In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2015: 16

FIONA MILLER
(Police Sargent)

Appellant

-v-

ROMARIO DILL

-and-

SHILOH ROBINSON

Respondents

JUDGMENT

(in Court)[1]

Appeal by Informant-sexual exploitation-whether section 190 of Criminal Code imposes evidential or legal burden on accused persons in respect of defence to charge under section 182A of Criminal Code

Date of hearing: April 19, 2016
Date of Judgment: May 26, 2016

Mr Loxly L. A. Ricketts, Department of Public Prosecutions, for the Appellant
Mr Javone Rogers, Mussenden Subair Limited, for the 1st Respondent
Mr Charles Richardson, Compass Law Chambers, for the 2nd Respondent

[1] The present Judgment was circulated to counsel without a hearing.

Introductory

1. The Informant appeals the acquittals of the Respondents in the Magistrates' Court (Wor. Archibald Warner) on May 11, 2015 of a joint charge of unlawfully touching a young person under sixteen years of age for a sexual purpose, contrary to section 182A(1)(a) of the Criminal Code. At the beginning of the hearing Mr Ricketts confirmed that the main purpose of this appeal was to clarify the law and that if it succeeded a retrial would not be sought.

2. The principal ground of appeal was that the Learned Magistrate erred in law in that he found that section 190 of the Criminal Code imposed an evidential burden rather than a legal burden in respect of the statutory defence. This point was difficult to readily accept because it appeared to me to be the accepted wisdom of the Bermudian courts that the ECHR case law was broadly followed. On this basis, the Appellant sought to overturn the orthodox view that reverse onus provisions merely imposed an evidential burden on an accused person without relieving the Crown of the ultimate legal burden of disproving any defence which was sufficiently raised on the evidence.

3. However, Crown Counsel also raised an ancillary point which I also had considerable difficulty grappling with in the context of a less than straightforward statutory provision. Was consent, raised at trial, legally relevant at all?

The Magistrates' Court Ruling

4. The impugned Ruling on the issue of burden of proof stated in material respects as follows:

> "*In Sheldrake Lord Bingham directs the lower Courts that when deciding the issue of burden of proof the considerations for the Court should be those set out in R-v-Johnstone. These considerations are:-*
>
> *(1) The more serious the punishment which may flow from conviction, the more compelling must be the reasons [for finding that the accused bears the ultimate legal burden of proof].*
>
> *(2) The extent and nature of the factual matter required to be proved by the accused-and their importance relative to the matters required to be proved by the prosecution.*

(3) The extent to which the burden on the accused relates to facts which, if they exist are readily provable by him as matters within his own knowledge or to which he has ready access.

Having applied Johnstone considerations to this case I rule that the burden of proof lies on the Prosecution to show that the Defendants separately did not have reasonable cause to believe that the Complainant was sixteen and did in fact not have that belief at the time of the offence."

The statutory provisions

5. The Complainant was just one week shy of 14 years of age on the date of the alleged offence. The 1st Respondent was 19 years of age and the 2nd Respondent was 16 years of age at the time of the alleged offence under section 182A of the Criminal Code.

Consent/ belief in consent: not available to the Respondents

6. On a straightforward reading of the first two subsections of section 190 of the Code, consent was not available as a defence to either Respondent:

"(1) *Where an accused is charged with an offence-*

(a) under section 182A; or

(b) under section 182B; or

(c) under section 323 or 324 or 325 or 326 in respect of a complainant under the age of sixteen years,

it is not a defence that the complainant consented to the activity that forms the subject matter of the charge.

(2)Notwithstanding paragraph (a) of subsection (1), where an accused is charged with an offence under section 182A, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused—

(a) is under the age of sixteen years; and

(b) is less than three years older than the complainant; and

(c) is neither in a position of trust or authority towards the complainant nor a person with whom the complainant is in a relationship of dependency."

7. So where an accused is charged with a sexual offence involving a child of less than sixteen years old under sections 182A, 182B or 323-326 of the Criminal Code, consent of the complainant is only a potential defence if the accused is underneath the age of 16. Even if the accused is less than 16 years old at the date of the offence, consent of the complainant is only a defence if:

    (1) the age gap between the parties is less than three years; and

    (2) there is no relationship of authority or trust or relationship of dependency between the accused and the complainant.

8. These provisions are complemented by subsection (5) of section 190, which provides:

> "(5)*Notwithstanding subsection (4), it is not a defence to a charge under section 182A or 182B or 323 or 324 or 325 or 326 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge if the complainant was in fact under fourteen years of age at the time the offence was committed.*"

9. It seems clear, without considering subsection (4), that there is no defence of belief that a complainant was consenting if the complainant was in fact less 14 years of age when the offence occurred.

10. As far as the Respondents were concerned, it seems clear (without considering subsection (4)) that no defence of consent or belief that the complainant was consenting was available because they were each over 16 years of age and the complainant was in fact under 14 years of age. Thus far, Mr Ricketts' submission that consent or belief in consent was irrelevant appears sound.

Defence of reasonable cause for belief: when available

11. Section 190(4) is at first blush almost unintelligible, both in light of the rest of the section and as applied to the facts of the present appeal. The subsection states:

> "*(4) It is not a defence—*
>
> *(a) to a charge under section 182A, that the accused believed that the complainant was fourteen years of age or older at the time the offence is alleged to have been committed; or*
>
> *(b) to a charge under section 182B, or, where on a charge under section 323*

or 324 or 325 or 326 it is alleged that the complainant consented to the activity that forms the subject-matter of the charge, to a charge under the said section 323 or 324 or 325 or 326, as the case may be, that the accused believed that the complainant was sixteen years of age or older at the time the offence is alleged to have been committed,

unless the accused proves that he had reasonable cause to have, and did in fact have, that belief at the time:

Provided that a defence shall not be available by virtue of this subsection—

(aa) in any circumstances, to an accused who was twenty-one years of age or older at that time; or

(bb) if an accused has once availed himself of such a defence to a charge under any of sections 182A, 182B, 323, 324, 325 and 326, ever again to that accused."

12. The proviso, which is not of concern for present purposes, is the clearest portion of the subsection. No defence of reasonable belief is available to an accused of 21 or older or to an accused who has deployed the defence before. However, it is also no less clear that subsection (4) only creates a defence of reasonable belief as regards age, and in no way dilutes the constraints on the circumstances in which consent (or belief in consent) can constitute a defence to a charge for contravening section 182A or 182B where the complainant is in fact under 14 years of age. So whether a complainant consented in fact should in such cases ordinarily be wholly irrelevant when the complainant is less than 14[2].

13. With these ancillary issues clarified, it becomes easier to apprehend the scope of the defence of reasonable belief that the complainant was 14 years old or over 14 years of age, which, subject to the proviso, is unavailable "*unless the accused proves that he had reasonable cause to have, and did in fact have, that belief at the time.*" This defence combines both objective and subjective elements:

    (a) reasonable grounds for belief; and

    (b) actual (subjective) belief.

Does section 190(4) impose an evidential or legal burden on accused?

14. This question was primarily framed on both sides by reference to authorities on article 6 of the European Convention of Human Rights ("ECHR"), which does not form part of Bermudian law, rather than by reference to section 6 of the Bermuda Constitution. This was perhaps merely shorthand because the generally accepted position appears to

[2] It is possible to conceive of cases where the fact of consent might be relevant linked to other evidence suggestive that the complainant was older than fourteen.

be that under both section 6 (2) (a) and article 6 (2), the Prosecution bears the ultimate legal burden of disproving any defence which arises for consideration at a trial.

The Bermuda Constitution-based position

15. Section 6 of the Bermuda Constitution provides in terms which broadly correspond to the language used in article 6 (2) of ECHR:

> "*(2) Every person who is charged with a criminal offence—*
>
> *(a) shall be presumed to be innocent until he is proved or has pleaded guilty…*"

16. Section 6 qualifies this absolute right in the following terms:

> "*(11)Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of—*
>
> (a) *subsection (2)(a) of this section to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;…*"

17. The first issue of constitutional principle which arises for consideration is what type of "burden" does section 6(11)(a) permit Parliament to impose on an accused person? When pressed to address this issue, Mr Ricketts referred the Court to the Eastern Caribbean Supreme Court ("BVI Court") case of *Nibbs-v- Attorney-General of Virgin Islands* [2010] 7 JBVIC 0501. It is clear from the report that section 16(2)(a) and 16(12)(a) of the Constitution of the Virgin Islands mirror our own section 6(2)a) and 6(11)(a). Foster J (Acting) was required to determine whether or not a legal or evidential burden was imposed on an accused person under the following statutory provision:

> "*Subject to subsection (1), a person found in possession of the following drugs in quantities of more than:*
>
> *(a)……*
>
> *(b) Five grammes of cocaine*
>
> *(c)……..*

Shall be deemed to be in possession of such controlled drug for the purpose of supplying it to another in contravention of section 6 (2) or for drug trafficking in contravention of section 6 (1) ***unless the contrary is proved****, the* ***burden of proof being on the accused****.*"

18. Foster J (Acting) approached the question by firstly concluding, with very little analysis (as the point was conceded by the Crown), that the statute clearly placed a legal or persuasive burden on the accused. Referring to the judgment of Lord Hope in in *Regina v Director of Public Prosecutions, Ex parte Kibelene and Others*[2006] AC 326, Foster J (Acting) identified two types of reverse onus provision:

    (a) a reverse onus provision in which the accused is required to prove an essential element of the offence; and

    (b) a reverse onus provision or proviso requiring the accused to prove certain matters to escape conviction once the essential elements are proved.

19. Referring to category (b), Foster J (Acting) then stated:

    "*[10] This category relates to an exemption or proviso which the accused must establish to avoid conviction* ***but is not an essential element of the offence****. According to Lord Hope, depending on the circumstances, provisions in this category may or may not violate the presumption of innocence. This category does apply to the provision that is before this court. In addition, the Attorney General has admitted that the burden placed on the accused is not an evidential burden but a legal or persuasive one and the section infringes the presumption of innocence; but whether such infringement is unconstitutional depends upon the joint reading of section 16(2) (a) and section 16 (12) (a) of the Constitution. It follows therefore that I now have to determine whether the persuasive burden is mandatory or discretionary.*"

20. The judge then cited *Vinton John and Others v The Attorney General of St. Lucia* [1998] Eastern Caribbean Law Reports 413 where, analysing a somewhat broader reverse onus provision to that under consideration by the BVI Court, Archibald J (Acting) held:

    "*The wording of section 7 (4) (b) of the Drugs Act of St. Lucia is such that I am unable to reject the compelling argument of Counsel for the Applicants that it requires of a defendant to prove more than "particular facts" mentioned in section 8 (12) (a) of the Constitution. It also seems to me that*

each Applicant as a defendant in a criminal trial will be required to disprove essential elements in the charge which would normally be proved by the prosecution, that is ***whether he was found in possession;*** *or whether* ***what was found is a controlled drug;*** *or whether the quantity of drugs was more than one gramme of cocaine; or whether the possession of the controlled drug is for the purpose of supplying it to another; or whether the possession of the controlled drug was for trafficking in contravention of section 6 (1) of the Drugs Act. It further seems to me that the statutory presumption or the deeming provision in section 7(4)(b) of the Drugs Act could give rise to the conviction of an accused despite the existence of a reasonable doubt as to his guilt; and such a result cannot be justified in terms of section 1 or section 8(12) (a) of the Constitution of St. Lucia. Such a result would be inconsistent with the fundamental value in the criminal justice system of the presumption of innocence.*"

21. So what was in issue here (i.e in *John*) was an amalgam of the two types of reverse onus provisions identified by Lord Hope in *Kebeline*; a provision requiring the accused to both disprove essential elements of the offence with which he was charged and to prove particular facts to escape liability. The BVI Court then proceeded to consider a pertinent authority from the Eastern Caribbean Court of Appeal sitting in Grenada ("The Grenadian Court") concerning a provision which only required the accused to prove particular facts. Foster J (Acting) stated:

"*[16] In* ***Michael Cox and Michael Mitchell v The Queen*** *, Redhead J (as he then was) dealt with a provision in the Grenadian Constitution that is identical to section 16 (12) (a). He was examining the constitutionality of section 42 (1) (b) and (d) of the Drug Abuse (Prevention and Control) Act 1972 of Grenada which reads;*

> *'Without prejudice to any other provisions of this Act…(b) where it is proved that a person had in his possession or custody or under his control anything containing a controlled drug, it shall be presumed, until the contrary is proved, that such a person was in possession of such a drug…(d) where it is proved that a person handled within the meaning of section 7 anything containing a controlled drug, it shall be presumed, until the contrary is proved that such a drug was contained in such thing.'*

[17] Redhead J (as he then was) held that the Prosecution must first prove that the accused person had in his possession something containing a controlled drug under section 42 (11) (b) and must prove within the meaning of section 7 that an accused person handled something in which a controlled drug was contained. The ***evidential burden*** *shifts to the accused to show that he did not know that the thing he possessed contained a controlled drug or to prove that he did not know that what was in the thing was a controlled drug.*

Having found that only the evidential burden shifts to the accused, Redhead J held that;

> *'Section 8 (11) (a) gives Parliament the authority to legislate as it did under Section 42, to require an accused person to offer proof on a balance of probabilities of essential facts which are rationally open to the accused to prove or disprove as the case may be. This could not in my view, violate the presumption of innocence under Section 8(2)(a) of the Constitution.'*

[18] I found earlier that sections 6 (2) (b) and 7 (3) (b) of the Drugs Act of the Virgin Islands place a mandatory persuasive burden (not an evidential burden) on the accused. This was accepted by the Attorney General as well. If it were only the ***evidential burden*** *that shifts to the accused then sections 6 (2) (b) and 7 (3) (b) of the Drugs Act would be saved by section 16 (12) (a) of the Constitution. Since it is the* ***mandatory persuasive burden or the legal burden*** *that shifts to the accused by virtue of sections 6 (2) (b) and 7 (3) (b) of the Drugs Act of the Virgin Islands, these sections are not saved by section 16 (12) (a) of the Constitution and in my view they violate the presumption of innocence.*"

22. So in *Cox and Mitchell*, Redhead JA apparently found that:

(a) a reverse onus provision which required the accused to prove certain facts to escape liability only imposed an evidential burden; and

(b) That the Grenadian equivalent of our section 6(11)(a) only permitted Parliament to impose an evidential burden on the accused person through reverse onus provisions.

23. In *Nibbs*, on the basis of a concession by the Attorney-General, Foster J (Acting) found that a constitutionally impermissible legal burden was imposed. However both the BVI Court and the Grenadian Court arrived at the same destination by different routes. The BVI Court found that although the reverse onus provision was unconstitutional, as it was enacted in a law which existed before the Grenadian Constitution came into effect, it fell to be construed in such a manner as would comply with the Constitution. Foster J (Acting) accordingly concluded as follows:

> "*[27] It is possible, in the light of the above authorities and section 115 of the Constitution to read sections 7 (3) of the Act in such a way as to impose no more than an evidential burden on the accused. As it is a rule of construction, I must identify the words used by the legislature which would otherwise be incompatible with the Constitutional right and then to say how these words are to be construed to bring them into conformity with the Constitution. If I were therefore to read the words "unless the contrary is proved" in section 7 (3) as if the words used in the subsection read "unless sufficient evidence is*

given to the contrary", would the effect that is to be given to these words mean that the evidential burden is placed on the accused to adduce sufficient evidence to the effect that he did not possess the controlled drug for the purpose of supplying it to another."

24. In *Nibbs,* the BVI Court referred a Privy Council decision in another Caribbean case, *Vasquez-v-R* [1994] 1 WLR 1304, where provisions of the Belize Criminal Code purporting to impose a legal burden on the accused to prove a defence of provocation were held to be unconstitutional. Although the legal/evidential burden distinction was not in issue, the Judicial Committee did importantly hold that the Belizean equivalent of our own section 6(2)(a) took primacy over the Belizean counterpart to our section 6(11)(a). An attempt to save the reverse onus provision as merely imposing a burden to prove particular facts failed. Lord Jauncey (at page 9) opined as follows:

> "*It has been stated by this Board on many occasions that a Constitution should be construed generously in relation to fundamental rights and freedoms of individuals …*
>
> *Applying this dictum to the two provisions of of section 6 of the Constitution which are under consideration, it would follow that sub-section (3) (a) should receive a generous construction whereas sub-section 10 (a) should not be construed in such a way as to emasculate the provisions of the former sub-section.*"

25. *Cox and Mitchell-v-R* [1997] J was followed in *Nibbs*. I find this judgment to be quite helpful, because Redhead JA (with whom Byron, CJ (Acting) and Matthew JA (Acting) concurred) adopted what I consider to be the most logical starting point for analysing the effect of a reverse onus provisions: the presumption of innocence as defined by the local Constitution, rather than by reference to an international convention which does not form part of Bermudian domestic law. The relevant sections of the Grenadian Constitution (section 8(2)(a) and 8(11)(a)) are identical to the corresponding provisions of the Bermuda Constitution. Redhead JA, invited to follow Canadian case law declined to do so noting that the Canadian Charter (just like the ECHR relied upon in the present case) did not expressly permit reverse onus clauses:

> "*Section 8 11(a) of the Grenada Constitution reads as follows:-*
>
> *S 11 Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of:-*
>
> > *'(a) Subsection 2(a) of this Section to the extent that the law in question imposes upon any person charged with a Criminal offence, the burden of proving particular facts.'*

The Constitution is the supreme law of the land, the whole Constitution. Mr. Clouden's assertion seems to relegate Section 8 11(a) to a lower status than that of 8(2)(a) when he says it is not saved by Section 8 11(a) of the Constitution. In my view, no provision of the Constitution has greater force, prominence or pre-eminence than another provision.

Section 8 11(a) gives Parliament the authority to legislate as it did under Section 42, to require an accused person to offer proof on a balance of probabilities of essential facts which are rationally open to the accused to prove or disprove as the case may be. This could not in my view, violate the presumption of innocence under Section 8(2)(a) of the Constitution.

There does not appear to be a similar provision in Canadian Charter or the Canadian Bill of Rights as that of Section 8 11(a) of the Grenada Constitution, yet Laskin C.J. in Appleby said 'that a reverse onus provision which goes no further than to offer proof on a balance of probabilities does not necessarily violate the presumption of innocence under S.2(f)'..."

26. Earlier in the judgment (at page 10), Redhead J described the relevant reverse onus provision as creating a "*rebuttable presumption which shifts* [an] *evidential burden that rests on the accused to show that he did not know that thing which he possessed contained a controlled drug*". So the controversy before the Grenadian Court was whether even such an evidential burden was unconstitutional, it being assumed that only an evidential burden was imposed on the accused. I adopt the following principles from this judgment:

    (a) a reverse onus provision which merely imposes an evidential burden on an accused person will potentially be constitutionally valid but a provision imposing a legal burden will generally not;

    (b) even where only an evidential burden is imposed on the accused, it may be necessary to determine whether it is rational to require the accused to discharge that burden;

    (c) in light of the contrary Privy Council findings on this issue in *Vasquez-v-R*[1994] 1 WLR 1304, which was seemingly not placed before Redhead JA *Cox and Mitchell*, I decline to follow Redhead JA's finding in that case that the primary presumption of innocence provision is of equal status to the provision providing an exception in the case of reverse onus provisions. In my judgment the former has primacy over or controls the latter.

27. The relevant provisions of the Criminal Code under present consideration are not "existing laws" which must be read (pursuant to section 5(1) of the Bermuda Constitution Order) with such adaptions, modifications or qualifications as will bring them into conformity with the Constitution should they be found to conflict with

section 6(2)(a) and/or section 6(12)(2)(a)[3]. Is there a conflict? This may be viewed as simply another way of asking the same question which is raised by the present appeal: does section 190(4) of the Criminal Code impose a legal or an evidential burden on the accused? This broad umbrella question may best be answered by resolving the following subsidiary questions:

(1) does section 190(4) arguably impose a legal burden on the accused?

(2) does section 6(12)(2)(a) of the Constitution preserve the right for Parliament to impose the legal burden of establishing a defence on an accused person or only an evidential burden?

(3) if the Constitution only permits the imposition of an evidential burden on an accused person, can section 190(4) be construed as only imposing an evidential burden to raise the defence?

28. I would answer these subsidiary questions as follows:

(1) section 190(4), literally read, does arguably impose a legal burden on the accused to prove the defence;

(2) section 6(11)(2)(a) of the Constitution does not preserve the right of Parliament to impose a legal burden on an accused person to raise a defence. I follow the analytical approach of Redhead J in *Cox and Mitchell*, which is entirely consistent both the primacy of presumption of innocence protected by section 6(2)(a) and the need to give fundamental rights and freedoms provisions a generous interpretation designed to amplify the guaranteed rights. Parliament is only free to impose an evidential burden of an accused person to benefit from a defence. This is certainly in the case of offences as grave as those attracting potential sentences of 20 years imprisonment, but probably reflects the general legal position[4]. This legal finding is also supported, indirectly but in terms of broad principle, by the BVI Court's decision in *Nibbs* and (most authoritatively) by the Privy Council decision in *Vazquez and the Yearwood* case considered below;

[3] Section 190 in its present form was enacted with effect from June 1, 1993 by 1993: No. 2.

[4] In a case not referred to either directly or indirectly in argument, Hull J held that a provision in the Road Traffic Act 1947 purportedly excluding the right of an accused person to advance a defence was unconstitutional: *Marsh-v-R* [1989] Bda LR 69. He contrasted this offensive provision with section 35D of the 1947 Act which he said "*create a rebuttable evidentiary presumption, to the effect that so long as specified conditions are observed, the results of the analysis of breath tests taken within two hours after an alleged offence give rise, in the absence of evidence to the contrary, to a presumption as to the condition of the defendant when he was driving.*" Section 35Dat that time provided as follows:

"*(3) Any person who, without reasonable excuse, fails or refuses to comply with a demand made to him by a police officer under this section commits an offence*."

(3) section 190(4), enacted after the Bermuda Constitution must be viewed in light of the presumption of constitutionality. Viewed through this lens, it does not unambiguously impose a legal rather than merely an evidential burden on an accused person to prove the defence. To the extent that two possible constructions are potentially available, it is trite law that the construction which favours conformity with fundamental rights should be preferred over an interpretation which would conflict with such rights.

29. Another constitutional case indirectly placed before the Court by the Appellant was *Yearwood-v- The Queen* [2001] UKPC 31, as cited in *R-v-Lambert* [2002] 2 AC 545 at 587. In *Yearwood*, the Privy Council Board cited its earlier decision in *Vasquez* and concluded (per Lord Hope):

> "*15. Their Lordships consider that the same reasoning applies with equal force to the relevant provisions of the Grenada Criminal Code, having regard to the provision in section 8(2)(a) of the Grenada Constitution Order which entitles a person who is accused of a criminal charge to the presumption of innocence. This point is not in dispute. It follows that section 239 of the Grenada Criminal Code must be read and given effect as if for the words 'are proved on his behalf" there were substituted the words 'are the subject of such evidence as to raise a reasonable doubt,' and that section 240 must be read and given effect in the same way. But, as Lord Jauncey of Tullichettle emphasised in Vasquez v The Queen at p 1314G-H, a judge need not be astute to conjure up hypothetical situations in which provocation could conceivably have arisen if the issue is not directly raised in evidence. He should only direct the jury on provocation if there is evidence before the court which, if believed, might be taken by a reasonable jury to support this defence.*"

30. In both *Vasquez* and *Yearwood*, the Privy Council held that existing laws which purported to impose a legal burden on the accused should be read in such a way as to conform to the Constitution. In so doing they were, it must be conceded, applying a constitutional rule of interpretation which is expressed in even more forceful terms than section 3 of the Human Rights Act 1998 (UK). For present purposes, however, it is instructive to note that the House of Lords in *Lambert* regarded the effect of the Privy Council decisions as being to construe what might be read as a statutory provision imposing a legal burden on the accused as merely imposing an evidential burden. As Lord Hope observed in *Lambert* [2002] 2 AC 545 at 588-589:

> "*90. The choice then is between a persuasive burden, which is what the ordinary meaning of the statutory language lays down, and an evidential burden, which is the meaning which it is possible to give to the statutory language under section 3(1) of the 1998 Act. If the evidential burden were to be so slight as to make no difference - if it were to be enough, for example, for the accused merely to mention the defence without adducing any evidence - important practical considerations would suggest that in the general interest of the community the burden would have to be a persuasive one. But an evidential burden is not to be thought of as a burden which is illusory.*

What the accused must do is put evidence before the court which, if believed, could be taken by a reasonable jury to support his defence. That is what Professor Glanville Williams envisaged when he was giving this meaning to the words 'unless the contrary is proved': '"The Logic of 'Exceptions"' [1988] CLJ 261, 265. It is what the Judicial Committee envisaged in Vasquez v The Queen [1994] 1 WLR 1304, 1314G-H and in Michael Yearwood v The Queen [2001] UKPC 31. It is what the common law requires of a defendant who wishes to invoke one of the common law defences such as provocation or duress."

31. It follows that I am bound to conclude based on a constitutional analysis that section 190(4) only imposes an evidential burden on an accused person as the Learned Magistrate correctly held. The contrary construction contended for by the Appellant is not a constitutionally available one.

The ECHR-based analysis

32. Mr Ricketts identified a thin sliver of authority in the ECHR persuasive jurisprudence which he contended supported his central thesis. The key proposition was that article 6 of the ECHR (and by analogy section 6 of the Constitution) permitted Parliament to impose legal burdens on accused persons provided that it was proportionate to do so. In *Sheldrake-v-DPP* [2005] 1 AC 264, the report deals with both the appeal of Sheldrake and Attorney-General's Reference (No. 4 of 2002). The House of Lords' findings in each case were different and instructive:

    (a) in the appeal, the question was whether section 5(2) of the Road Traffic Act 1988 (UK) in providing a defence to a charge of attempting to drive with excess alcohol in the blood if the accused "proved" certain circumstances imposed a legal burden and, if so, whether this was inconsistent with the presumption of innocence in article 6 of ECHR incorporated into UK domestic law by the Human Rights Act 1998. The House of Lords held that a persuasive burden was imposed and that this was not inconsistent with article 6;

    (b) in the reference, the Terrorism Act 2000 explicitly imposed a legal burden on accused persons to prove facts which would amount a defence to the charge of belonging to a proscribed organisation. The question was whether this was incompatible with the presumption of innocence because it was not a proportionate legislative aim to impose a legal rather than an evidential burden. The House of Lords held that it was inconsistent with presumption of innocence to impose a legal burden on a defendant with a view to deploying a defence to such a serious offence.

33. The Appellant's submission at trial and before this Court essentially contended that Parliament was entitled to, and legitimately had, created an offence of strict liability for persons in the position of the Respondents. It was entirely logical and proportionate for the Prosecution to be required to prove sexual contact with a complainant of less than 14 years of age and for an accused to bear the legal or

persuasive burden of exculpating himself by proving facts within his own peculiar knowledge. The following conclusions of Lord Bingham in *Sheldrake* were, somewhat persuasively (if one ignores the Bermudian constitutional position), relied upon in support of this point:

> "*41 It may not be very profitable to debate whether section 5(2) infringes the presumption of innocence. It may be assumed that it does.*
> *Plainly the provision is directed to a legitimate object: the prevention of death, injury and damage caused by unfit drivers. Does the provision meet the tests of acceptability identified in the Strasbourg jurisprudence? In my view, it plainly does. I do not regard the burden placed on the defendant as beyond reasonable limits or in any way arbitrary. It is not objectionable to criminalise a defendant's conduct in these circumstances without requiring a prosecutor to prove criminal intent. The defendant has a full opportunity to show that there was no likelihood of his driving, a matter so closely conditioned by his own knowledge and state of mind at the material time as to make it much more appropriate for him to prove on the balance of probabilities that he would not have been likely to drive than for the prosecutor to prove, beyond reasonable doubt, that he would. I do not think that imposition of a legal burden went beyond what was necessary. If a driver tries and fails to establish a defence under section 5(2), I would not regard the resulting conviction as unfair, as the House held that it might or would be in R v Lambert. I find no reason to conclude that the conviction of Mr Sheldrake was tainted by any hint of unfairness.*"

34. Mr Richardson countered that imposing a legal burden on a defendant charged with a traffic offence was very far removed from section 190(4) of our Criminal Code, which provided a defence to offences punishable by (in the case of section 182A) a maximum of 5 years summarily and 20 years imprisonment on indictment. He relied broadly upon the contrary finding reached on the reference in *Sheldrake*. It is important to note that the different approach taken to the Attorney-General's Reference by Lord Bingham was to my mind influenced in part by considerations which do not necessarily apply to the present offence:

> "*51A number of considerations lead me to a conclusion different from that reached by the Court of Appeal. They are these:*
>
> *(1) As shown in paras [47] and [48] above, a person who is innocent of any blameworthy or properly criminal conduct may fall within section 11(1). There would be a clear breach of the presumption of innocence, and a real risk of unfair conviction, if such persons could exonerate themselves only by establishing the defence provided on the balance of probabilities. It is the clear duty of the courts, entrusted to them by Parliament, to protect defendants against such a risk. It is relevant to note that a defendant who tried and failed to establish a defence under section 11(2) might in effect be convicted on the basis of conduct which was not criminal at the date of commission.*
>
> *(2) While a defendant might reasonably be expected to show that the organisation was not proscribed on the last or only occasion on which he*

became a member or professed to be a member, so as to satisfy subsection (2)(a), it might well be all but impossible for him to show that he had not taken part in the activities of the organisation at any time while it was proscribed, so as to satisfy subsection (2)(b). Terrorist organisations do not generate minutes, records or documents on which he could rely. Other members would for obvious reasons be unlikely to come forward and testify on his behalf. If the defendant's involvement (like that of Hundal and Dhaliwa: see paragraph [47] above) had been abroad, any evidence might also be abroad and hard to adduce. While the defendant himself could assert that he had been inactive, his evidence might well be discounted as unreliable. A's own case is a good example. He arrived as a stowaway. He described himself on different occasions as Palestinian and also as Jordanian. An immigration adjudicator concluded that he was Moroccan. The judge, as already noted, thought he might well be a fantasist. He was not a person whose uncorroborated testimony would carry weight. Thus although section 11(2) preserves the rights of the defence, those rights would be very hard to exercise effectively.

(3) If section 11(2) were held to impose a legal burden, the court would retain a power to assess the evidence, on which it would have to exercise a judgment. But the subsection would provide no flexibility and there would be no room for the exercise of discretion. If the defendant failed to prove the matters specified in subsection (2), the court would have no choice but to convict him.

(4) The potential consequence for a defendant of failing to establish a subsection (2) defence is severe: imprisonment for up to ten years.

(5) While security considerations must always carry weight, they do not absolve member states from their duty to ensure that basic standards of fairness are observed.

(6) Little significance can be attached to the requirement in section 117 of the Act that the Director of Public Prosecutions give his consent to a prosecution (a matter mentioned by the Court of Appeal in para 42 of its judgment) for the reasons given by the Court of Appeal in para 91 of its judgment in Attorney General's Reference (No 1 of 2004) [2004] EWCA Crim 1025."

35. It is far more obvious that wholly blameless persons might become mixed up with proscribed organisations than it is that wholly blameless persons above the age of consent might become involved in sexual activity with children of less than 14 years of age. The more powerful argument advanced on behalf of the Respondents, which Mr Richardson forcefully pressed, is that in relation to serious offences, greater care must be taken to avoid diluting the presumption of innocence principle. Mr Richardson best supported this fundamental argument by reference to the *R-v-Lambert* [2002] 2 AC 545, where the House of Lords unanimously held that a reverse onus provision in the Misuse of Drugs Act should be construed as imposing only an evidential burden on an accused person. Lord Clyde (at paragraphs 155-156) opined as follows:

"*155. In Sweet v Parsley (1970) AC 132 at 148 Lord Reid observed that "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". The advent of the Human Rights Act 1998 has certainly sharpened a consciousness of the human right which is embodied in the presumption of innocence and invites a closer scrutiny of what Ashworth and Blake (The Presumption of Innocence in English Criminal Law, (1996) CLR 314) have described as a large-scale derogation from basic principle They quote the advice of the Eleventh Report of the Criminal Law Revision Committee that "both on principle and for the sake of clarity and convenience in practice, burdens on the defence should be evidential only". The 1998 Act should encourage a reconsideration of a trend which has for over a decade been exposed to powerful criticism.*

156. While it may be that offences under section 5 of the Misuse of Drugs Act may be described as regulatory they can lead to the most serious of consequences for the accused. Of course trafficking in controlled drugs is a notorious social evil, but if any error is to be made in the weighing of the scales of justice it should be to the effect that the guilty should go free rather than that an innocent person should be wrongly convicted. By imposing a persuasive burden on the accused it would be possible for an accused person to be convicted where the jury believed he might well be innocent but have not been persuaded that he probably did not know the nature of what he possessed. The jury may have a reasonable doubt as to his guilt in respect of his knowledge of the nature of what he possessed but still be required to convict. Looking to the potentially serious consequences of a conviction at least in respect of class A drugs it does not seem to me that such a burden is acceptable."

36. I do not ignore the fact that the UK courts might be considered to have a greater scope for construing legislation in such a manner as will bring about conformity with the ECHR. Under Bermuda law, the interpreter (not concerned with pre-1968 "existing laws") can only deploy the common law rule of seeking to avoid a construction which conflicts with fundamental rights or international treaty obligations, together with the presumption of constitutionality, as a means of resolving two competing constructions. Under UK law, the rule has arguably be given somewhat greater force and scope by section 3 of the Human Rights Act 1998:

> "*3(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*"

37. Accordingly, decisions such as *Lambert* where section 3 of the UK 1998 Act is being deployed to inform the interpretation of UK legislation may not necessarily have as great persuasive force as decisions defining the scope of substantive ECHR rights.

Nevertheless, there appears to be a modern trend towards adopting a purposive approach to statutory interpretation which probably blurs the distinction between the differing rules of construction which generally apply in the Bermudian and the UK Human Rights Act 1998/ECHR contexts-at least in many cases. As noted above, Lord Hope in *Lambert* buttressed his analysis of the ECHR position by reference to Privy Council (primarily) Caribbean constitutional case law.

38. Assuming that under Bermuda law it is open to Parliament to impose legal burdens on accused persons where it is proportionate to do so, applying the ECHR criteria explained in *Sheldrake*, I would find that it is not possible to construe section 190(4) of the Criminal Code as a provision which falls within the ambit of this exceptional rule. The Appellant identified no precedent for the primary presumption of innocence rule being diluted in this manner in the context of any criminal offence triable on indictment and potentially resulting in a lengthy term of imprisonment.

39. Of course it is my primary finding that one need not engage with this ECHR line of analysis because the Bermuda Constitution only permits Parliament to impose an evidential burden on accused persons, and so section 190(4)of the Criminal Code should be construed as intending to achieve this constitutionally permissible effect.

Conclusion

40. For the above reasons, the appeal on a point of law is dismissed. Section 190(4) of the Criminal Code only imposes an evidential burden on an accused person. As the Learned Magistrate rightly ruled, the ultimate burden of proof remained with the Prosecution. Nevertheless, the Appellant did succeed in establishing that where consent is not in law an available defence, the issue of whether the complainant <u>in fact</u> consented should not (in and of itself) ordinarily be a material consideration in the context of the trial of a sexual offence.

Dated this 26th day of May, 2016 _____

KAWALEY CJ