The Court of Appeal for Bermuda

CRIMINAL APPEAL No 10 of 2014 &

CIVIL APPEAL No 2 of 2015

Between:

KRISTOPHER GIBBONS

Appellant

-v-

THE QUEEN

Respondent in the Criminal Appeal

and

THE ATTORNEY GENERAL

Respondent in the Civil Appeal

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: Mr. Dantae Williams, Mussenden Subair, for the Appellant
Ms. Cindy Clarke and Ms. Maria Sofianos, Department of Public Prosecutions, for the Respondent in the Criminal Appeal
Ms. Shakira Dill, Attorney General's Chambers, for the Respondent in the Civil Appeal

Date of Hearing: **5 & 10 March 2015**

Date of Judgment: **20 March 2015**

JUDGMENT

PRESIDENT

1. On 14 May 2014 Kristopher Gibbons (the appellant) was convicted of one offence of serious sexual assault contrary to section 325(1)(d) of the Criminal Code. On 26 June 2014 he was sentenced to five years' imprisonment followed by one

year's probation. The trial before Acting Justice Scott had begun in mid April 2014 and there were three other defendants, all of whom were charged with the same offence and acquitted. On 5 March 2015 we said we would set aside the verdict of serious sexual assault on the basis that it was unsafe and substitute a verdict of sexual assault contrary to Section 323 of the Criminal Code and give our reasons later. We also said we would give our reasons later for rejecting the appellant's claim that section 190 of the Criminal Code breached the appellant's rights under the Bermuda Constitution Order ("the Constitution Point"). These are our reasons and our judgment on the sentence appeal.

The Facts

2. The prosecution case was that on Friday 26 and Saturday 27 July 2013 DC ("the victim") and KJ, both aged 14, were in cell phone communication with the defendant Hollis who invited them to his home in Sandy's. On the evening of 27 July, Hollis and the appellant collected them from Warwick and took them to Hollis' home. Soon after arrival they went into a tent. Also in the tent was the defendant Robinson, the appellant and a few other young men. A bottle of rum was passed around and Hollis put it to the victim's mouth coercing her to drink from it. At some point Hollis grabbed the victim, put her on his lap and began kissing her. He asked her upstairs to his room but she refused. Some of the men began touching her from behind. She was on a lawn chair and the clothing from the lower half of her body was removed. She felt dizzy from the effects of the alcohol. Hollis held her waist and put his penis in her vagina. The appellant and Robinson then in turn put their penises into her mouth and so did at least one other man. The victim asked them to stop. At some point KJ left and telephoned her sister.
3. The assault ended when the victim forced her body to the ground. Some of the men were pulling at her arms and trying to pick her up. The appellant asked them to stop. She put on her clothes and was taken to the bus stop by the appellant where she found KJ. The victim was crying, upset and complaining of pain. She did not consent to any of the sexual activity we have described.

4. In the early hours of Sunday, 28 July the appellant and the three co-defendants were arrested. When interviewed they all said "no comment". At trial the appellant gave evidence. His case was that he had seen the victim's Facebook profile prior to going with Hollis and collecting the victim and KJ. On returning to Hollis' home they joined Robinson, the defendant Virgil and a man called Carl who had a bottle of rum that was passed around everyone present. The victim sat on Hollis' lap and drank from the bottle a few times.
5. The appellant went into the house to warm up some food. When he returned outside only he and the victim were there. She was sitting on a lawn chair. They talked. He asked her to give him oral sex. She never said "no". She touched his penis which became erect. She told him she wanted to have sex. The appellant did not have a condom. She gave him oral sex and he ejaculated onto the grass. He touched her vagina using his fingers. She was not drunk and no force was used. She was, he said, a fast little girl, a whore. At no time did she cry or say stop. She did not appear dizzy. She was normal and alert. There was no one else present just the two of them. The victim put on her clothing and got up. He then took her down the hill on his motor cycle where they saw KJ.
6. Hollis give evidence but Robinson and Virgil did not.

The Constitution Point

7. The Constitution Point arises in this way. Section 190(1) of the Criminal Code provides that where an accused is charged with an offence *inter alia* under section 323 or 325 it is not a defence that the complainant consents to the activity that forms the subject matter of the charge. Section 190(4) provides that it is not a defence where on a charge *inter alia* under sections 323 or 325 it is alleged that the complainant consents to the activity that forms the subject matter of the charge that the accused believed the complainant was sixteen years of age or older at the time of the offence is alleged to have been committed unless he proves that he had reasonable cause to have, and did in fact have, that belief at the time. However there follows a proviso (section 190(4)(aa)) that the defence is not available in any circumstances to an accused who was 21 years or older at

the time. There is a further limit of the proviso, not directly relevant in the present case, that the defence cannot be used on more than one occasion.

8. The three co-defendants, Hollis, Robinson and Virgil were all under 21 and therefore the defence was available to them, subject to satisfying the criterion of reasonable belief that the victim was over 16. However the appellant was 21. Where a complainant is under fourteen at the time of the offence, which was not the case, the defence is not available (section 190(5).
9. Put shortly, the appellant complains that the effect of 190(4)(aa) when read with either section 323 or 325 of the Code is to create an absolute liability offence whereas his three co-defendants being under the age of 21 had a defence, provided that the victim consented, if they had reasonable cause to believe and genuinely believed she was 16 or older. This, it is submitted, breaches sections 1 and 6 of Schedule 2 to the Bermuda Constitution Order 1968.

   Section 1 provides:

> "Whereas every person in Bermuda is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:
>
> (a) life, liberty, security of the person and the protection of the law;
> (b) freedom of conscience, of expression and of assembly and association; and
> (c) protection for the privacy of his home and other property and from deprivation of property without compensation, the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

10. It is then section 6 that is of relevance to the present case. It is headed **Provisions to secure protection of law** and provides:

(1) "If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(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;
..."

11. Section 6(11)(a) provides that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (2)(a) to the extent that the law in question imposes on any person charged with a criminal offence the burden of proving particular facts. The remainder of the section, which largely relates to the fairness of the trial process, is not relevant to the issue in the present case.
12. The Constitution Point was taken during the course of trial by an originating summons filed on 21 April 2014 and amended on 30 April 2014. The judge heard argument and dismissed the application on 5 May 2014 saying that her reasons would follow soon. Regrettably they were not provided until 4 ½ months later on 17 September 2014. Further as the judge pointed out, the application was not made until three months after the appellant had been arraigned.
13. The judge referred to the fact that the complainant's consent was not a defence and the mandatory terms of section 190(4)(aa) that reasonable belief she was over 16 did not afford a defence to someone 21 or older. She also referred to section 190(6) which provides:

> "Except as otherwise expressly stated, it is immaterial, in the case of any of the offences constituted by the foregoing provisions of this Part or specified in subsection (1) of this section committed with respect to a complainant under a particular age, that the accused did not know that the complainant was under that age, or believed that the complainant was not under that age."

14. She pointed out that in respect of certain sexual offences, the laws of Bermuda afford defences to defendants under the age of 21 who engage in sexual conduct

with young girls over 14 years old and that Parliament has carefully thought out the various ages of criminal responsibility and the age of the victim in respect of morality offences. While some ages may seem arbitrarily set, others are not. The fact that a defence is not open to someone over 21 that is open to someone under 21 does not, she concluded, make the provision unconstitutional. In reaching this conclusion she followed Kawaley CJ in *Miller (Police Sergeant) v Crockwell* [2012} Bda LR 56 at para 50 and Lord Hoffmann in *R v G* [2008] UK HL 37 para 55. I shall return to both cases.

15. Before us the argument focused more specifically on why it was contended Section 190(4)(aa) breaches the Constitution. The starting point of Mr. Williams' argument for the appellant was *Robinson v R* [2009] Bda LR 40 in which it was stated at paragraph 2 that the Bermuda Constitution, unlike many of those of the Caribbean Independent States, does not declare that the Constitution is the supreme law of Bermuda but that that position is achieved by the Bermuda Constitution 1967, which by Order-in-Council applied the Bermuda Constitution to Bermuda in conjunction with the Colonial Laws Validity Act 1865 which provides that any law passed in Bermuda will be void to the extent of any inconsistency with the Bermuda Constitution. This is not in dispute.

16. The legislation with which the Court is concerned was revised by Parliament and effective from 1 June 1993. Mr. Williams submits that the changes reflect the former Ontario Criminal Code, and legislative changes and development of the law in Canada and Queensland. United Kingdom developments have not been reflected in Bermuda in the same way. He submits that section 7 of the Canadian Charter of Rights and Freedoms is consistent with section 1 of the Bermuda Constitution Order and relies strongly on a number of Canadian authorities to support his proposition that section 190(4)(aa) is inconsistent with the presumption of innocence in section 6(2)(a) of the Bermuda Constitution Order. He also relies on Article 6 of the European Convention of Human Rights.

17. Section 7 of the Canadian Charter provides that:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

18. Mr. Williams submits that this mirrors section 1(1)(a) of the Bermuda Constitution Order but as Kay JA pointed out in argument, the relevant comparison is not section 1(1)(a) but section 6 because the closing words of section 1 make it clear that the protections are to be found in the subsequent provisions and Chapter 1. Section 6 deals with procedural protections.

19. Mr. Williams referred us to Lord Bingham in *Sheldrake v DPP* [2005] 1 AC 264 at paragraph 21:

> "The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of *mens reas*. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case."

Then he referred us to *Hansen v Denmark* an ECHR case which raised the question whether strict liability cases were compatible with Article 6(2) of the ECHR. However, the decision was only about admissibility and we gain no assistance from it.

20. On the question of proportionality he reminded us that a provision may not be proportionate if it is wider than necessary or ineffective to achieve its object. However, our understanding of Mr. Williams' main line of attack is the presumption that *mens rea* is an essential ingredient of every statutory offence. There is a difficulty with this argument in that there is a mental element of the present offence in the intention to commit the act prohibited by the statute. Nevertheless he referred us to *R v K* [2001] UKHL 41, a case which predated the

changes in the law made by the Sexual Offences Act 2003. In that case, K was indicted on a single count of indecent assault against C, aged 14. His defence was that the sexual activity was consensual and she had told him she was 16 and he had no reason to disbelieve her. He was aged 26. The relevant certified question in that case, which the House answered in the affirmative, was:

> "Is a defendant entitled to be acquitted of the offence of indecent assault on a complainant under the age of 16 years, contrary to section 14(1) of the Sexual Offences Act 1956, if he may hold an honest belief that the complainant in question was aged 16 years or over?"

In reaching this conclusion the House referred to the earlier case of *B (a Minor) v Director of Public Prosecutions* [2000] 2 AC 428 where the issue was whether under section 1(1) of the Indecency with Children Act 1960 it was necessary to prove the absence of a genuine belief on the part of the defendant that the child was the specified age of 14. Lord Bingham of Cornhill cited Lord Nicholls of Birkenhead at p. 460F who relied on:

> "the established common law assumption 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."

21. There is similar passage in the speech of Lord Reid in *Sweet v Parsley* [1970] AC 132 148G:

> "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*."

The law in England and Wales changed with the Sexual Offence Act 2003. By sections 9 and 13 reasonable belief that the complainant is under 16 (provided she was over 13) is a defence, regardless of the age of the defendant.

22. The remaining United Kingdom case to which it is necessary to refer is *R v G* [2008] UKHL 37. The defendant, aged 15, pleaded guilty to the rape of a child under 13 contrary to section 5 of the Sexual Offences Act 2003. She consented to intercourse and told him she was 15. The questions for the House were whether a criminal offence of strict liability violated Article 6 of the ECHR and whether conviction was compatible with his rights under Article 8. The House was unanimous on the Article 6 issue. The facts were different from the present case but there are some observations that bear on the present issue.

Lord Hoffmann pointed out at paragraph 3 that:

> "The mental element of the offence under s. 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."

He went on at paragraph 4, citing Dyson LJ in *R v G* [2002] EWCA Crim 1992 at [33] that so far as Article 6 is concerned, the fairness of the provisions of the substantive law of the contracting states is not a matter for investigation. The content and interpretation of domestic substantive law is not engaged by Article 6.

23. Baroness Hale of Richmond stressed that the object of section 5 was not only to protect children under 13 from predatory adult paedophiles but also to protect them from premature sexual activity of all kinds. She observed that they are protected in two ways, firstly the fact that it is irrelevant whether or not they want or appear to want it; and secondly, by the fact that in the case of children under 13 it is irrelevant whether or not the possessor of the penis in question knows the age of the child he is penetrating. She went on:

> "Thus there is not strict liability in relation to the conduct involved. The perpetrator has to intend to penetrate. Every male has a choice about where he puts his penis. It may be difficult for him to restrain himself when aroused but he has a choice. There is nothing unjust or irrational about a law

> which says that if he chooses to put his penis into a child who turns out to be under 13 he has committed an offence (although the state of his mind may again be relevant to sentence). He also commits an offence if he behaves in the same way towards a child of 13 but under 16, albeit only if he does not reasonably believe that the child is 16 or over. So in principle sex with a child under 16 is not allowed. When the child is under 13, three years younger than that, he takes the risk that she may be younger then he thinks she is. The object is to make him take responsibility for what he chooses to do with what is capable of being, not only an instrument of great pleasure, but also a weapon of great danger."

Whilst *R v G* was a case involving a defendant aged 26 and a girl aged 14 the analysis of Baroness Hale has relevance to the present case. The fundamental mental element of the offence in both cases is the intention of the defendant to penetrate.

24. Ms. Dill, for the Attorney-General, relies on *R v G* as establishing that the right to a fair hearing (and there is no difference in this regard between what is required by the ECHR and the Bermuda Constitution) relates to the guarantee of fair procedure rather than whether the substantive law is required to have any particular substantive content. As Lord Hope said at paragraph 27:

> "The article as a whole is concerned essentially with procedural guarantees to ensure that there is a fair trial, not with the substantive elements of the offence with which the person had been charged. As have been said many times, art 6 does not guarantee any particular content of the individual's civil rights. It is concerned with the procedural fairness of the system for the administration of justice in the contracting states, not with the substantive content of domestic law."

25. Mr. Williams, unsurprisingly, relies on the Canadian authorities. The leading Canadian authority is *R v Hess; R v Nguyen* [1990] 2 SCR 906. The four judge majority held that it was a principle of fundamental justice that a criminal offence punishable by imprisonment must have a *mens rea* component. Section 7 of the Charter elevated the requirements of *mens rea* from a presumption of statutory interpretation to a constitutionally mandated element of a criminal offence. Section 146(1) of the Code which made it an indictable offence

punishable by a maximum of life imprisonment for a man to have sexual intercourse with a female under the age of 14 expressly removed the defence that the accused *bona fide* believed that the accused was 14 or older. An offence punishable by imprisonment that does not allow the accused a due diligence defence infringes the right to liberty enshrined in section 7. Wilson J giving the judgment of the majority had this to say about *mens rea*:

> "In my view, the history of the doctrine of *mens rea* shows a gradual move away from a purely retributive conception of punishment, where the law sought to pay back the moral evil done without regard for the reasons why the actor committed the prohibited act, to a conception of punishment that is not only sensitive to the injustice involved in punishing those who are mentally innocent, but also takes account of the fact that punishment will not act as an effective deterrent if persons are punished who did not know or could not have known that they were committing an offence. The doctrine of *mens rea* reflects the conviction that a person should not be punished unless that person knew that he was committing the prohibited act or would have known that he was committing the prohibited act if, as Stroud put it, 'he had given to his conduct, and to the circumstances, that degree of attention which the law requires, and which he is capable of giving.'
>
> Our commitment to the principle that those who did not intend to commit harm and who took all reasonable precautions to ensure that they did not commit an offence should not be imprisoned stems from an acute awareness that to imprison a 'mentally innocent' person is to inflict a grave injury on that person's dignity and sense of worth. Where that person's beliefs and his actions leading up to the commission of the prohibited act are treated as completely irrelevant in the face of the state's pronouncement that he must automatically be incarcerated for having done the prohibited act, that person is treated as little more than a means to an end. That person is in essence told that because of an overriding social or moral objective he must lose his freedom even although he took all reasonable precautions to ensure that no offence was committed."

Wilson J went on to reject the argument that deterrence was of any value on the basis that it was unsupported by evidence. Further he said that mental

innocence could not be left to the sentencing process to mitigate the harshness of the law.

26. McLachlin J, as she then was, giving the judgment of the minority said this at page 33:

> "The philosophy upon which the Charter rests is that the fundamental rights which it enshrines should be subject to scrutiny under s. 1. It may be difficult to establish the conditions necessary to override them, but that does not mean that they should not be examined. Constitutional jurisprudence here and in the United States has shown the impracticability of treating rights as abstract absolutes. The framers of our Charter recognized this and provided that laws in conflict with fundamental rights should be scrutinized under s. 1. What is really at stake in determining the scope and priority of constitutional rights are conflicting values and interests. Such values and interests are best dealt with under s. 1 of the Charter, which permits a contextual analysis in which the effect of permitting one interest to prevail over the other may be considered in the matrix of the facts and social situation in which the rights are situate: see Wilson J., *Edmonton Journal v. Alberta (Attorney General),* 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326.
>
> I therefore proceed on the premise that important as the right not to be convicted in an absence of *mens rea* is, one must nevertheless proceed to s. 1 of the Charter to determine if s. 146(1) can be saved as a reasonable measure justified in a free and democratic society.
>
> The first point is that many societies which we would regard as free and democratic, such as England and the United States, consider the offence of statutory rape to be both reasonable and justifiable notwithstanding its elimination of *mens rea.*
>
> Several reasons may be suggested for this position. The first and most important is that there is no equally effective way of dealing with the problem of intercourse with young girls. For the reasons suggested earlier, offences permitting a defence of due diligence or reasonable belief as to age are predictably less effective in deterring intercourse with young girls than is an absolute liability offence.
>
> The second is that the elimination of *mens rea* from s. 146(1) of the Criminal Code may be viewed as less offensive than,

> for example, the elimination of *mens rea* from the offence of murder. The age of a young girl with whom one is contemplating intercourse is unlikely to be a matter to which a man fails entirely to address his attention. He must have some impression as to her age, and must from his experience have some idea of how far wrong he is likely to be in this impression; his conduct may be presumed to be predicted on a range of accuracy. A girl of thirteen may appear to be older, but there are limits as to how much older. Cases in which the accused does not at least advert to the possibility (or wilfully shuts his eyes to the possibility) that a girl actually under fourteen might be that age, may be surmised to be infrequent.
>
> Although one may postulate the case of a 'morally blameless' person being convicted under s. 146(1), however rare that case may be, one must also remember that all that a person need do to avoid the risk of this happening is to refrain from having sex with girls of less than adult age unless he knows for certain that they are over fourteen. Viewed thus, the infringement on the freedom imposed by s. 146(1) of the Criminal Code does not appear unduly draconian, considering the great harms to which the section is directed."

27. In 1987 the Canadian Parliament repealed section 146 and an accused now has a defence if he believes the complainant is under 16 and has taken all reasonable steps to ascertain her age.

28. Mr. Williams also relied on the Irish case of *CC v Ireland* 1ESC 33. In that case a 24 year old man was charged with having sexual intercourse with a girl under 15. No defence of reasonable belief was available. He admitted consensual intercourse but claimed the complainant told him she was 16. This appeal was allowed and he was granted a declaration that the section under which he was charged was inconsistent with provisions of the constitution. In his judgment, Hardiman J preferred the reasoning of Wilson J to that of McLachlin J describing McLachlin J's justification of her conclusion as wholly utilitarian arguing that she did not deny the injustice: she embraced it on the basis that its operation tended to the greater good (see 17). He pointed out (p.15) that the English decisions although addressing matters of construction rather than compatibility with the constitution like the Canadian cases spoke powerfully to the central

importance of a requirement for mental guilt before conviction of a serious criminal offence, and the central position of that value in a civilised system of justice.

29. None of the authorities to which the Court was referred matches precisely the facts of the present case. Whether the act of intentional sexual activity with a consenting underage girl should without more create criminal liability attracts divided opinion throughout common law countries. See for example, *Michael M v Superior Court of Sonoma County* [1981] 450 US 464 where the decision of the United States Supreme Court was by a majority of five to four. Some states both in the United States and Australia have reasonable belief defences.

30. In summary Mr. Williams submits that, following the Canadian authorities, section 190(4)(aa) of the Code is unconstitutional and of no effect. The age limit of 21 is arbitrary and disproportionate, knowing/reasonable belief as to the age of the complainant is or ought to be a defence and the exclusion of a defence of a mistake as to the age of the complainant makes the offence created by s. 323 of the Code an absolute one and thereby inconsistent with the Constitution which must prevail.

31. Ms. Dill, who appeared for the Attorney-General submits that the Court is not required to follow Canadian authorities and that is should not do so. Other jurisdictions may assist but the starting point is the Bermuda Constitution. She reminds the Court of section 10 of the Interpretation Act 1951 which provides:

> "Except as otherwise expressly provided in this or in any other Act, a court or other public authority constituted in Bermuda shall, in interpreting or construing any statutory provision, apply as nearly as practicable the rules for the interpretation and construction of provisions of law for the time being binding upon the Supreme Court of Judicature in England."

She points out that although the sexual offences in the Criminal Code may reflect the provisions found in the Canadian legislation the Code does not reflect the history of legislative changes and development in Canada.

32. Further, she submits that section 1 of the Convention is a recital in general terms; the substantive rights are to be found in the following sections. One

cannot look at section 1 alone; this case is concerned with section 6(2), nothing else in section 6 is relevant. Section 6(2) reflects Article 6(2) of the ECHR.

33. She referred to *Re B (a Minor)* and the words of Lord Steyn at page 28 that "... in the absence of express words or a truly necessary implication, Parliament must be presumed to legislate on the assumption that the principle of legality will supplement the text. This is the theoretical framework against which section 1(1) must be interpreted." What was fatal to the Prosecution's case in *re B* was that the section was silent as to the *mens rea* in respect of the age ingredient of the offence. The present case is distinguishable because Parliament has expressly provided that the defence of reasonable belief the complainant is aged 16 or over is not available to a defendant.

34. In *Miller v Crockwell* at para 43, a case concerning sexual exploitation of a girl under 14 contrary to section 182A of the Criminal Code, Kawaley CJ said this:

> "For an accused who at the time of the offence was under 21 years of age, although consent can never be a defence, reasonable grounds for believing that the complainant was fourteen years old or more is a defence. For persons above 21 years of age, no such defence exists. Persons under sixteen years of age and not in a special position of trust or responsibility and not more than three years older a complainant can additionally raise consent as a defence to a charge under section 182A of the Code. The legislation contains a carefully calibrated legal regime according to which the strictest levels of criminal liability are reserved for persons of 21 years and older with the result that the conduct of such offenders is legally defined as being more serious in terms of gravity."

35. Ms. Dill drew attention to a passage from the speech of Lord Steyn in *R v K* at para 33:

> "...I would hold that in the present case a compellingly clear implication can only be established if the supplementation of the text by reading in words appropriate to require *mens rea* results in an internal inconsistency of the text. Approaching the problem in this way, one can readily accept that section 14(2) could naturally have provided that a genuine belief by the accused that the girl was over 16 was no defence. Conversely, section 14(2) could have provided that a genuine belief that the girl was under 16 was a defence. In my view a provision of the latter type would not have been conceptually

> inconsistent with any part of section 14. By contrast, the terms of sections 5 and 6 of the 1956 Act namely offences of having sexual intercourse with girls under 13 (section 5) and with girls under 16 (section 6) are inconsistent with the application of the presumption. The 'young man's defence' under section 6(3) makes clear that it is not available to anybody else. The linked provision in section 5, dealing with intercourse with younger girls, must therefore also impose absolute liability. There is nothing in section 14(1) as clearly indicative of the displacement of the presumption. In these circumstances it cannot in my view be said that there is a compellingly clear implication ruling out the application of the presumption."

36. The final authority to which it is necessary to refer is *R v Brown* [2013] UKSC 43 in which a youth of 17 was charged with unlawful carnal knowledge of a girl of 13 contrary to section 4 of the Criminal Law Amendment Act (Northern Ireland) 1885 – 1923. The issue was whether the section created an offence in which proof that the defendant did not honestly believe that the girl was over 14 was not required. Lord Kerr, will whom the other members of the Court agreed, said at paragraph 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."

37. He then reviewed the authorities before saying at paragraph 38 and 39:

> "The strength of the constitutionally 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, [2000] 1 All ER 833, [2000] 2 WLR 452, referred to as the 'magisterial statement' of Lord Reid in *Sweet v Parsley* [1970] AC 132, 148-149, [1969] 1 All ER 347, 133 JP 188."

38. When *R v G* was considered by the European Court of Human Rights (See *G v United Kingdom* (App No37334/08)) the Court said that Article 6(1) and (2) of the Convention do not prevent domestic criminal law from providing for presumptions of fact or law to be drawn from elements proved by the prosecution, thereby absolving the prosecution from having to establish separately all the elements of the offence, provided such presumptions remain within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. The Court went on at paragraph 27:

> "It is not the Court's role under Article 6 ss 1 or 2 to dictate the content of domestic criminal law, including whether or not a blameworthy state of mind should be one of the elements of the offence or whether there should be any particular defence available to the accused."

Before adding at para 28:

> "The Court notes that Parliament created the offence under section 5 of the 2003 Act in order to protect children from sexual abuse. As the domestic courts confirmed, the objective element (*actus reus*) of the offence is penile penetration, buy any person old enough for criminal responsibility, of the vagina, anus or mouth of a child aged 12 or under. The subjective element (*mens rea*) is intention to penetrate. Knowledge of, or recklessness as to, the age of the child or as to the child's unwillingness to take part in the sexual activity are not elements of the offence."

39. In our view the issue in this appeal is more appropriately resolved by recourse to the England and Wales authorities and the observations of the European Court of Human Rights than elsewhere. It is a matter for the Bermuda Parliament to decide the essential elements of this offence and any defence to it. This they have done with the paramount intention of protecting children from premature sexual activity as well as predatory adult paedophiles. Parliament has chosen the cut-off age at which defendants lose the defence of reasonable belief that the complainant is 16 years of age or over as 21. They were entitled to do so, albeit as Kawaley CJ pointed out in *Miller v Crockwell* and as the trial judge mentioned in the present case there is now a logical argument for reducing it to 18. This does not in our view breach the Bermuda Constitution. The appellant is afforded a fair hearing and the element of *mens rea* is established by his deliberately committing

the *actus reus*. The omission of the defence of reasonable or mistaken belief does not offend the provision in section 6(1) of the right to a fair hearing and the presumption of innocence is not breached by section 190(4)(aa) of the Criminal Code. There is therefore no breach of the Bermuda Constitution.

The Conviction

40. The jury returned verdicts of not guilty of serious sexual assault against the three co-defendants but found the appellant guilty. What followed was unfortunate. Ms. Mulligan for the Crown said "obviously it can only be of a sexual assault, not a serious sexual assault." The Court responded "sexual assault" and Ms. Mulligan said "-even though the jury didn't say as much, clearly, having the others acquitted, it would have to be just a sexual assault". The judge replied: "Yes, definitely" and so the matter was left, without comment from counsel for the appellant. The warrant of commitment records that the appellant was convicted of sexual assault rather than serious sexual assault. In truth, the jury returned a verdict of serious sexual assault and this was never altered by the Court, nor could it have been. What should have happened is that the judge should not have accepted the verdict and should have reminded the jury that serious sexual assault could only by committed by the appellant if it was committed by the appellant with another person. There are two possibilities either the jury overlooked the judge's direction that serious sexual assault could not be committed by one person alone or they concluded it was committed with one or more of the others unnamed but referred to in the indictment. The only other person mentioned in the evidence was Carl but the judge in summing up did not leave to the jury the possibility that the appellant could be convicted of serious sexual assault on the basis that Carl was a co-perpetrator. She said this at p. 84 line 22:

> "After you have considered all of the evidence you may reach one of three verdicts: 'Not guilty'; 'Guilty of serious sexual assault' if you find two or more of the Defendants guilty of this serious sexual assault; 'Guilty of sexual assault' if you only find one Defendant guilty."

In either event the verdict of guilty of serious sexual assault is unsafe and cannot stand. Accordingly I would set it aside and substitute a verdict of sexual assault contrary to section 323 of the Code.

41. Unfortunately the problems do not end there because there remains the issue of the basis on which the appellant should be sentenced. In her sentencing remarks the judge said:

> "So, based on the evidence that you have led during the actual trial, and which I heard, the sexual assault took place when you were by yourself; the others, as your evidence said, they were scattered about the property or not even there. That being the case I will sentence you on the basis of sexual assault."

42. She observed that the maximum penalty was 20 years imprisonment, said the victim was 14 and perhaps masquerading as someone older. Then she added that she was small in stature which might have indicated she wasn't as old as she looked. She mentioned the appellant's evidence as to her mistaken behalf as to her age and that consent was no defence. She did not think the appellant took full responsibility for what he had done.

43. The appellant fell to be sentenced in the basis of the account he had given in evidence rather than the account, or any variation of it, advanced by the prosecution. He had offered a plea of guilty on that basis, albeit only very shortly before the start of the trial. The prosecution cannot for a moment be criticised for not accepting that plea because their case was very different, but the offer of the plea and the victim's verdict means that the appellant is entitled to some discount on his sentence. Even on the appellant's account there were serious features of this case. There was genital fondling as well as oral sex; the victim was only 14 and the appellant 7 years older; the victim was a virtual stranger and the offence was committed in the open in an area where others could have come across them. Consent on the part of the victim has to be seen in the context that the sexual activities where at the appellant's instigation. In addition to the plea of guilty the appellant had the mitigation of previous good character.

44. If the appellant had been tried alone for the offence to which he pleaded guilty he would have been tried in the Magistrate's Court where the maximum penalty is 5

years imprisonment. Our attention was drawn to the sentencing guidelines for this type of offence which suggest a starting point of 2 years and a range of 12 to 30 months custody. As Ms. Clarke pointed out the England and Wales Guidelines are not markedly different. Mr. Williams referred us to *R v Boorman* (unreported) where the defendant was sentenced to 12 months imprisonment, but all these cases turn on their particular facts. Five years was manifestly excessive on the facts on which the appellant had to be sentenced. We would allow the appeal against sentence and substitute a sentence of 2 years imprisonment. The one year's probation to follow will remain undisturbed.

Baker, P

Kay, JA

Bell, JA