Neutral Citation no. [2011] NICA 47 | *Ref:* **MOR8276**

Judgment: approved by the Court for handing down | *Delivered:* **8/09/11**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

RICHARD BROWN

_____

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

_____

MORGAN LCJ

[1] On 22nd June 2004 at Belfast Crown Court the appellant was convicted, on a plea of guilty, of unlawful carnal knowledge of a girl under 14 years of age contrary to section 4 of the Criminal Law Amendment Act 1885 (the 1885 Act) and was sentenced to 3 years detention at the YOC suspended for 2 years. Although the effective period of the suspended sentence has now expired, the appellant remains subject to registration on the Sex Offenders Register. Mr Sayers appeared on behalf of the appellant and Mr Sefton for the respondent. We are grateful to both counsel for their helpful oral and written submissions.

[2] The appellant has been granted leave to appeal. He submits that his plea was entered on the basis that the fact that he honestly believed the age of the victim to be 15 was not a defence open to him in law. His argument turns on recent House of Lords authority suggesting that express words would be required to make this offence one of strict liability, that mens rea is necessary and that he did not have such mens rea. The necessary extension of time to seek leave was granted.

Background

[3] On 6th August 2003 the appellant, then aged 17 but one week from his 18th birthday, had been drinking with friends. He then left them to go to the shop and while there encountered the victim whom he recognised as his

friend's sister. The victim was aged 13 although the appellant stated in interview that he believed she was 15. The appellant said that he asked her did she 'fancy a bit' and that he used the term 'shag'. He stated that she agreed and she left her friends to go with him, stopping outside his house while he went in to get a condom. They then walked along Prince's Way and entered the forest where the appellant and victim had sexual intercourse. The appellant stated that they stopped when the victim's mother phoned her and the victim told him to stop. At this time the victim rang a taxi and the appellant waited with her at the bottom of the forest while the taxi arrived. He said that she seemed all right and that she didn't seem annoyed. She was talking to him 'as normal'.

[4] In the complainant's first account she stated that she was afraid that the appellant was in the paramilitaries because of remarks shouted by other boys while they were talking. She said she and her friend had walked together down the road after meeting the appellant and he had followed them asking them both for sex. They had both declined. She later changed her story, however, and admitted that she had told lies and that the intercourse was consensual. Both parties accepted these facts for the appeal.

[5] The learned trial judge proceeded on the basis that it was irrelevant to the issue of liability under section 4 of the Criminal Law Amendment Act 1885 that the appellant had an honest belief that the victim was fifteen years old. He did not allude to any submissions made by counsel on this issue. The parties both accept that the case proceeded on the basis that it was a strict liability offence. The judge said that there were strange features to the case which allowed him to deal with the appellant in a lenient way. He stated that given the defendant's youth, clear record and the special circumstances of the case he was proceeding to sentence him in the absence of a pre-sentence report. He noted the appellant was a hard worker and the case had clearly taken a serious toll on him. In addition he was satisfied that the appellant was immature and that the subject incident was isolated. Remarking on his obligations under the 1996 Act the Judge stated that he took into account the plea of guilty at the first opportunity and the defendant's clear record and for those reasons he would suspend a period of detention of 3 years for a period of two years.

[6] There is no doubt that there is a constitutional principle which imposes a duty on the courts in most circumstances to import a requirement of mens rea into statutory offences where the statute is silent on the mental element necessary for the crime. It was the basis of the decision in B v DPP [2000] 2 AC 428 where the offender was charged with inciting a child under the age of 14 to commit an act of gross indecency contrary to section 1(1) of the Indecency with Children Act 1960. The House of Lords held that the prosecution had to prove that the defendant lacked an honest belief that the child was aged 14 or over. It was also applied in R v K [2001] UKHL 41 where a 26 year old man

was charged with a single count of indecent assault against a 14 year old girl contrary to section 14(1) of the Sexual Offences Act 1956. By virtue of section 14(2) of the 1956 Act a girl under 16 could not give consent in law. The House held that the prosecution had to prove that the defendant did not honestly believe that the girl was aged 16 or over.

The statutory scheme

[7] The principle applicable in such cases was most helpfully set out in the opinion of Lord Steyn in R v K.

> "It is well established that there is a constitutional principle of general application 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 applicability of this presumption is not dependent on finding an ambiguity in the text. It operated to supplement the text. It can only be displaced by specific language, i.e. an express provision or a necessary implication."

[8] Since it is accepted that there is no express provision to displace the presumption the issue in this case is, therefore, whether the presumption is excluded by necessary implication. As Lord Hutton made clear in R v K a necessary implication is a more stringent test than a reasonable implication.

[9] The starting point is to look at section 4 of the 1885 Act in its original context. As originally enacted it provided that any person who unlawfully and carnally knew any girl under the age of 13 years should be guilty of felony and could be sentenced to penal servitude for life. The section was silent on mens rea.

[10] It has to be seen, however, in the context of the adjoining sections. Section 5 of the 1885 Act provided that if any person unlawfully and carnally knew any girl above the age of thirteen years but below the age of sixteen years he was liable to 2 years penal servitude. It was further provided, however, that it was a sufficient defence to this charge if the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen.

[11] Section 6 dealt with the criminal liability of the owners and occupiers of premises to which young girls resorted for the purpose of being carnally known. A defence was also provided in that case where the defendant had reasonable cause to believe that the girl was aged sixteen or over. Finally

section 7 dealt with the abduction of females and it again provided a defence based upon reasonable cause to believe that the girl was sixteen or over.

[12] It is apparent, therefore, that there was a deliberate decision in the drafting of the 1885 Act to omit any defence based upon the offender's belief of the age of the child for the offence under section 4 of the 1885 Act as originally enacted. To imply such a defence into the original enactment would be to act contrary to the parliamentary intention of the statute as discerned by reading its provisions in context. That was also the conclusion reached by Lords Bingham and Steyn in respect of comparable English legislation in R v K.

[13] The defences under sections 5 and 6 of the1885 Act were then removed by section 2 of the Criminal law (Amendment) Act (Northern Ireland) 1923 (the 1923 Act) which provided:

> "2. [1] Reasonable cause to believe that a girl was of or above the age of seventeen 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"

We have decided in R v Kenneth Hamilton [2011] NICA 46 that the removal of this defence does not contravene the convention rights of the defendant.

[14] In his attractively presented and well researched submissions Mr Sayers contended that the effect of the 1923 Act was to remove the defences in sections 5 and 6 of the 1885 Act so as in substance to make sections 4, 5 and 6 of the 1885 Act silent on the question of mens rea. He submitted, therefore, that the context had changed and the argument for the displacement of the presumption had been undermined. He argued that the reason that the presumption did not apply to sections 5 and 6 of the 1885 Act was because of the express words of the 1923 Act. If the presumption did not apply those express words would not have been necessary and all that would have been necessary was the removal of the defences in the relevant sections.

[15] We acknowledge the ingenuity of the argument but we do not accept that it is correct. It is dependent upon the conclusion that the exclusion of a defence related to belief in age for an offence under section 4 of the 1885 Act was reversed by implication. It is clear, however, that section 2 of the 1923 Act was concerned solely with the defences based on reasonable belief under sections 5 and 6. That is apparent not just from the words of the section itself but from the heading of the section by the draftsman which is confined to sections 5 and 6. The methodology used to effect the removal of the defence under sections 5 and 6 gave rise to no implication for any other section of the 1885 Act.

Conclusion on conviction

[16] We consider, therefore, that unlike the Sexual Offences Act 1956 the Criminal Law Amendment Act 1885 provides a reliable statutory framework for the necessary implication that a defence based upon belief as to age is not available to a charge under section 4 of that Act. We dismiss the appeal against conviction.

Sentence

[17] We can deal with the issues in relation to sentence rather more briefly. There were aggravating factors in this case. The age difference was greater than four years. The appellant knew that the victim was underage because he said that he believed her to be fifteen. This as an opportunistic crime on a child who was relatively inexperienced sexually and the fear of pregnancy clearly caused her considerable upset.

[18] Although these factors might well justify a sentence of 3 years detention the learned trial judge also identified significant mitigating factors which we have set out at paragraph 5 above. Making due allowance for those factors we consider that the sentence of 3 years detention was manifestly excessive and we substitute for it a sentence of 2 years detention suspended as before for a period of 2 years. The period of notification on the Sex Offenders register is 10 years from the date of the imposition of the original sentence.