Trinity Term
[2013] UKSC 43
On appeal from: [2011] NICA 47

JUDGMENT

R *v* Brown (Appellant) (Northern Ireland)

before

Lord Neuberger, President
Lady Hale
Lord Kerr
Lord Wilson
Lord Reed

JUDGMENT GIVEN ON

26 June 2013

Heard on 7 March 2013

Appellant
Eilis McDermott QC
Donal Sayers
(Instructed by McCoy Steele Solicitors)

Respondent
Barra McGrory QC
Robin Steer
(Instructed by Public Prosecution Service of Northern Ireland)

LORD KERR (with whom Lord Neuberger, Lady Hale, Lord Wilson and Lord Reed agree)

Introduction

1. On 6 August 2003 a young man of 17 and a young girl of 13 had sexual intercourse. Afterwards the young girl told her mother that this had occurred but she suggested that she had not been a willing participant. Understandably, her mother went to the police and the young man was arrested. Later her daughter retracted her account of not having consented to sexual relations. The young man was therefore charged with a less serious offence than that which he might have faced. It was, nonetheless, a serious charge. He was charged with having had unlawful carnal knowledge of a girl under the age of 14 years contrary to section 4 of the Criminal Law Amendment Acts (Northern Ireland) 1885-1923.

2. The young man pleaded guilty to that charge at Belfast Crown Court on 22 June 2004. That plea had been entered on the basis that the offence created by section 4 was one in which reasonable belief that the girl was over the age of 14 was not available to him as a defence. The defendant was sentenced to three years' detention in a Young Offenders' Centre. The sentence was suspended for two years. Later, having received different legal advice from that which had prompted his plea of guilty, the young man applied to the Court of Appeal in Northern Ireland for leave to appeal against his conviction. The issue before the Court of Appeal was whether section 4 of the 1885 Act created an offence in which proof that the defendant did not honestly believe that the girl was over the age of 14 was not required. That is also the issue with which this court has had to deal.

The legislative provisions

3. Traditionally, sexual offences (other than forced intercourse) against girls and young women have been dealt with in legislation according to age bands, with, in general, more grave offences reserved for and heavier penalties imposed for crimes involving younger females. A clearly discernible historical trend of increasing the age of the victim at which liability for more serious offences is incurred, while reducing the sentence to be imposed, can be detected. Thus, section 20 of the Offences against the Person (Ireland) Act 1829 provided that any person who had unlawful carnal knowledge of a girl under the age of ten years was guilty of a felony, punishable by death. By contrast, the same section provided that unlawful carnal knowledge of a girl between ten and 12 years was a misdemeanour punishable by a term of imprisonment at the discretion of the court.

4. Section 50 of the Offences against the Person Act 1861 reduced the sentence to be imposed for the felony of unlawful carnal knowledge of a girl under the age of ten to, at the discretion of the court, penal servitude for life or for a term of not less than three years or imprisonment for a term not exceeding two years with or without hard labour. For unlawful carnal knowledge of a girl between the ages of ten and 12, a defendant was guilty of a misdemeanour under section 51 of the same Act and liable to be sentenced to penal servitude for three years or to be imprisoned for up to two years with or without hard labour. Section 3 of the Offences against the Person Act 1875 made it a felony to "unlawfully and carnally know and abuse" any girl under the age of 12 years.

5. Section 4(3) of the Criminal Law Amendment Act (Northern Ireland) 1923 provided that the Criminal Law Amendment Acts (Northern Ireland) 1885-1912 and the Criminal Law Amendment Act (Northern Ireland) 1923 should, to the extent to which they applied to Northern Ireland, be cited together as the Criminal Law Amendment Acts (Northern Ireland) 1885-1923.

6. Section 2 of the 1885-1923 Acts provided for a procuration offence:

> "Any person who-... procures or attempts to procure any girl or woman under 21 years of age … to have unlawful carnal connexion, either within or without the Queen's dominions, with any other person or persons ... shall be guilty of a misdemeanour …"

7. Section 4, as amended, and in so far as is relevant to the present appeal, provided that "Any person who unlawfully and carnally knows any girl under the age of 14 years shall be guilty of felony, and being convicted thereof shall be liable to be imprisoned for life or to be fined or both". (As originally enacted, section 4 had stipulated an age of 13 years. This was increased to 14 by the Children and Young Persons Act (Northern Ireland) 1950).

8. As also originally enacted, section 5 of the 1885 Act provided for an offence of unlawful carnal knowledge of a girl between 13 and 15. The age limit was increased by section 13 of the 1950 Act so that in its amended form it provided as follows:

> "Any person who ... unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl under the age of 17 years; shall be guilty of a misdemeanor …"

9. Section 6, as amended by section 13 of the 1950 Act, provided for an offence of permitting defilement on premises:

> "Any person who, being the owner or occupier of any premises, or having, or acting or assisting in, the management or control thereof - induces or knowingly suffers any girl … to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, shall ... if such girl is under the age of 17 years be guilty of a misdemeanour…"

10. Section 7 provided for an offence of abduction:

> "Any person who - with intent that any unmarried girl under the age of 18 years should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally - takes or causes to be taken such girl out of the possession and against the will of her father or mother, or any other person having the lawful care or charge of her, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years or to be fined or both.
>
> Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court or jury that the person so charged had reasonable cause to believe that the girl was of or above the age of 18 years."

11. Provisos of a similar nature to that contained in the latter part of section 7 were included in sections 5 and 6 of the 1885 Act as originally enacted. These were removed by section 2 of the 1923 Act, as amended by section 13 of the 1950 Act:

> "Reasonable cause to believe that a girl was of or above the age of 17 years shall not be a defence to a charge under sub-section (1) of section five or under section six of the Criminal Law Amendment Act 1885 …"

12. In August 2003, therefore, the Criminal Law Amendment Acts (Northern Ireland) 1885-1923 included five offences in which age was an essential component of the actus reus, of which two (sections 2 and 4) were silent as to the

effect, if any, of reasonable belief as to the age of the girl; two (sections 5 and 6) were subject to an express exclusion of a defence of reasonable belief as to age; and one (section 7) was subject to a defence of reasonable belief as to age.

13. Thus, from 1885 until 1923, unlawful carnal knowledge of a girl of 13 years or more was not an offence under section 4. During the same period such an offence was committed under section 5 of the 1885 Act if the girl was between the ages of 13 and 15 but a defence of reasonable belief that the girl was 16 years or more was available. From 1923 until 1950 unlawful carnal knowledge of a girl of 13 or more continued not to be an offence under section 4. During that time, however, unlawful carnal knowledge of a girl between 13 and 15 years did not require proof under section 5 that the defendant did not believe that the girl was over the age of 16. From 1950 onwards sexual intercourse with a girl under the age of 14 became an offence under section 4.

The appellant's arguments

14. The appellant argued that the approach to the interpretation of section 4 of the 1885-1923 Acts must be informed by a fundamental common law principle. This was that there should be a mental element, commonly referred to as mens rea, for criminal liability unless a clear intention was evinced by the words of a statute that a particular criminal offence should be one of strict liability. The presumption that mens rea was required could only be displaced, it was suggested, where it could be shown that this was the unmistakable intention of Parliament. Such an intention was less readily found to exist where the offence was a serious one. In this regard, reliance was placed on the judgment in *R v Muhamad* [2003] QB 1031 where, at para 19, Dyson LJ said:

> "The offences where no mental element is specified, for the most part, attract considerably lower maximum sentences than those where a mental element is specified."

15. Since section 4 was silent on the question of whether proof of mens rea was required, the appellant submitted that the offence specified in the provision could only be regarded as not requiring such proof if that had to be unavoidably and necessarily implied. The suggestion that a particular provision imposed strict liability had to be considered, the appellant argued, in its statutory and social contexts. The Criminal Law Amendment Acts (Northern Ireland) 1885-1923 fell to be interpreted as they stood at the time of the appellant's offence: that is, with an express provision making clear that no defence of reasonable belief applied to sections 5 and 6, but remaining silent as to the mens rea of an offence contrary to section 4.

16. The legislative history of the relevant provisions, although not irrelevant, was, the appellant argued, merely one factor to be taken into account. In this regard, reference was made to the speech of Lord Steyn in *R v K* [2002] 1 AC 462, para 30 where he said that it was unhelpful to "inquire into the history of subjective views held by individual legislators" and that the "always speaking" nature of a statute dealing with sexual offences meant that a particular provision had to be interpreted "in the world as it exists today, and in the light of the legal system as it exists today". The statutory context of section 4 therefore suggested that the presumption that mens rea was required had not been displaced.

17. The appellant argued further that, if an implication of strict liability was to be considered as compellingly clear, it must arise from a coherent and consistent legislative scheme. The Acts of 1885-1923 did not fit that description. The express provision of a defence of reasonable belief to an offence under section 7, when considered alongside the explicit exclusion of such a defence to offences under sections 5 and 6, and silence on the issue under section 4, meant that the legislation contained signposts which pointed in various directions. It was impossible to detect a convincingly obvious implication.

18. As to the social context of the offence under section 4, the appellant again referred to the particular strength of the presumption where the offence was serious or, as described by Lord Scarman in *Gammon (Hong Kong) v Attorney General of Hong Kong* [1985] AC 1, 14, "truly criminal". The offence under section 4 was unquestionably serious and carried a maximum penalty of life imprisonment. As Lord Bingham said in *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264, para 6, "The more serious the crime, and the more severe the potential consequences of conviction, the less readily will it be displaced".

19. The appellant accepted that section 4 dealt with an issue of social concern but pointed out that Lord Scarman in *Gammon (Hong Kong) v Attorney General of Hong Kong* had observed that the presumption of mens rea should stand unless it could be shown that the creation of strict liability would be effective to promote the objects of the statute. The objects of the statute in this context were considered to be the encouraging of greater vigilance to prevent the commission of the prohibited act. To the extent that strict liability might be said to promote the objects of the statute by encouraging greater vigilance against sexual intercourse with girls under the age of 17, it was submitted that this was sufficiently achieved in Northern Ireland by the strict liability imposed under section 5.

20. Finally, in a written submission provided on his behalf after the hearing of the appeal before this court, it was pointed out that the appellant could not have been convicted of the section 4 offence in 1885 (the time of the original enactment) since the offence at that time related to girls under the age of 13. Nor

could he have been convicted of such an offence until 1950. An analysis of whether the common law presumption was displaced had to be conducted against the background that no consistent policy approach had been adopted to the question of whether unlawful carnal knowledge of a girl under 14 years should be a strict liability offence.

The case for the respondent

21. The proviso introduced by sections 5 and 6 of the 1885 Act introduced for the first time, the respondent explained, a defence of reasonable belief as to the age of the person against whom an offence under these sections was charged. The background against which the defence had been made available was that *R v Prince* (1875) LR 2 CCR 154 had held that reasonable grounds for believing that the girl involved was over the age of consent did not constitute a defence under section 51 of the Offences against the Person Act 1861. But when Parliament came to abrogate that rule in 1885, it did so (by virtue of section 5 of the 1885 Act) only in relation to girls between the ages of 13 and 16. It did not do so in relation to girls under the age of 13. The decision not to provide for a similar defence under section 4 of the 1885 Act could not have been other than deliberate, it was argued.

22. This was not the only distinction between sections 4 and 5, however. A limitation period of three months on the prosecution of offences under section 5 was also provided for but there was no corresponding provision in section 4. (This limitation period was subsequently increased to 12 months but it was expressly recommended that no such limitation should be introduced for an offence of unlawful sexual intercourse with a girl under the age of 13 because of the gravity of that particular offence – in this regard, see *R v J* [2005] 1 AC 562, para 10).

23. Section 4 of the 1885 Act also made specific provision for a lesser sentence in respect of an attempt. And, as originally enacted, it also provided for a less severe sentence with respect to young offenders under 16. Neither of these different sentencing options was provided for by section 5(1), however.

24. In England and Wales maintenance of the distinction between, on the one hand section 4 and, on the other, sections 5 and 6 of the 1885 Act, could be seen, the respondent argued, in the amendments introduced by section 2 of the Criminal Law Amendment Act 1922. It appears that the government had intended to remove altogether the defence of reasonable cause to believe that the girl was over the age of 16 years but, by way of compromise, introduced what has become known as "the young man's defence". By virtue of section 2 of the 1922 Act a man of 23 years or less could avail of the defence (on the first occasion that he was charged with an offence under sections 5 or 6 of the 1885 Act) that he had reasonable cause

to believe that the girl was over the age of 16 years. No such defence was provided for in relation to offences under section 4.

25. In 1923 the Northern Ireland Parliament, in one of its first items of legislation, achieved, according to the respondent, what Parliament in Westminster had failed to bring about in 1922, namely, the complete abolition of the defence of reasonable belief on the part of the defendant that the girl was above the age of consent. To have abolished that defence in relation to sections 5 and 6 while leaving open the question whether such a defence might be available in respect of the more serious offence under section 4 was inconceivable, the respondent claimed. It was therefore argued that it has always been undeniably clear that an offence under section 4 should be one in which proof of mens rea as to the age of the victim was not required.

Discussion

26. The constitutional principle that mens rea is presumed to be required in order to establish criminal liability is a strong one. It is not to be displaced in the absence of clear statutory language or unmistakably necessary implication. And true it is, as the appellant has argued, that the legislative history of an enactment may not always provide the framework for deciding whether the clearly identifiable conditions in which an implication must be made are present. It is also undeniable that where the statutory offence is grave or "truly criminal" and carries a heavy penalty or a substantial social stigma, the case is enhanced against implying that mens rea of any ingredient of the offence is not needed.

27. The strength of the constitutional principle in favour of a presumption that criminal liability requires proof of mens rea finds eloquent expression in what Lord Nicholls, in *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428, 460, referred to as the "magisterial statement" of Lord Reid in *Sweet v Parsley* [1970] AC 132, 148-149:

> "… there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea . . . it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary"

28. In *B (A Minor)* Lord Nicholls reinforced that essential message at p 460G where he said:

> "… the starting-point for a court is the established common law presumption that a mental element, traditionally labelled mens rea, is an essential ingredient unless Parliament has indicated a contrary intention either expressly or by necessary implication. The common law presumes that, unless Parliament has indicated otherwise, the appropriate mental element is an unexpressed ingredient of every statutory offence."

29. One must begin, therefore, with this strong presumption firmly at centre stage. And its ready displacement should not be countenanced, as has, perhaps, happened in the past. In *Smith and Hogan's Criminal Law*, 13th ed (2011), para 7.2 the authors deprecated the tendency of some judges to declaim that the presumption was well-embedded only to willingly find that it was easily rebutted.

30. Lord Bingham made clear in *R v K* [2002] 1 AC 462, para 18 that description of an offence such as that prescribed by section 4 as an absolute offence or an offence of strict liability is a misnomer. There must always be deliberation on the part of the defendant in committing the acts which constitute the factual underpinning of the offence. The real and proper question is whether it must be proved that there was a lack of reasonable belief, on the part of the perpetrator of the acts, that the girl was above the prescribed age. In *R v K* at para 17 Lord Bingham referred with approval to Lord Steyn's quotation in *B (A Minor)* at p 470F of Professor Sir Rupert Cross's statement that the presumption that mens rea was required in the case of all statutory crimes was a "constitutional principle … not easily displaced by a statutory text". These sturdy assertions provide the setting for the inquiry whether mens rea in relation to the girl's age had to be proved in order to found liability under section 4.

31. That inquiry must start, I believe, with a clear understanding of what the legal position was at the time that the relevant provisions were enacted. It is true that the subjective intention of individual legislators will not always provide an incontrovertible guide to the meaning of the legislation, as Lord Steyn said in *R v K*. But one must at least begin with an examination of what the legislative intention was before considering whether modification of that intention is justified by later amendments or contemporary social contexts.

32. In my view, there can really be no doubt that section 4 in its original form was intended to impose criminal liability for carnal knowledge of a female under the age of 13 without proof that the perpetrator knew or had reason to believe that

she was below that age. Two considerations make that conclusion inevitable. Firstly, the decision in *R v Prince* had confirmed that proof of knowledge or lack of reasonable belief in the age of the victim was not required. Coming as it did merely ten years before the 1885 Act, that decision formed the crucial backdrop to the enactment of section 4. It is inconceivable that, had it been intended that such proof was required, section 4 would have remained silent on the issue. Secondly and relatedly, the juxtaposition of sections 5 and 6 (in which a dispensing proviso was contained) with section 4 makes it impossible to conclude that the absence of such a proviso in section 4 signified anything other than a clear intention that a defence of reasonable belief in the girl's age was not to be available. This is particularly so because the 1885 Act introduced for the first time such a defence in relation to offences of the type provided for in sections 5 and 6. It seems to me unquestionable that the decision not to extend the defence to offences under section 4 was deliberate and that it clearly signified that the legislature intended that no such defence would be available in relation to offences under that section.

33. That being so, the next question is whether the amendment in the 1923 Act made any difference to the availability of the defence under section 4. The appellant contended that the textual amendment of the 1885 Act prompted consideration within a new context of the question whether the presumption that mens rea is required had been displaced. A change to the statutory framework, the appellant argued, required examination of that question from an entirely new perspective – one in which, in contrast to that which had hitherto obtained, the defence of reasonable belief no longer applied to sections 5 and 6 (as a consequence of explicit provision to that effect) but the question of whether it applied to offences under section 4 was open because of the absence of any reference to it in that section.

34. It would be a curious, indeed anomalous, outcome of the removal of the defence from sections 5 and 6 that it should be implied into section 4 to which it had not previously applied. At a technical or theoretical level, it can be argued that such a result is feasible because, as the appellant has submitted, the 1885-1923 Acts are to be construed as a whole in their amended form. *Bennion on Statutory Interpretation,* 5th ed (2008) describes the effect of textual amendment of a statute at p 290 as follows:

> "... under modern practice the intention of Parliament when effecting textual amendment of an Act is usually to produce a revised text of the Act which *is thereafter to be construed as a whole.* Any repealed provisions are to be treated as never having been there, so far as concerns the application of the amended Act for the future." (original emphasis)

35. The appellant has pointed out that in *B (A Minor)*, in deciding whether the presumption was rebutted, both Lord Nicholls and Lord Steyn had taken account of the amendment of the applicable maximum penalty from two to ten years' imprisonment. And in *R v Kumar* [2005] 1 WLR 1352, paras 11-13, 28, the Court of Appeal construed section 12 of the Sexual Offences Act 1956 in its present form within an amended statutory framework that included the Sexual Offences Act 1967 and amendments to section 12 in 1994 and 2000, by virtue of which homosexual acts between consenting males of a prescribed age were decriminalised. It was suggested therefore that a new approach to the interpretation of section 4 is now warranted.

36. I cannot accept that argument. In the first place, while the amended legislation is to be construed as a whole in its revised form, it does not follow that its antecedent history be left entirely out of account. More pertinently, the relevant amendment of the 1885 Act *removed* a defence which had previously been available for offences under sections 5 and 6 when none had existed for offences under section 4. To suggest that the removal of the defence under sections 5 and 6 would have the effect of introducing it under section 4 by implication takes contrivance too far. I am satisfied that in its statutory context section 4 must be interpreted as not requiring proof that the defendant did not know or reasonably believe that the girl was aged 14 or over.

37. The appellant's argument that the Acts of 1885-1923 did not form a coherent and consistent legislative scheme must likewise be rejected. The fact that the legislation "contained signposts which pointed in various directions" does not render it incoherent. It is entirely logical (and in keeping with the historical trend described earlier) that a defence of reasonable belief should be available for the less serious offences prescribed by sections 5 and 6, but that it should not exist for the more grave offence under section 4. For essentially the same reasons, I would reject the appellant's argument that there was no consistent policy approach to the question of whether unlawful carnal knowledge of a girl under 14 years should be a strict liability offence. On the contrary, the policy approach of protecting younger females by ensuring that a defence of reasonable belief should not be available has been unswerving. The fact that the age was increased from 13 to 14 does not make the policy inconsistent. It merely represents the evolution of changing views as to when the policy should take effect.

38. Finally, there is nothing in the contemporary social context which militates against the denial of the defence of reasonable belief as to age for section 4 offences. This issue was dealt with authoritatively in *R v G (Secretary of State for the Home Department intervening)* [2009] AC 92. In that case the appellant had pleaded guilty to an offence of rape of a child under the age of 13, contrary to section 5 of the Sexual Offences Act 2003. The prosecution had accepted the appellant's claim that the girl had consented to sexual intercourse and had told him

that she was 15 years old. The appellant himself was 15 at the time of the offence and the girl was aged 12. At para 3 Lord Hoffmann said:

> "The mental element of the offence under section 5, as the language and structure of the section makes clear, is that penetration must be intentional but there is no requirement that the accused must have known that the other person was under 13. The policy of the legislation is to protect children. If you have sex with someone who is on any view a child or young person, you take your chance on exactly how old they are. To that extent the offence is one of strict liability and it is no defence that the accused believed the other person to be 13 or over."

39. Precisely the same policy considerations underpin section 4 of the 1885-1923 Acts. Young girls must be protected and, as part of that protection, it should not be a defence that the person accused believed the girl to be above the prescribed age. As Lady Hale said in para 46 of *G*, "When the child is under 13 … [the accused] takes the risk that she may be younger than he thinks she is. The object is to make him take responsibility for what he chooses to do…" If you have sexual intercourse with someone who is clearly a child or young person, you do so at your peril.

40. I would dismiss the appeal.