

IN THE CROWN COURT OF NORTHERN IRELAND

THE QUEEN

-v-

EOIN RAFFERTY

RULING

MORGAN J

[1] The defendant is charged on the first count with rape, on the second count with unlawful carnal knowledge and on the third and fourth counts with indecent assault. This ruling arises as a result of a request by the defence to establish the basis on which the jury will be directed in respect of the second, third and fourth counts.

[2] I can deal briefly with the third and fourth counts. The equivalent English provisions were considered by the House of Lords in *R v K* [2001] UKHL 41. The issue in this case is whether the complainant consented to the acts performed by the defendant and other the defendant honestly and genuinely believed that the complainant was over 16 years of age. I am satisfied that I should follow the approach taken by the House of Lords and if the issues of consent and the defendant's belief in the age of the complainant are put in issue at the trial it will be for the Crown to establish the absence of consent or the lack of belief that the complainant was over 16 beyond reasonable doubt.

[3] Different considerations arise, however, in relation to the unlawful carnal knowledge count. The offence is charged contrary to section 5 (1) of the Criminal Law Amendment I885. As originally enacted that provided a defence if it should be made to appear to the court or jury before whom the charge was brought that the person so charged had reasonable cause to believe that the girl was above the age of 16 years. Section 4 of the 1885 Act provided for a corresponding offence with a heavier penalty in respect of in

respect of children under the age of 13. The effect of these provisions was that a defence based on a belief as to the age of the complainant was available in respect of older girls but was not available in respect of the younger girls.

[4] The 1885 Act was amended in England and Wales by the Criminal Law Amendment Act 1922. Section 2 of that Act provided the so-called young man's defence whereby a man under 24 who had not previously been charged with an offence could avail of a defence based on his belief as to age but an older man or one who had been previously charged could not so avail. In Northern Ireland the Act was amended by the Criminal Law Amendment Act (Northern Ireland) 1923. By section 2 of the 1923 Act reasonable cause to believe that the girl was over the age of 16 years was not to be a defence to a charge under section 5 (1) 1885 Act.

[5] The House of Lords has recently emphasised in *B (a minor) v DPP* [2000] 2 AC 428 and *R v K* [2001] UKHL 41 that whenever a section as silent as to the mens rea required for an offence there is a presumption that in order to give effect to the will of Parliament words appropriate to require mens rea must be read in and the presumption can only be displaced by an express provision or a necessary implication. In this case the express statutory words leave no room for the presumption to operate. If the amendment had simply deleted the proviso to the 1885 Act I should have been inclined to follow the approach to statutory construction taken by Denham J in her dissenting judgment in *CC v Ireland* (IESC 12 July 2005). I consider, however, that the express words of the 1923 Act prohibit such an approach.

[6] The defence contend that the defendant is entitled to have the question of his belief as to the age of the complainant left to the jury by virtue of the ECHR. A discrimination case was referred to in the skeleton argument but no authority was for put forward to support it in argument. It is clear that article 6 of the convention is a procedural rather than a substantive right. The defendant's argument was that his sexual activity concerned an intimate aspect of his private life and was protected by article 8. I accept that private consensual sexual activity is protected by article 8 (1) of the convention and that any interference with such activity must be in accordance with law, for a legitimate purpose and be proportionate.

[7] The criminal offence pursuant to section 5 (1) is clearly in accordance with law and is demonstrably for the legitimate purpose of protecting young females. The mechanism for effecting that protection by means of the statutory criminal law is clearly a matter for the legislature who would normally expect to have a wide area of discretionary judgement in relation to such an issue. Different jurisdictions have taken different views about these matters and I have been referred to the Irish decision of *CC v Ireland* [2006] IESC 33 and the Canadian decision of *R v Hess and Nguyen* [1990] 2 SCR 636

where on constitutional grounds strict liability for this offence was rejected. A different approach was taken by the United States Supreme Court in *Michael M v Superior Court of Sonoma County* [1981] 450 US 464.

[8] In my view these decisions are of little assistance depending as they do on the particular provisions of the constitution to which they are relevant. The policy underlying the provisions in England and Wales was articulated without disapproval by the House of Lords in *B v DPP* and *R v K*. The difference in Northern Ireland is the absence of the so-called young man's defence but in my view the issues of principle remain the same. The same issues were explored more recently in *R v G* [2006] EWCA Crim 821 although the argument in that case concerned the choice of charge under the Sexual Offences Act 2003. It is clear that questions of culpability will be highly relevant to sentence and that proportionality may well be relevant in that context but none of these cases give any support for the proposition that article 8 can operate so as to impose a change to the substantive law such as is being contended for in this case.

[9] The approach which the court should take to issues of proportionality was set out by the Privy Council in *de Freitas* [1999] 1 AC 69. Applying that approach, the legislative object is the protection of young females and is sufficiently important to justify an interference with private consensual sexual activity. The measures in question are rationally connected to that objective. The real issue between the parties is whether the measures are reasonably justifiable in a democratic society. The convention does not prohibit criminal liability based on factual events that do not require a guilty mind. The cases set out at paragraph 7 and 8 above reflect the particular concern arising from the involvement of children in consensual sexual activity. The policy adopted in this jurisdiction is one which has also been followed in other democratic countries. Where it has been rejected, that has generally occurred because of specific constitutional provisions relating to penalisation without a guilty mind.

[10] I consider that there is no proper basis upon which I can interfere with the discretionary judgement exercised by the Northern Ireland legislature in relation to this social issue. Accordingly in this case I do not consider that it is open to me to direct the jury that the prosecution have to prove that the defendant did not have an honest or reasonable belief that the complainant was over 16.