears more emotive than meaningfully consistent with the language and intent of the legislation which should be construed contextually.

[110] If indeed the legislature intended that the sexual offence of rape should only include the penetration of the vagina by a penis then why was no specific language used to

establish that there should be no other interpretation? The learned magistrate in his analysis failed to acknowledge that the sentence beginning "in the circumstances" is the beginning of a **subsection** in section 3 where rape is already defined in gender neutral terms and which lists a number of other descriptions of rape which are totally different to the penis entering the vagina. Why should they be construed to all refer to only the circumstances of a man and woman involved in sexual intercourse? Is the **subsection** being interpreted to mean that even if the penis enters the mouth only it would not be rape unless the penis had first entered the vagina? This interpretation makes the use of the section even more difficult than that in which the **subsection** is construed to be listing the various ways in which rape can be committed. But it is obvious that the circumstances which would make these **acts** rape, are lack of consent and those others set out in **section 3(2)**, along with the sexual connotations which would be revealed in the evidence at trial.

[111] The other sections of **Cap. 154** referred to by the learned magistrate which refer to offences which are identified in gender terms, are so identified because they represent human relationships which sometimes fall prey to unlawful sexual acts.

[112] It is logical to presume that these **sections** do not require reform to establish a non-discriminatory policy. It is also important to note that reform of the law generally does not imply the reform of everything.

[113] The learned magistrate very forcefully referred to all of the instances he could identify to demonstrate that sexual intercourse must be between a man and a woman.

Elimination of defences

[114] The learned magistrate first cites **section 23** which clearly intends to remove doubt that there must be emission of seed to establish rape. This section goes to the ingredients of rape where sexual penetration with a penis by a man is involved and does not purport to refer to any other situation or circumstance. **Section 23** eliminates the defence that absence of seed connotes absence of penetration and therefore of rape. But this reference bears no relevance to the insertion of an object into the anus, being part of the human body which is neither male nor female. Consequently **section 23** has no bearing on the construction of **section 3(6)**. One can conclude from this **section** nothing more than that rape where the penis penetrates the vagina is an offence and it therefore needs to be made clear that there need not be emission of seed.

[115] The learned magistrate then goes on to **subsection (4)** of **section (3)** which again is not intended to define rape but merely addresses the circumstances in which a husband can rape a wife, which was not possible under the common law or offences against the person's act without qualification since it would be presumed that a wife consents to sex with her husband by her vows and obligation to consummate the marriage. It therefore eliminates the general defence of "she is my wife." But it

cannot address any other circumstance of rape. The **subsection** is connected to the **mental element** of rape where consent would ordinarily be presumed.

[116] The learned magistrate moves on to **section 4(1)** of the **Act**. This **section** is clearly intended to distinguish between those capable of consent and those who are not. Once again the issue of spousal relations arises because consent is presumed in marital relations unless the circumstances in **section 3(4)** exist. Under this **subsection** the legislation establishes that if the person with whom one has sexual intercourse is under the age of 14 the question of consent does not arise. Again it eliminates the defence of consent because the complainant would not be of age to give such consent. It has no impact on the **definition** of sexual intercourse or of rape declared in **section 3** of the **Act** except that it removes the need to prove lack of consent. The reference to a spouse in the legislation has no impact on the definition of rape but only becomes relevant where the marriage between man and woman subsists. Nothing there says that sex between a man and a woman is an essential ingredient of the offence of rape. That the word person is used is to be consistent with the gender-neutral language of the **Act** and of course the word spouse is also gender neutral. But it is not the intent of the section to make the point that relations similar to spousal relations must exist in order for rape to occur. Again the **section** addresses the defence of marriage between the parties to the offence of rape. **Cap. 154** does not purport to amend the **Marriage Act CAP 218A** of the Laws of Barbados.

[117] However, **section 4** does mean that if any of the examples of the act of sexual intercourse set out in **subsection 3(6)** is applied, there can be no consent if the person with whom the other is having sexual intercourse is under 14 years of age, and therefore this would be treated as rape. The defence of consent would not exist in those circumstances. There is no gender issue here, the issue raised in the **section** is about the absence of consent as long as the person is under 14 years.

[118] **Section 8** of the legislation makes the point that if the person with whom one has sexual intercourse is an "idiot" (an unhappy term), the defence of consent is not available unless the person is one's spouse or the person did not know that the other person was an "idiot, imbecile or mentally subnormal." This again addresses the defence of consent and remains gender neutral. It does not purport to affect the **Marriage Act** and should not be construed as such, since the purpose of the legislation is to reform sexual offences not marriage. The gravamen of the section is to establish that prima facie a mentally subnormal person may not have the mental capacity to consent to sexual intercourse.

[119] It is true that **section 3** must be read "as a whole" but if read carefully, there is no difficulty in the word "person" being construed as gender neutral. Since in every case of its use other than **section 3**, the purpose of the relevant **section** is not to define rape but to set out the circumstances in which rape can exist in spite of historical defences which would no longer apply.

[120] The examples identified above demonstrate that if **Cap. 154** is read in its entirety, it becomes quite clear that consent is always relevant in circumstances involving the offence of rape except where the victim/complainant is below the age of 14 years or lacks mental capacity otherwise.

BUGGERY

[121] The learned magistrate made mention of the fact that the **Act** still includes a section which deems "buggery" an offence. The response to that argument however is that buggery is not synonymous with rape even though it may carry a similar maximum sentence, which presumably remains because buggery can be committed without consent or with aggravation or by force. The sentence handed down in any case would be in keeping with known sentencing guidelines which are generally characterised by the existence of aggravating or mitigating factors along with the need for punishment, retribution, deterrence, and rehabilitation. The aggravating or mitigating factors would arise from the evidence of the offence itself and the offender's circumstances which are ordinarily provided to the court in a report from the probation department and where necessary a report from a licenced psychiatrist or psychologist. But buggery is also to a large extent a gender neutral offence since both men and women could be participants in the offence.

[122] However, the existence of the offence of buggery provides the prosecutor with a choice depending on the circumstances gleaned from the evidence the prosecutor

intends to lead. The prosecutor may look at the facts of a case and determine whether he/she will prefer the charge of rape or buggery. It is not for the learned magistrate to determine what charge the prosecutor must choose. This is a matter exclusively for the prosecution.

[123] Indeed **section 22** of the **Interpretation Act Cap. 1** of the Laws of Barbados makes it very clear that when there is more than one offence committed by an act or omission either one of them may be charged:

> ***Section 22. (1)*** *"where any act or omission constitutes an offence under two or more than two enactments or under an enactment and at common law, the offender shall be liable to be prosecuted and punished under either or any of those enactments or at common law, but shall not be liable to be punished twice for the same offence."*

[124] Based on **section 3 of Cap. 154** if it turns out that there is consent then the proper charge may be buggery, where sex between a man and a man is the offending act. However, if the accused used methods such as forcefully inserting a foreign object in the anus or putting his penis into the mouth of another man or woman without their consent, the proper charge is "rape." A prosecutor may make a choice based on the facts of a case and those facts would be known only from the statements of witness or based or circumstantial evidence from forensic sources. The facts to be led in evidence would guide the prosecutor and it is not within the jurisdiction of the learned magistrate to attempt to determine what the facts are without hearing the evidence.

[125] It is indeed a proper approach to the construction of any law to have regard to the history of the law. The history related by my brother **Chandler JA (Ag)** is therefore enlightening with regard to the origin of the concepts of rape and buggery however it sheds little light on the interpretation of **section 3 (6)** since it ignores the contextual importance of the preamble to **Cap. 154** and the structure of **section 3** itself which clearly defines rape in gender neutral terms and goes on in **subsection 3(6)** to list the various scenarios which could amount to rape using the language "includes" which signals inclusive circumstances rather than exclusive circumstances of rape and the conditional use of "would" which imports the notion of lack of consent in the context of the circumstances outlined in the list of scenarios, the context of the introductory note which speaks to revising and reforming the law in relation to sexual crimes and the gender neutral definition of rape in **section 3(1)** of **Cap. 154**.

[126] In pursuance of the approach which utilizes the rules of construction it is accepted that one should look at commonwealth legislation. Hence refences to similar statutes in other Commonwealth countries is useful. The comparable statutory provisions from others Commonwealth countries make one thing clear; that is, that the drafters of the Barbados legislation could have been more emphatic and inserted after the word person "whether male or female." However, that matter is resolved by the **Interpretation Act Cap. 1** which is always the best reference in aid of the interpretation of legislation. **Section 36** of **Cap. 1** states:

"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 person."

[127] Most significantly, none of the interpretations of the Commonwealth provisions have led to the conclusion that rape can only be committed by a man on a woman even though almost the precise language is used both in their definitions sections and the **subsections** which expand the circumstances which could be considered rape with the exception that in the case of the Australian law it says "whether man or woman."

[128] The reference to authorities which question the unequivocal use of the word "person" as gender neutral would have to be read with **section 22** of **Cap. 1** in mind in the context of **section 3(6)** of **Cap. 154**, it is obvious that the word person is to be construed as gender neutral except in the circumstances of the penis entering the vagina which in itself is not definitive of rape. In Barbados "person" is not being used in an isolated circumstance in **Cap. 154.** It is established in **Cap. 1** that "person" is to include male and female.

[129] Quite apart from **section 36 of Cap. 1** the word "person" is clearly gender neutral. A reference to the Oxford Concise Dictionary makes it clear that there is no innuendo emanating from the word person which causes it to be construed as exclusively masculine or feminine.

[130] Indeed when the legislature wishes to depart from this principal of neutrality there would be a clear indication that this is the case. For example, such as in the **Marriage Act Cap. 218A** which states in **section 3(1)** "a marriage between a man and a woman standing to him in any relationships mentioned in **column 1** of the **Frist Schedule** or between a woman and a man standing to her in any of the relationships mentioned in **column 2** thereof is void." All of the relationships mentioned in the stated columns are female (**column 1)** or male **(column 2)**.

[131] Furthermore, when one looks at **Chapter III** of the **Barbados Constitution** which applies to all persons subject to the law of Barbados, the **Constitution** consistently uses the expression "person." One can only conclude that there is no need to refer to man or woman in this context. This example provides another instance of the importance of a contextual approach to legislative interpretation.

[132] My brother **Chandler JA (AG)** cited the case of R **v Miller [1983] 2 AC 161** and the words of *Lord Diplock* at *174* to the effect that the parliamentary draftspersons leave certain principles of English Law unexpressed in statutes because they know that these principles would generally be accepted unless expressly stated otherwise. While this common law principle generally stated may be true, what we have before us is a specific instance where we have an introductory note speaking to the aim of revising and reforming the law related to sexual crimes. Secondly, there is the consistent use of the term person which is established to be gender neutral in our

Interpretation Act, Cap. 1. To fully comprehend R v Miller, one therefore has to look at the context in which the learned judge was commenting on the intention of Parliament and the mischief in that case. The learned judge made no specific reference to any statute in Barbados or the use of the word person even in the UK, far less in Barbados. It can only be concluded that the weight of the said authority would have to be miniscule in the context of Barbadian statutory law generally and even less relevant in relation to **Cap. 154**. Clearly if the legislative change was so confusing that it made no sense or in no way reflected any change, we would resort to such an authority in aid of construction. In this case it cannot be said that the meaning being urged by the prosecution makes no sense nor that it is not reflected in the actual language used in the statute. Indeed by defining rape in gender neutral terms along with adding **subparagraphs (a)** and **(b)** in **section 3(6) of Cap. 154** Parliament clearly demonstrated an intention to revise and reform the law.

[133] But even if the learned magistrate in the aid of construction relied on the rules developed which have been applied by judges, namely the *literal rule,* the *golden rule* and the *mischief rule* the conclusion would be the same.

[134] Those arguments proffered in favour of the learned magistrate purported to be applying the *literal rule* and giving the words "in the circumstances" the meaning that would apply if the intention was to maintain the common law definition of "rape."

[135] However, even if one accepts that that the *literal rule* could appear to defeat the intention of Parliament to create a gender neutral law, the interpretation that makes sense would still imply that the phrase "in the circumstances" refers to the "lack of consent" and other situational circumstances which would include a sexual assault including a physical act of violence of some kind. This would also be the conclusion if one applies the *golden rule* which relies on the context of the legislative provision falling to be construed.

[136] If the *mischief rule* is applied the interpretation would secure the same result. As would the *purposive approach* approved by *Lord Denning* in **Nothman v Barnet London Borough Council [1978] 1 W.L.R. 220** which means the approach would "promote the general legislative purpose underlying the provisions."

[137] An example of the purposive approach is also found in **Jones v Tower Boot Co Ltd (1997) IRLR 168**, where the complainant suffered racial abuse at work, which he claimed amounted to racial discrimination for which the employers were liable under **section 32** of the **Race Relations Act 1976**. The Court of Appeal applied the *purposive approach* and held that in relation to the acts of discrimination which were committed the phrase "in the course of employment" is to be given an everyday, rather than a tort law meaning. Any other interpretation ran counter to the whole legislative scheme and underlying policy of **section 32**.

[138] It should also be noted that if another linguistic approach namely the "*expressio unius*" rule is applied the conclusion would be that the clear intention of the legislation is to speak in gender neutral terms by making use of the word "person" rather than, man or woman. This logically excludes the presumption that the non-gender neutral interpretation is applicable since "person" is used consistently in the legislation. In **section 3(6) of Cap. 154** the reference to penetration of the vagina by the penis is not exclusive but is complemented by **sub paragraphs (a)** and **(b)** which as already indicated are to be included in the scenarios which could qualify as rape and some of them are gender neutral.

[139] I note the submissions of counsel for the crown with approval so far as they relate to the construction of **section 3(6)** of **Cap. 154**. Her analysis may not have attempted to construe all of the operative language of the subsection but it captured the meaning and purpose of it.

[140] On the other hand counsel for the respondent made it clear at the hearing that his intention was to file a motion to have buggery deemed unconstitutional at the first opportunity and like the learned magistrate appeared to be focused on policy rather than an objective construction of the relevant **sections** of **Cap. 154**.

[141] It is notable that neither counsel for the respondent nor the learned magistrate seem to attribute the wording of **section 3(6) of Cap. 154** to any attempt to reform and thus

the language used "in the ordinary course of things" betrays their unwillingness to even consider a possible reform of the law.

[142] At the end of the day clarity is a matter of construction and construction must be guided by law. Hence as stated above a reference to a mere sexual act makes no sense as an illustration of rape unless reference to "circumstances" in the subsection is construed to mean the *mens rea* of rape which is knowledge of lack of consent.

[143] I should indicate that I am not in agreement with a stance which professes that all law is gender neutral. We who have some exposure to criminal law and sexual offences know that in the case of rape, the offence was so infused with gender implications that judges used to sum up to the jury with regard to care in convicting, with the words "women often lie about sex." That practice has been thrown into the legal dump heap. But it belies the assertion that all law is gender neutral. The gender neutrality arises from deliberate legislative reforms and consequential new construction of statutes in line with a global and regional gender neutrality campaigns along with other practises which bring more balance to the law. I will refer to this campaign later.

CHOICE OF OFFENCE TO PROSECUTE

[144] I also wish to note that the office of the Director of Public Prosecutions is an independent office in this country. The DPP and her officers and indeed the Commissioner of Police (who may take advice from the DPP), have the right to exercise discretion with regard to prosecution of offenses. Judicial officers should be very wary of treading on the precincts of the prosecution who may adopt a policy with regard to any offence including buggery, if deemed fit. There may be many reasons for a policy position including doubt about the ability to obtain a conviction, but this is not the only consideration. The stigma inflicted on a person who allegedly participates in an act of buggery would be a fair consideration, as would be the fact that the act in this case was an act of force and therefore should not be confused with a consensual act. The prosecution could also consider possible constitutional challenges to certain offences which contribute to the choice of the charge.

[145] Judicial officers should not appear to be casting doubt on a prosecutor's constitutionally and statutorily protected right to choose which offence to prosecute, in line with known facts on the basis that they would like to see a different offence prosecuted or by stating or implying that the amended statute sets out to do something (such as declare consensual sex between two men lawful) when there is no such statement in the law. Indeed that issue is not before the court. Indeed any such presumption is based on mere speculation and should not form part of the reasoning

against the lawful right of the prosecutor to choose an offence to prosecute based on the facts before her or him.

[146] The latter point is emphatically made by the authors of *Archbold Criminal Pleadings Evidence & Practice, 2009*. In paragraph 4-48 under the heading Abuse of Process the authors of the *Practitioner's Text* refer to an excerpt from the speech of *Lord Salmon* in **DPP v Humphreys [1977] A.C. 1** at **page 46 C-F**.

> *"I respectfully agree with [Lord Dilhorne] that a judge has not and should not appear to have any responsibility for the institution of prosecutions, nor has he any power to refuse to allow prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought, but the power of the court to prevent them is in my view, of great constitutional importance and should be jealously preserved. For a man to be harassed and be put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court of the power to which I have referred."*

[147] The idea that the failure to utilize **section 9** buggery is in some way strange is not a matter for the court in this case and cannot logically lead to a construction of the clear intent of the legislation in **section 3(6)**. The reference to buggery in my view is irrelevant and should play no part in the construction of **section 3(6)** of the legislation. It is much more persuasive in my view to have regard to the historical background to the reforms and be guided by well tested rules of construction, than to question the

ability of legal draftspersons and law makers in Parliament to follow through on a plan to reform the law.

[148] **Cap. 154** sets out to reform the law of rape and other sexual crimes. It says that is its intent and the construction of **section 3(6)** being urged upon this court by others, makes no sense in the context of law reform. But as in many other things the reforms may not reach into other areas of law such as marriage or consensual sex between males. That is the prerogative of Parliament and should not be construed to mean that they did not know what they were doing when they created a new definition of rape and consequently they did not amend the definition of rape. Indeed this is an illogical conclusion which makes no sense.

[149] It should be noted that in light of the arguments which appear to reject gender neutrality, it is important to refer to the extent of the evidence that gender neutrality in the law is at the centre of a human rights campaign which has already been addressed by the Caribbean Court of Justice (**CCJ)** in the case of **Quincy McEwan et al v The Attorney General of Guyana [2018] CCJ 30 (AJ)**. At **para 68** of this decision the learned President said:

> *"At its core, the principle of equality and non-discrimination is premised on the inherent dignity of all human beings and their entitlement to personal autonomy. There is a marked link between gender equality, self determination and the limits placed on self-determination by gender stereotypes. The CEDAW [1] Committee has noted that:"*

[1]UN Convention on the Elimination of Discrimination Against Women

"inherent to the principle of equality between men and women, or gender equality, is the concept that all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers and make choices without limitations set by stereotypes, rigid gender roles and prejudices.."

THE DISCRIMINATION ISSUE

[150] The argument against the intent to make **section 3** of **Cap. 154**, gender neutral therefore purports to establish that in spite of signing and ratifying the CEDAW in 1980, the government of Barbados set out to declare to the whole world that it was in compliance with the recommendations of CEDAW via its amendments to the **Sexual Offences Act** when in fact it was not in compliance.

[151] I find it difficult to accept that the Parliament of Barbados, intending to reform its law, would embark upon an exercise in obfuscation. It is much easier to accept that they amended the law in the manner described by the appellant and refrained to do so in **section 9** because of local values. Any inconsistency with gender neutrality in that context is likely to be based on local conditions and not on the definition of buggery itself.

[152] But it must be said that the Parliament of Barbados may have been responding to a campaign which is exemplified by a report prepared by the organization Human Rights Watch on the situation facing LGBT people in the Eastern Caribbean including

Barbados, and which was referred to in **Quincy McEwan et al** and of which I take judicial notice. That report made the following recommendations, *inter alia*:

> *i. Repeal all laws that criminalize consensual sexual activity among persons of the same sex.*
>
> *ii. Ensure that criminal laws and other legal provisions are not used to punish consensual sexual activity among persons of the same sex.*
>
> *iii. Pass laws defining the crime of rape in a gender-neutral way so that non-consensual sex between men or between women is included in the definition and subject to equal punishment.*
>
> *iv. Consistent with the principle of non-discrimination, ensure that an equal age of consent applies to both same-sex and different sex sexual activity.*

[153] It is noted that the **Sexual Offences Act Cap 154** of Barbados followed these recommendations in at least two of the instances listed.

[154] Finally, I must state also that not only would the prosecution have been constrained to argue that the legislation clearly changes the definition of "rape" allowing rape to be committed by a man against another man, but the constitutional framework makes it imperative that the construction of the legislation be liberal to provide the broadest meaning possible within the scope of the stated intention to eliminate discrimination and considering the possible impact of the **CCJ** decision in **McEwen Et al**. One should not ignore this element of the construction of the law and confine the

construction to the narrowest interpretation possible. The non-discrimination approach addresses the need to protect the right of the accused since it is his right not to be discriminated against as a male person along with the victim's right to be protected by the law.

THE RIGHTS OF THE ACCUSED

[155] In the context of equality and non-discrimination then, lest it be argued that it would not be fair to the respondent to prosecute him under a statute that is unclear, it should be considered that the respondent's rights are being protected by the decision not to charge buggery where the prosecution would not be required to prove "lack of consent", while the virtual complainant is being protected by being seen as a victim of an act of violence or trickery, rather than a willing participant in act which is stigmatized in this society.

[156] In light of this approach, the construction of the law should strictly recognise the non-discriminatory intent of the word "person" unless it is clearly shown that there was another intent not inconsistent with **section 23** of the Constitution of Barbados.

Judicial Transparency

[157] In conclusion, I do not think that this judgement would be complete without raising the issue of the learned magistrate's jurisdiction in proceeding to dismiss the charge of rape in the circumstances in which he purported to make that order. Indeed even if it could be argued that he had the jurisdiction to do what he did, such jurisdiction

should have been clearly articulated at the forefront of the reasons for his decision so that the statutory context and the full array of the options before him could be assessed for all to see.

[158] I note with some concern in this regard that the learned magistrate stated in his reasons for the decision that he inquired of the virtual complainant whether the person presenting was a male or female. The learned magistrate said, he indicated that he was male and on similar inquiry the accused too indicated that he was male. Nowhere in his reasons does the learned magistrate state what procedure he was embarking upon. He never stated that he took these statements from the accused (before him) and the complainant on oath. Neither did he state that he was pursuing the examination of the witnesses before him pursuant to **Sections 19 and 20** of the **Magistrates Court Act Cap. 116A** of the laws of Barbados since rape is an indictable offence. It is therefore somewhat unclear exactly how he embarked upon a decision to dismiss the charge of rape against the accused person who was before him.

[159] What the learned magistrate says he did next does not enlighten us any further. He said he drew his concern to the Police prosecutor that the charge appeared to him to be incongruent. He drew **section 3 (6)** of the **Sexual Offences Act** to the attention of both the Police Prosecutor and counsel for the accused, Mr Arthur Holder. He then invited them to make submissions on the point at a future date.

[160] None of the aforesaid steps shed any light on the process upon which the learned magistrate was embarking and what it had to do with his duties pursuant to **sections 19 and 20 of Cap. 116A**. Under **section 19** the learned magistrate had the power to state that the matter was being sent to the High Court for the accused to face the charge of buggery. Indeed it is arguable that he could have done the same thing pursuant to **section 20 of Cap. 116A**.

[161] But in both instances he should have indicated that he heard (under oath) or read the statements of witnesses, before coming to his conclusion if there was no objection to him doing so from counsel.

[162] The question therefore arises whether the learned magistrate acted within his jurisdiction since this is in doubt based on the scant information about the process provided in his Reasons for Decision.

[163] In all the circumstances, I must conclude that the learned magistrate was clearly wrong to dismiss the charge against the respondent without hearing the evidence from the prosecution. Secondly his construction of **section 3(6)** of **Cap. 154**, the only relevant **section** in this matter, is erroneous in point of law and should be rejected by this court.

DISPOSAL

[164] The court would therefore allow the appeal and remit the case to the Magistrate's Court for District "B" to be dealt with according to law.

Justice of Appeal