THE SUPREME COURT

AN CHÚIRT UACHTARACH

O'Donnell C.J.

Dunne J.

Charleton J.

O'Malley J.

Woulfe J.

Hogan J.

Murray J.

Between/

C.W.

Plaintiff/Respondent

-and-

The Minister for Justice, Ireland, the Attorney General and the Director of Public Prosecutions

Respondents/Appellants

Judgment of Mr. Justice O'Donnell, Chief Justice and Ms. Justice Iseult O'Malley delivered the 28th August 2023.

Introduction

1. This is an appeal by the State parties against the finding of the High Court that s.3(5) of the Criminal Law (Sexual Offences) Act 2006 (as substituted by s. 17 of the Criminal Law (Sexual Offences) Act 2017), is invalid having regard to the provisions of the Constitution and in particular Article 38 thereof (Stack J. – see *C.W. v. Minister for Justice* [2022] IEHC 336).

2. Persons charged under s.3 of the Act with the offence of defilement (that is, engaging in a sexual act with a child under the age of 17), may defend the charge on the basis that they believed, on reasonable grounds, that the child was in fact over that age. The subsection under challenge provides that this defence must be proved on the balance of probabilities – the defendant must satisfy a jury that it is more likely to be true than not. The sole issue in the appeal is whether that burden is permissible having regard to the guarantee under Article 38 of the Constitution that no person may be tried for a criminal offence other than in "due course of law".

3. The Act of 2006 creates two related offences – defilement of a child under the age of 15 (s.2) and defilement of a child under the age of 17 (s.3). This appeal is concerned only with s.3 but, clearly, regard must be had to the fact that the two sections are drafted in identical terms apart from the specification of the relevant age and the applicable sentences.

4. Section 2(3), as amended in 2017, provides that it shall be a defence to a charge under that section for the defendant to prove that he or she was reasonably mistaken that the child had in fact attained the age of 15. Section 3(3), similarly, provides that it shall be a defence to a charge to prove that the accused was reasonably mistaken that the child had attained the age of 17. That provision is not challenged – the respondent does not object to the stipulation that it is for him to show that he held such a belief, and that the belief must have been reasonable. The impugned

provision is s.3(5), which provides that an accused person who claims that he or she made a mistake about the age of the child must prove that claim on the balance of probabilities.

5. It is important to be clear from the outset that, despite the apparently broad drafting of both s.2(3) and s.3(3) ("*It shall be a defence to proceedings for an offence under this section*…"), the defence is only capable of being relied upon in a case where, had the mistaken belief been correct, the offence charged would not have been committed. (In the case of a charge under s.2, the effect would be that the accused person could be acquitted of that offence but would be convicted, by virtue of the alternative verdict provisions of the Criminal Law Act 1997, of an offence under s.3 unless the mistaken belief was also and improbably a reasonable belief that the person in question had attained the age of 17.) Although the very serious sexual offences of aggravated sexual assault and rape under s. 4 of the Criminal Law (Rape) (Amendment) Act 1990 can, in the case of a child, be prosecuted under the Act of 2017 as defilement, no belief about the child's age could logically lead to an acquittal in relation to non-consensual acts. This issue will be considered further in due course.

6. Thus, the issues in this appeal concern only cases where it is claimed by the defence that the child under 17 did, as a matter of fact rather than law, consent to the sexual act *and* the accused claims that he or she believed, on reasonable grounds, that the child was 17 years of age or older. It is accepted by all of the parties that it is legitimate for the legislature to provide that a belief, even if honest, will not be a defence unless it is based on reasonable grounds. It is also accepted that it is permissible to make the accused prove his or her claim to *some* extent. The dispute in the appeal is concerned only with how far such a claim must be proved by the defence.

7. The respondent, who was the plaintiff in the High Court, was charged by the third named appellant with two offences, being one count of rape and one count of the offence of defilement of a child under the age of 17. After being returned for trial in the Central Criminal Court he issued these proceedings, in which he originally sought a declaration that the offence of defilement, as provided for in s.3, was

invalid having regard to the Constitution and/or was incompatible with the European Convention on Human Rights. (As already noted, the claim is now significantly more restricted.) The trial proceeded in May 2021. The respondent was acquitted by the jury on the charge of rape but was convicted of defilement. He was sentenced to a term of imprisonment of one year and ten months. His appeal against conviction remains listed in the Court of Appeal pending the outcome of this appeal in the civil proceedings.

8. The respondent's case is primarily based on the proposition that the age of the child is a key ingredient of the offence of defilement, since no crime is committed unless the child is under 17. He says that it follows as a matter of law that this element must require *mens rea* on the part of the accused person. He accepts that it can be permissible to impose a burden of proof on the defence in this regard, but argues that any burden so imposed cannot go beyond the requirement to prove grounds for reasonable doubt on the issue. To go further than this amounts, he says, to an infringement of the presumption of innocence and, therefore, a violation of the constitutional guarantee of a right to a trial in due course of law.

9. The appellant State parties accept that age is a key ingredient of the offence, in the sense that the age of the child at the relevant time must be proved beyond reasonable doubt. However, they contend that *knowledge* of the age on the part of the accused is not an ingredient, and that, therefore, there is no onus on the prosecution to show that an accused person had any *mens rea* in relation to the age. The offence is complete if the accused person did in fact engage in sexual activity with a child who was in fact under 17. They say that the section simply provides for a special defence available to a person who can show that they had made a reasonable mistake about the age of the child.

10. In the alternative, the appellants argue that the right to be presumed innocent is not absolute and that, if *mens rea* as to age is indeed an element of the offence, the reverse burden is nonetheless justifiable. They contend that it is both rational and proportionate. The respondent disputes these contentions.

11. The Irish Human Rights and Equality Commission, which joined in this appeal as an *amicus curiae*, agrees with the respondent that the age of the child is an element of the offence and that there must be *mens rea* in respect of that element. Like the respondent, it interprets the section as, in effect, providing for a mandatory but rebuttable presumption that an accused person was aware that the child was under 17. It argues that the provision goes too far in imposing a standard of proof on the balance of probabilities.

12. In the High Court, Stack J. held that the subsection breached the constitutional guarantee of a trial in due course of law. In her view, the offence of defilement required the accused person to have some degree of knowledge about the age of the child. That *mens rea* was seen by her as a core element of the offences. The effect of the provision was that the accused was obliged to discharge a burden of proof, on the balance of probabilities, in respect of that core element. She considered that such a burden was not constitutionally permissible and breached the right to be presumed innocent. Stack J. also considered, and rejected, an alternative argument made on behalf of the State parties to the effect that even if the provision did impair that right, it was justifiable in the light of the difficult policy choices made by the Oireachtas and the reasons for those choices.

This judgment

13. The interpretation of s.3(3) is obviously a significant matter to be addressed. In some cases, the proper interpretation of a statute under challenge will determine the outcome without more. In this case, however, O'Donnell C.J. and O'Malley J. disagree on the question of interpretation but agree on the end result – that the appeal should be dismissed. The reason that we deliver a joint judgment is that, for the reasons set out below, we agree on a number of applicable principles, and even on the issue where our reasoning diverges we agree on the essential nature of the analysis required. Given the complex legal background to this case, it is, we consider, desirable to provide the maximum degree of clarity on what is decided in this case and the reasoning leading to that conclusion. Most importantly, our separate analyses converge on the ultimate question. We are agreed that the

impugned provision is unconstitutional in that it breaches Article 38 of the Constitution.

14. The original version of s. 3 of the Act of 2006 was enacted in the immediate aftermath of the decision of this Court in *C.C. v. Ireland* [2006] 4 I.R. 1 ("*C.C.*") and a significant part of the debate in the instant appeal centres on the legal effect of that decision. That is not to say, however, that the outcome of the appeal is to be decided by reference only to the analysis of the Court in *C.C.*

15. The determination of the correct interpretation of the current legislation (as it now stands after amendment in 2017), and the legal consequences of that interpretation, will require some consideration of the pre-2006 legislation and caselaw. It also requires consideration of the principles relating to *mens rea*, reversed burdens of proof and the presumption of innocence in criminal law. It will be helpful to set out the main features of that background before turning to the analysis of the High Court and the submissions of the parties in this case. In the first instance, the focus must be on the decision in *C.C.* and the context in which the Court arrived at its conclusions in that case.

General observations

16. Before setting out the background specific to the issues in the case, however, we will commence with some necessarily general statements about the nature of criminal law in this jurisdiction.

17. Our criminal law was not developed pursuant to a single unifying theory, and when in 1937 the Constitution guaranteed by Article 38 that trials in criminal matters should be in due course of law, it did not impose any such theory. Instead, the criminal law is an eclectic mix of common law and statutory provisions, containing an array of offences, and defences, comprised of different elements, and requiring different proofs which are, moreover, capable of being established in different ways. Article 38 of the Constitution does not, therefore, require offences to be formulated in conformity with a single pattern in relation to either the definition of an offence or the manner in which it can be proved.

18. In some cases, the extent to which a particular offence deviates from a standard pattern, particularly, perhaps, in cases of offences of some age, (whether created by the common law or by statute), may suggest that it requires close scrutiny by reference to the standards now understood to be required by the Constitution. But as Charleton J. observes in the judgment he delivers, uniformity is not required, or necessarily to be desired. In many cases, the differences in formulation, structure and methods of proof, may be a product of the incremental development of the common law, a particular vogue in statutory drafting, or the developing experience of the law in seeking to prohibit behaviour thought harmful in some respect, and to punish those found guilty of such behaviour, while remaining consistent at all times with the fundamental obligation of fairness in the criminal trial process.

19. It is therefore risky to make broad, over-general statements about the criminal law, since our law probably encompasses exceptions to any such statement. This is not necessarily to be seen as a sign of inconsistency or irrationality – it reflects the historical development of the criminal law within a common law system now governed by constitutional values.

20. So, for example, it is generally true to say that serious crimes require proof of a guilty mind. However, that does not mean that every crime that can be classed as serious requires proof of intention or recklessness in respect of all the elements of the offence, and it very often does not mean that the defendant must have intended to bring about the consequence of his or her actions. The required *mens rea* does not have to map exactly onto the *actus reus*. For example, the offence of attempted murder is the only crime within the range of homicide offences where the defendant must have intended to cause death. A person can be guilty of murder without actually having either intended or desired to kill. Manslaughter can be committed in various different ways, with various mental states. A conviction for gross negligence manslaughter is posited on a *failure* to advert to a risk that would have been clear to a reasonable person. In this latter case, the only mental element is that the accused intentionally did the act that in fact caused death.

21. The offence of causing death by dangerous driving requires proof of fault, in that the accused must be shown to have driven in a manner which a reasonably prudent person, having regard to all the circumstances, would have recognised as involving a direct, immediate and serious risk to the public, but it does not have to be shown that the accused gave any consideration to the possibility that death might be caused. Careless driving causing death comes even lower down the scale, where the defendant's driving simply shows an appreciable falling below the standard of care and attention expected of a reasonably competent driver. It was explained in *People (DPP) v. O'Shea* [2017] IESC 41 that such offences could not be analysed on an assumption that proof of intention or recklessness was required, since the presence of either of those elements would elevate the offence to the far more serious level of murder or manslaughter. *O'Shea* also pointed out that this did not mean that a "*blameless*" driver would be convicted, since driving without due care and attention creates an unjustifiable risk of harm and is not blameless. However, it must be emphasised that the culpability of, and the penalties liable to be imposed on, defendants in such cases will, of course, be far less than in the more serious homicides.

22. Similarly, it is true as a general statement that in a criminal trial that it is for the prosecution to prove each element of an offence beyond reasonable doubt. However, that principle does not mean that in no case may a burden be placed on to the defence in relation to some particular aspect. The authorities discussed below demonstrate that there is nothing unique about a statutory provision that expressly imposes some burden on the defence in respect of some matter, even in respect of the mental state of the defendant. The real issue in this appeal is whether it is constitutionally permissible to impose a burden of proof on the balance of probabilities in respect of the statutory defence of mistaken belief.

C.C. v. Ireland

(i) The legislative history

23. In *R. v. Prince* (1875) LR 2 CCR 154, the defendant had been charged with taking an unmarried girl under the age of 16 out of the possession and against the will of

her father. The jury made express findings to the effect that the defendant had believed the girl to be 18 and had reasonable grounds for so believing. The majority of the judges in the Court of Crown Cases Reserved held that this was not a defence, as the offence depended solely upon the actual age of the girl. The view seems to have been that the necessary *mens rea* lay in the fact that the defendant had carried out an unlawful and immoral act. The judgments in *Prince* (apart from the sole dissent delivered by Brett J.) have been heavily criticised in both the English and Irish courts in the modern era, and would not now be relied upon as sound statements of law in either jurisdiction. However, the case had a very significant impact on the analysis of sexual offences for a considerable period of time. This was at least in part because certain of the judgments expressly addressed the then-extant legislation concerning unlawful carnal knowledge of underage girls (see, for example, the extracts from the judgments of Blackburn J. and Bramwell B. quoted by Denham J. in *C.C. v. Ireland*).

24. The views of the members of the Court in *Prince* as to the effects of a mistake of fact were later summarised as follows by Stephen J. in *R. v. Tolson* (1889) Q.B.D. 168:

"Lord Esher, then Brett, J., was against the conviction. His judgment establishes at much length, and, as it appears to me, unanswerably, the principle above explained, which he states as follows:

> *"That a mistake of facts on reasonable grounds, to the extent that, if the facts were as believed, the acts of the prisoner would make him guilty of no offence at all, is an excuse, and that such an excuse is implied in every criminal charge and every criminal enactment in England."*

Lord Blackburn, with whom nine other judges agreed, and Lord Bramwell, with whom seven others agreed, do not appear to me to have dissented from this principle, speaking generally; but they held that it did not apply fully to each part of every section to which I have referred. Some of the prohibited acts they thought the legislature intended to be done at the peril of the person who did them, but not all.

The judgment delivered by Lord Blackburn proceeds upon the principle that the intention of the legislature in s. 55 was "to punish the abduction unless the girl was of such an age as to make her consent an excuse."

Lord Bramwell's judgment proceeds upon this principle:

> *"The legislature has enacted that if any one does this wrong act he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of the mens rea. If the taker believed he had her father's consent, though wrongly, he would have no mens rea; so if he did not know she was in any one's possession nor in the care or charge of anyone. In those cases he would not know he was doing the act forbidden by the statute."*

All the judges therefore in Reg. v. Prince agreed on the general principle, though they all, except Lord Esher, considered that the object of the legislature being to prevent a scandalous and wicked invasion of parental rights (whether it was to be regarded as illegal apart from the statute or not) it was to be supposed that they intended that the wrongdoer should act at his peril."

25. After the decision in *Prince*, Parliament made express provision in s. 5 of the Criminal Law Amendment Act 1885 for a defence of reasonable mistake as to age in relation to a number of sexual offences including that of unlawful carnal knowledge. In the case of a girl aged over 13 but under 16 (the "older girl" offence), it was a sufficient defence if it was "*made to appear to the court or jury*" that the accused had reasonable cause to believe that the girl was over 16. No such defence applied if the girl was under 13 (the "younger girl" offence).

26. Fifty years later, in this jurisdiction, the Criminal Law Amendment Act 1935 repealed and replaced a number of provisions of the 1885 Act. Section 1(1) of the Act of 1935 provided for the offence of defilement of a girl by simply stating that *"Any person who unlawfully and carnally knows any girl under the age of fifteen years shall be guilty of a felony…"* and providing for a penalty. Section 2 made

provision for the same offence when committed in respect of a girl aged between 15 and 17 ("*any person who unlawfully and carnally knows any girl who is of or over the age of fifteen years and under the age of seventeen years shall be guilty of a misdemeanour*…"), with a lower penalty. Significantly, s. 5 of the Criminal Law Amendment Act 1885 was among the sections repealed and no similar measure replaced it.

27. Section 2 was amended in 1997 by the deletion of the words "*of or over the age of fifteen years and*" (s.13 and the First Schedule to the Criminal Law Act 1997). This would have had the effect of removing one cause of concern voiced by the judges in *R. v. Prince*, which was that if a claim of mistaken belief as to age was permissible, then an accused man charged with a "younger child" offence could claim that he believed the girl to be in the "older child" age bracket and *vice versa*. That would have meant that he could not be convicted under either provision, since he would have committed the *actus reus* of one offence with the *mens rea* for another. (In a sequel to the decision in *C.C.* (see *ZS v. Director of Public Prosecutions* [2013] 3 I.R. 626) the State argued that the section was sufficiently altered by the amendment to allow for a different interpretation to that in *C.C.*, relying on the double construction rule. However, this Court held that s.2 as enacted was inconsistent with the Constitution, had not been carried over in 1937, and could not have been validly amended in 1997.)

28. It is relevant to note here some of the other provisions of the 1935 Act. Section 4 dealt with the offence of defilement of a mentally impaired woman or girl. A person charged with that offence could be convicted only where the circumstances proved that he knew of the complainant's condition. Section 6 provided for an increased penalty for the common law offence of indecent assault. Section 9 amended a provision of the Criminal Law Amendment Act 1885 whereby it was an offence for a person having control of a premises to permit a girl to be on the premises for the purpose of being unlawfully carnally known. As well as amending the age ranges for the purpose of this offence, the 1935 Act abolished the defence of having reasonable cause to believe that the girl was above the relevant age. It also removed a similar defence in respect of the offence of abduction. Finally, s. 14 of the Act

provided that consent on the part of a girl aged under 15 should not be a defence to a charge of sexual assault.

(ii) Relevant caselaw

29. The Criminal Justice Act 1964 abolished the death penalty for all murders, with the exception of cases where the victim was a member of a specified class of persons. The offence of murder was, in relation to those excepted categories, renamed "capital murder". One such specified class was members of the Garda Síochána acting in the course of their duty, and the appeal before the Court in *People (DPP) v. Murray* [1977] I.R. 360 was concerned with the murder of a garda. The prosecution case, accepted in the court of trial and in the Court of Criminal Appeal, was that it simply had to prove a murder in the normal way (with the *mens rea* being an intent to kill or to cause serious injury), and additionally to prove as a matter of fact that the victim was a garda who had been acting in the course of his duty.

30. Of note, the Court of Criminal Appeal said that if it had reached a different conclusion, and capital murder was to be considered a new offence or a new variety of an existing offence, there would be a presumption at common law that it was the intention of the Oireachtas that an accused person was not guilty unless he had a *mens rea* in relation to all the ingredients of the offence.

31. On appeal, this Court unanimously held that the legislation had indeed created a new offence, with an additional feature relating to the status of the victim. All members of the Court agreed that the interpretation of the provision as contended for by the prosecution – that a person could be guilty of the offence of capital murder by the fortuitous circumstance that his victim was, unknown to the murderer, a member of the Garda Síochána – could not be read into it in the absence of clear and unambiguous wording to that effect. There was no such wording in the Act. The next question was whether it was necessary for the prosecution to prove *mens rea* as to that additional feature.

32. Walsh J. agreed with the Court of Criminal Appeal analysis as to the consequence of finding that this was a new offence. The prosecution would have to prove that

the accused had known that the victim was a garda. In the course of his judgment, he drew a contrast with the offence of unlawful carnal knowledge contrary to the Criminal Law Amendment Act 1935 in the following terms:

> "*With regard to the submission made in relation to the requirements of the Criminal Law Amendment Act, 1935, the position is somewhat different. There it is obviously the policy of the Act of 1935 to protect young girls. The Oireachtas thought it necessary to ensure this by imposing upon a male person who undertakes to have carnal knowledge of a young woman the risk of her turning out to be under the age of consent. It might well be impossible for the prosecution to prove in most cases that the accused had knowledge, and it is to be noted that the statute does not even envisage the accused successfully setting up a defence of lack of knowledge on his part even with the whole onus of proving that fact resting upon himself. The Oireachtas also apparently thought that an honest belief or an honest mistake with regard to age would not be consistent with the general policy of those statutory provisions, the object of which was to protect young girls from themselves as much as from men. The essential difference between that class of case and the present case is that in those cases the defendant is aware that he is dealing with a young woman, because the Act makes no distinction between one class or category of girl and another when they are under age. So far as capital murder of a member of the Garda Síochána is concerned, it is the occupation of the victim which is the decisive matter. Before the offence of capital murder was created it mattered not in the proof of the offence of murder whether the victim was a member of the Garda Síochána or not. If the protection afforded by the Act of 1935 to girls under the age of 17 were to be confined only to girls of a particular occupation, then the position would be quite different as obviously the intention of the Act would be quite different from that Act as it now stands. Therefore, I think there is no valid comparison to be made between the statutory provisions relating to capital murder and those relating to unlawful carnal knowledge of girls under the age of consent."*

33. Walsh J. considered that the offence of capital murder, including the new additional element, was one of specific intent. Citing the well-established common law principle that, unless a statute either clearly or by necessary implication ruled out *mens rea* as a constituent part of a crime, a court could not find a person guilty of an offence against the criminal law unless he had a guilty mind, he rejected the view that recklessness as to the additional element would suffice for the purpose of establishing *mens rea* and would have held that there must be an intent to kill or to cause serious injury to a garda. However, no other member of the Court agreed with him on that issue.

34. Henchy J. agreed that capital murder was a distinct offence, holding that to treat it otherwise would produce illogical and unjust consequences.

> "*It would mean, as counsel for the prosecution contends, that mens rea need not be proved as to the circumstances of the victim having been a member of the Garda Síochána acting in the course of his duty. If that were correct, then a person could be found guilty of capital murder not only if he did not know but also if he had no reason to know that his victim was a Garda, and even if he had been assured that his victim was not a Garda. If capital murder were to depend on the purely adventitious circumstance that the victim turned out to be a Garda acting in the course of his duty, and not on any moral culpability of the killer in that respect, the awesome distinction in penal severity between murder and capital murder would have no ethical or rational foundation.*"

35. Henchy J. then considered the nature of the *mens rea* required. After examining two disparate lines of authority dealing with assaults on police officers he came to the view that the necessary *mens rea* was intention or recklessness as to the fact that the victim was a police officer acting in the course of his duty. In an important passage, he referred to the reasoning behind those cases where it had been held that no *mens rea* was required in relation to that element:

> *"It seems to stem from the idea that, because the section did not qualify the reference to a peace officer acting in the execution of his duty with words*

indicating a requirement of knowledge on the part of the accused of that fact, the offence should be held to be one of strict liability as to that fact. I believe that to be an incorrect method of interpreting a statutory provision imposing criminal liability. The correct rule of interpretation in such a case is that stated by Lord Reid at p 148 of the report of Sweet v. Parsley:

> *"Sometimes the words of the section which creates a particular offence make it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases 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."*

Admittedly Lord Reid was referring to a whole offence rather than to a constituent element of an offence, but the basis for the presumption is the same in both cases, ie, *to avoid the unjust or oppressive application of the section to those who have not merited the guilt and punishment envisaged by the section, either because they are totally blameless or because their blameworthiness is only such as to attract guilt for a lesser offence.*

I find an unrebutted presumption that Parliament, in enacting s 1 of the Criminal Justice Act, 1964, and in creating the new offence of capital murder which is defined for the purpose of this case as "murder of a member of the Garda Síochána acting in the course of his duty," intended that the section should be read as requiring mens rea for all the elements of that definition. As I have indicated earlier, to hold otherwise would be to remove any logical or ethical basis for the distinction between murder and capital murder."

36. The reference to Lord Reid's opinion in *Sweet v. Parsley* [1970] A.C. 132 should be noted, as it has been a significant influence on the jurisprudence in the area in both the United Kingdom and here.

37. Henchy J. differed from Walsh J. in that he accepted that recklessness would suffice in respect of this aspect. This was partly on the basis that intention or recklessness was the *mens rea* for the offence of assault on a police officer. Perhaps more significantly, for present purposes, he considered that a requirement of actual knowledge would not fulfil the purpose of the legislature in making the murder of a member of the Garda Síochána a capital offence. That purpose was to give extra protection to the members of an unarmed force, and that purpose had to include gardaí in plain clothes. Griffin, Kenny and Parke JJ. came to the same conclusion.

38. The next significant judgment is that in *Re Article 26 and the Employment Equality Bill, 1996* [1997] 2 I.R. 321. The general approach of the Court to its assessment of the Bill was set out in the following passage:

> *"The scope of the Bill is comprehensive and purports to deal with all employment related areas from vocational training to access to employment and employment conditions generally, including training, work experience and promotion. Its purpose is to outlaw discrimination in employment and to promote equality between employed persons and the manner in which this purpose is sought to be achieved is set out in the Bill.*
>
> *As will appear when the terms of the Bill are discussed, the achievement of such purpose necessitated a balancing by the legislature of different constitutional rights.*
>
> *It was stated by this court in Tuohy v. Courtney [1994] 3 I.R. 1 at p. 47:—*
>
> > *". . . in a challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function, the role of the courts is not to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from*

an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights."

It is in accordance with these principles that the Court approaches the ultimate task of deciding upon the question of whether any of the impugned provisions is repugnant to the Constitution."

39. Most of the judgment is indeed concerned with provisions that could be described as involving the balancing of rights. However, it will be seen that in its assessment of two separate sections dealing with, respectively, criminal liability and criminal trial rights, the Court did not approach the issues in this manner. The first of these was the proposed imposition of vicarious criminal liability on employers. Section 15 of the Bill provided that anything done by a person in the course of his or her employment was to be treated as done by that person's employer "*whether or not it was done with the employer's knowledge or approval*".

40. It may be noted here that s.15(3) of the Bill provided that it should be a defence to prove that the employer took such steps as were reasonably practicable to prevent the employee from doing either the particular act or acts of that description. This may be seen as what will be referred to here as a "due diligence" defence. The judgment referred to a submission by counsel for the Attorney General to the effect that this provided "*an escape route of some description*" for an accused, but expressed a view (without further discussion) that this might not always be so and that it would, in particular, be "*problematic*" in criminal cases.

41. Having determined that s.15 applied to criminal as well as to civil proceedings (where such a provision would be unexceptionable), the judgment observed that at common law there were only two instances of offences where an employer could be convicted on the basis of vicarious liability (criminal libel and public nuisance). The general principle was that individuals had only to answer for their own actions. The Court acknowledged that, by statute, there were many exceptions to that principle, which were described as tending to be confined to what were

termed "public welfare" offences (sometimes referred to as "regulatory offences"). Its conclusions in relation to offences of that nature were as follows:

> "*While the Court is not now called upon to pronounce on the validity of such provisions, nevertheless, the Court is of the opinion that the conditions by which they may be held to pass muster under our present constitutional system is that they were part of the established legal order at the birth of the State as well as on the coming into operation of the present Constitution; they should essentially be regulatory in character; apply where a person has a particular privilege (such as a licence) or a duty to make sure that public standards as regards health or safety or the environment or the protection of the consumer, and such like, are upheld, and where it might be difficult, invidious or redundant to seek to make the employee liable."*

42. The Court then compared the provision under examination with that body of law.

> "*However, what is sought to be done by this provision is that an employer, devoid of any guilty intent, is liable to be found guilty on indictment of an offence carrying a fine of £15,000 or a prison sentence of two years, or both such fine and imprisonment, and to be tainted with guilt for offences which are far from being regulatory in character but are likely to attract a substantial measure of opprobrium. The social policy of making the Act more effective does not, in the opinion of this Court, justify the introduction of so radical a change to our criminal law. The change appears to the Court to be quite disproportionate to the mischief with which the section seeks to deal.*
>
> *In the course of his speech in Sweet v. Parsley [1970] A.C. 132 at p. 150, Reid L.J.—the case dealt more with the concept of strict liability as opposed to vicarious liability, but what he had to say is equally pertinent to what the Court has to consider—referred to "the public scandal of convicting on a serious charge persons who are in no way blameworthy". Of course, the English courts would have to recognise that if parliament decreed that a person should be found guilty in those circumstances, then the legislation might be upheld because parliament in the British system is said to be supreme.*

Our situation, however, is totally different. We are governed by a Constitution with the separation of powers as its fulcrum and the two Houses of the Oireachtas are precluded from enacting any legislation which is in any respect repugnant to the Constitution.

The Court concludes that to render an employer liable to potentially severe criminal sanctions in circumstances which are so unjust, irrational and inappropriate would make any purported trial of such a person not one held in due course of law and, therefore, contrary to Article 38, s. 1 of the Constitution and also repugnant to the provisions of Article 40, s. 1 of the Constitution."

43. Clearly, the Court did not approach this particular provision as one that sought to balance rights between victims and perpetrators of discrimination. It referred, rather, to the disproportionality of the section to the mischief aimed at, to the injustice of convicting a person of a serious offence ("*far from regulatory in character*") when they were "*devoid of any guilty intent*", and to rights under Articles 38 and 40.1 of the Constitution.

44. The second relevant part of the judgment concerns a proposed method of furnishing by way of certificate evidence "*relating to the circumstances in which the offence is alleged to have occurred*", in trials for certain offences under the Bill. Counsel assigned to argue against the Bill submitted that the provision shifted the persuasive burden of proof onto the defence and thereby violated the Article 38 guarantee.

45. The Court agreed, on the basis that the entirety of the prosecution case could be given by way of a document that was certified by a person who did not necessarily have direct knowledge of the contents. It saw the key question as being whether that interference had been "*limited in a reasonable and justifiable manner appropriate to the circumstances*", in other words by the application of a form of proportionality test. In answer to that question, it stated:

"The objective of the legislation is a laudable social policy. However, nothing inherent in that policy or in the nature of the legal rights granted by the legislation renders it necessary to have the remedy in the form proposed. It is

neither rational nor necessary to so limit the right of due process to achieve the objective of the legislation.

In effect a form of proportionality test must be applied to the proposed section. (a) Is it rationally designed to meet the objective of the legislation? (b) Does it intrude into constitutional rights as little as is reasonably possible? (c) Is there a proportionality between the section and the right to trial in due course of law and the objective of the legislation? A similar test was used by the Canadian Supreme Court in R v. Oakes *[1986] 1 SCR 103 and* Chaulk v. R *[1990] 3 SCR 1303. Applying this test to s.63, sub-s.3 it is clear that s.63, sub-s.3 is not specifically designed to meet the objectives of the Bill. The process is not rationally connected to the objective. The process of certification is an intrusion into the constitutional rights of an accused, yet there is no rational reason why trial by certification process is necessary in this type of case. Thus, there is no proportionality between the process of trial by certification and the objective of the Bill and the limitations of the right to trial in due course of law. The objective of equality in employment does not require that the offence in issue be tried by the method set out in s. 63, sub-section 3. The intrusion, the interference in the due course of law, is not limited in a rational way. Or to put it a slightly different way, s. 63, sub-s. 3 when read in the context of the Bill is a failure to protect the constitutional rights of the citizen and not warranted by the objectives which it is sought to secure: see Cox v. Ireland [1992] 2 I.R. 503 at p. 523.*

The use of such a certificate is so contrary to the concept of affording a person a trial in due course of law as to render the provision contrary to Article 38, s 1 of the Constitution. Accordingly, on this ground, the Court finds the provision repugnant to the Constitution."

46. Again, the Court did not for the purpose of this analysis apply *Tuohy v. Courtney* but expressly utilised the test of proportionality (set out in the Canadian cases of *Chaulk* and *Oates* and adopted into the law of this jurisdiction in *Heaney v. Ireland*) in the context of Article 38 trial rights, with the concept of rationality being relevant within that context rather than constituting a free-standing test.

47. In *Maguire v. Shannon Regional Fisheries Board* [1994] 3 I.R. 580 the appellant owned a piggery and was convicted of a water pollution offence when a fault developed in the feed system. The District Judge who tried the matter found as a fact that the appellant had taken all reasonable steps, at a very considerable expense, to prevent such an occurrence. In the High Court Lynch J. considered, *inter alia*, *Sherras v. De Rutzen*, [1895] 1 QB 918 where Wright J. had accepted that there was a presumption that "*mens rea*, an evil intention, or a knowledge of the wrongfulness of the act" was an essential ingredient in every offence. Wright J. had gone onto say, however, that that presumption was liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it dealt. In his view, the principal classes of exceptions included the class of acts which, in the language of Lush J. in *Davies v. Harvey* LR 9 QB 433 were "*not criminal in any real sense*" but were acts which, in the public interest, were prohibited under a penalty.

48. Adopting that view, Lynch J. in *Maguire* held that the presumption of *mens rea* could be displaced, in favour of strict liability, by clear statutory words. This was permissible in the case of a provision that was regulatory in essence and did not create an offence "*which would be regarded as of a truly criminal character*".

49. In another water pollution case, *Shannon Fisheries Board v. Cavan County Council* [1996] I.R. 267, the local authority asserted by way of defence that it had had no choice but to cause imperfectly treated sewage to be discharged because it did not have, and could not raise, the funds necessary to upgrade its sewage treatment plant. Such funding was controlled by the relevant government department. In a consultative case stated, the District Judge asked *inter alia* whether the offence was one of strict liability that did not require proof of *mens rea*, negligence or knowledge. This Court was divided in its response. In a brief judgment, the majority (Blayney and O'Flaherty JJ.) held that the question about *mens rea* was irrelevant. Even if it was required, there was no doubt that the defendant's actions were deliberate rather than inadvertent or accidental. They doubted whether the defendant had in fact been powerless, but in any event the reasons for its actions did not change the legal nature of those actions.

50. In a dissenting judgment, Keane J. said that there was no doubt but that the Council had committed the *actus reus* of the offence and had done so knowing that it was an offence under the statute. However, he saw the issue as being whether, having regard to the traditional insistence of the criminal law that there should be no conviction in the absence of a guilty mind, it should have been a defence for the defendant to establish as a matter of probability that it had taken all reasonable steps open to it to prevent the deleterious matter entering the waters. That depended in turn on whether there existed in the law a "halfway house" between those crimes in which the prosecution must establish *mens rea* and those of "absolute liability", sometimes called "strict liability" in respect of which proof of the commission of the prohibited act was sufficient and the state of mind of the accused was irrelevant.

51. Keane J. noted the development in all common law countries of a vast range of statutory offences, described as "*public welfare offences*", in respect of which defendants had been convicted although it could not be said that they acted with the "*guilty mind*" of the "*true criminal*". These were cases in which the policy of the statute creating the offence was the protection of the public welfare, characteristically in areas such as health and security, the number of prosecutions was likely to be significant and the penalties provided for were relatively minor. They differed from what had been sometimes described as "*true crimes*" such as murder, rape, assault, and theft, where the law had always required proof by the prosecution of *mens rea* in the form of intention or recklessness. For the courts to require proof by the prosecution of *mens rea* in all such public welfare cases would, it had been thought, be impracticable and convictions, in any event, would not result in the stigma associated with true crime. The result was the development of the doctrine of strict or absolute liability, which he traced to *Sherras v. De Rutzen.*

52. Although he rejected as too extreme a suggestion that no person should be convicted of a criminal offence unless they were in some way morally culpable (since that would be meaningless in respect of, for example, parking offences) Keane J. thought that the debate did concern a fundamental issue as to the nature of the criminal law. If that law is designed to punish the commission of acts or omissions which are in some sense culpable or blameworthy, then the creation by the

legislature of a huge spectrum of offences, ranging from the relatively trivial to the very serious, in which the culpability of the accused is wholly irrelevant, save when it came to the infliction of punishment, would mean that Irish law would have departed significantly from that central value.

53. Keane J. contrasted the approach taken in relation to public welfare cases by the courts of England and Wales with that taken by the Supreme Court of Canada in *R. v. City of Sault Sainte Marie*. That was also a water pollution case, where the judgment of the Court (delivered by Dickson J.) observed that there was a "*generally held revulsion against punishment of the morally innocent*". Dickson J. proposed a tripartite categorisation in the following terms:

> *(1)* "*Offences in which* mens rea*, consisting of some positive state of mind such as intent, knowledge or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.*
>
> *(2)* *Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act* prima facie *imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts, which, if true, would render the act or omission innocent or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability…*
>
> (3) *Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault*."

54. It seems that for the second category, crimes the Court described as strict as opposed to absolute liability (terminology we will adopt in this judgment), the Court considered that two separate (although possibly overlapping) defences would be

open. The first was reasonable belief in a mistaken set of facts which, if true, would have rendered the act or omission innocent, while the second involved showing that all reasonable steps were taken to avoid the particular event. Regulatory offences were seen as *prima facie* falling within this category. In the instant appeal, the appellants argue that the statutory provision for the offence of defilement brings it into the same area.

55. Keane J. concluded that the law in this jurisdiction should also recognise an intermediate range of offences, of which the case under consideration was one, in which, while full proof of *mens rea* would not be required and the proof of the prohibited act would *prima facie* prove the commission of the offence, the accused might avoid liability by proving that he took reasonable care to avoid the occurrence.

56. Finally, in this context, it is necessary to refer to the opinions of the House of Lords in *Re B (A Minor)* [2000] 2 A.C. 248. This concerned the statutory offence of committing an act of gross indecency with or towards a child under the age of 14 or inciting a child under that age to commit such an act. The issue to be determined was whether the offence included a mental element as to the age of the child. The provision was silent on this question. Applying the common law presumption of *mens rea*, Lord Nicholls therefore considered whether the mental element was negatived by necessary implication.

> *"'Necessary implication' connotes an implication which is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence.*
>
> *I venture to think that, leaving aside the statutory context of section 1, there is no great difficulty in this case. The section created an entirely new criminal offence, in simple unadorned language. The offence so created is a serious offence. The more serious the offence, the greater is the weight to be attached to the presumption, because the more severe is the punishment and the graver*

the stigma which accompany a conviction…Further, in addition to being a serious offence, the offence is broadly drawn ('an act of gross indecency'). It can embrace conduct ranging from predatory approaches by a much older paedophile to consensual sexual experimentation between two teenagers of whom the offender may be the younger of the two. The conduct may be depraved by any acceptable standard, or it may be relatively innocuous behaviour in private between two young people. These factors reinforce, rather than negative, the application of the presumption in this case."

57. Accordingly, Lord Nicholls saw the question as being whether there was a "*compellingly clear*" implication that Parliament had intended to exclude the ordinary common law requirement of a mental element. In arguing that there was no requirement of *mens rea* as to age, the Crown relied upon the statutory background. It was contended that the law in relation to age-based sexual offences had been settled since *R. v. Prince*, and that the Act under consideration had not been intended to change that law. Lord Nicholls described this as a formidable argument but rejected it on the basis that the statute did not give sufficiently clear guidance on the issue.

58. Reaching the same conclusion, Lord Steyn commenced his analysis with reference to the principle of legality. The application of that principle meant, as discussed in *Ex parte Simms* [1999] 3 WLR 328, that in the absence of express language or necessary implication to the contrary, even the most general words used by Parliament must be presumed to be subject to the basic rights of individuals. Lord Steyn referred to the description of the presumption of *mens rea* by Cross on Statutory Interpretation (3rd ed. 1995) as a "*paradigm*" of the principle of legality. Cross had stated that presumptions of this nature were of general application and were not dependent on finding an ambiguity in the statutory text. Rather, they operated as constitutional principles which were not easily displaced.

59. Lord Hutton also framed the question as being whether the requirement for *mens rea* had been ruled out "by necessary implication", citing *Gammon (Hong Kong) Ltd. v. Attorney-General of Hong Kong* [1985] A.C. 1. He considered the arguments made by the parties to be almost evenly balanced, and gave greater weight to the

Crown's arguments and greater credit to the judgments in *R. v. Prince* than Lords Nicholls and Steyn. He accepted that *Prince* could be viewed as laying down a general rule that that mistake as to age did not afford a defence in age-based sexual offences. He therefore thought that it would be reasonable to infer that Parliament had intended liability under the section to be strict, so that an honest belief as to the child's age would not be a defence. However, he continued:

> *"But the test is not whether it is a reasonable implication that the statute rules out mens rea as a constituent part of the crime – the test is whether it is a necessary implication."*

60. Applying that test, Lord Hutton concluded that any general rule laid down in *Prince* could not prevail over the analysis in *Sweet v. Parsley.*

(iii) – The judgments in C.C. No. 1

61. The first set of judgments in *C.C.* (here referred to as *C.C. No.1*) was concerned with two separate appeals heard together. In the first, the appellant C.C. had been charged with incidents of unlawful carnal knowledge of a girl under the age of 15. In the second, the appellant P.G. had been charged with sexual assault on a girl aged 13. Each wished to contend in his trial that he had made a *bona fide* error as to the girl's age and had believed that she was over 15, and each issued judicial review proceedings seeking declaratory relief in advance of a trial.

62. It must be noted that the Court was troubled by the fact that in those circumstances the issues in the appeals were presented, in effect, on a hypothetical basis – since neither matter had gone to trial, there was no evidential basis upon which relevant findings might have been made. It is also worth noting here that in C.C.'s case, the "defence" that he wanted to put forward (as recorded in the first paragraph of *C.C. No 2*) was that the girl had told him she was 16. This, in effect, amounted to a confession on his part that he had believed he was having intercourse with a girl below the age of consent, albeit if she had been 16 the offence involved would have been less serious than that with which he was charged. Had a defence of mistaken belief been available, and had the matter gone to trial, he would in our view have

been liable to be convicted in any event of that lesser offence under the alternative verdicts rules (see s.9 of the Criminal Law Act 1997). This aspect is not, however, discussed in the judgments.

63. C.C. and P.G. each sought a declaration that a defence of mistaken belief was available or, if it was not, a declaration that the exclusion of such a defence was inconsistent with the Constitution. In P.G.'s case, the claim was only for a defence of "reasonable" mistake. This was taken as involving an attack on the constitutionality of ss.1(1) and 14 of the Act of 1935.

64. The Court dealt with the issues in two stages. In *C.C. No 1*, it considered whether a defence of mistake as to age was open in respect of either of the offences charged against the appellants. Three judgments were delivered on this aspect. The Court was unanimous in holding that the defence was available to P.G., but held by a majority that it was not available to C.C.. The lead judgment on this first aspect is that of Geoghegan J., with whom Hardiman, Fennelly and McCracken JJ. agreed. Fennelly J. delivered a separate concurring judgment.

65. The dissenter (in part) on that first issue was Denham J. and it is perhaps useful to note her judgment first. Firstly, she took the view that *R. v. Prince* was bad law and no longer represented the common law on the issue. She adopted instead the approach taken by the House of Lords in *Sweet v. Parsley* [1970] A.C. 132, by Henchy J. in *People (DPP) v. Murray* [1977] I.R. 360, and by this Court in *Re Article 26 and the Employment Equality Bill, 1996* [1997] 2 I.R. 321, leading her to conclude that the common law presumption that proof of *mens rea* was required had not been rebutted in the absence of (borrowing Lord Nicholls's words) "*compellingly clear*" statutory provision to the contrary.

66. The presumption was seen by Denham J. as part of "*the protective cloak*" of Article 38.1. The age of the girl was an element of the offence of unlawful carnal knowledge, and, in her view, the statute did not exclude the requirement of *mens rea* as to that element.

67. Denham J. addressed the argument made by the State that the repeal of s.5 of the Act of 1885, and the absence of any equivalent provision permitting a defence of mistake as to age in the 1935 Act, necessarily meant that the offence under the latter was one of strict liability. She was satisfied that the absence in the Act of 1935 of the provision that had been present in the Act of 1885 did not, on its own, have the effect of ousting the fundamental constitutional concept that *mens rea* was a constituent element of a crime. Accordingly, she would have held that the defence was open to both appellants.

68. Geoghegan J. did not see the absence of any express provision as to *mens rea* to be particularly significant in itself, given the longstanding practice of applying the principle of *mens rea* where legislation was silent. If there had been no other circumstances affording a legitimate guide to interpretation of the section, he would have taken the view that the suggested defence would be available "at least in some form". However, it was necessary to have regard to the legislative antecedents of the section and, in particular, to the fact that the offences created by ss. 1, 2 and 4 of the Act of 1935 were intended as replacements for offences created by the Act of 1885. That Act had included a proviso in s.5, with a defence of reasonable mistake as to age in the case of unlawful carnal knowledge of girls aged between 13 and 16, but the 1935 Act repealed s.5 and did not replace the proviso. By contrast, it did effectively repeat the provision relating to *mens rea* in the case of offences relating to women of unsound mind. The necessary implication was that the omission of the defence in a case of unlawful carnal knowledge was deliberate. Therefore, it was not available to the appellant C.C.

69. The position, however, was quite different in relation to the appellant P.G. In Ireland, indecent assault was a common law offence. Section 14 meant that the consent of a child under the age of 15 was no defence, but that did not mean that a genuine mistake as to age would be no defence. *Mens rea* had to be presumed to be a necessary ingredient of all serious offences, whether common law or statutory, unless there was a statutory provision from which it was clear that *mens rea* was excluded either expressly or by necessary implication.

70. Geoghegan J. considered the judgments in *Prince* and, like Denham J, found them unsatisfactory. He saw the judgment of Bramwell B. as meaning that unless a statute expressly provided otherwise, no *mens rea* was required if the act that was made an offence was immoral as well as criminal. Like most modern commentators, Geoghegan J. preferred the dissent of Brett J. (later Lord Esher M.R.) and observed that the following extract from it was a reasonably accurate representation of Irish law:

> *"What reason is there why, in like manner, a criminal mind, or mens rea, must not ultimately be found by the jury in order to justify a conviction, the distinction always being observed, that in some cases the proof of the committal of the acts may be prima facie, either by reason of their own nature, or by reason of the form of the statute, import the proof of mens rea? But even in those cases it is open to the prisoner to rebut the* prima facie *evidence, so that if, in the end, the jury are satisfied that there was no criminal mind, or mens rea, there cannot be a conviction in England for that which is by the law considered to be a crime."*

71. *Murray* was seen by Geoghegan J. as the only directly relevant Irish authority. He considered that the passage from the judgment of Walsh J. dealing with unlawful carnal knowledge was *obiter*, and that the principle stated by Lord Reid in *Sweet v. Parsley* and approved by Henchy J. gave rise to a presumption that *mens rea* was applicable to the offence of sexual assault.

72. *Re the Employment Equality Bill, 1996* was cited for its conclusion in relation to vicarious criminal liability and for its approval of Lord Reid's speech in *Sweet v. Parsley*. Geoghegan J. noted in particular the conclusion of Lord Reid that *mens rea* was an essential ingredient of every offence unless some reason could be found for holding that it was not necessary, and his view that, in the absence of a clear indication in the statute that Parliament intended to create an absolute offence, it would be necessary to show by reference to other relevant circumstances that this "must" have been the case. Since the issue before the Court in the P.G. appeal related to a common law offence, the presumption that *mens rea* was an ingredient applied with even greater force.

73. In his concurring judgment Fennelly J. agreed with Denham and Geoghegan JJ. in relation to the P.G. appeal. Addressing the issue in the C.C. appeal, he stated that it was "*of course*" axiomatic that the age of the girl was the "*very gist*" of the offence.

> "*The law does not concern itself with the morality of consensual sexual behaviour between adults. If the man believes the girl to be under age, when she is not, he commits no crime. If it is indeed an offence of strict liability, he commits the offence whatever his belief. It can scarcely be doubted, nonetheless, that there is a moral component in the legislative policy underlying statutory protection of young girls. It does not seem to me to be correct to equate mens rea, as some judges have done, with moral blameworthiness. The morality of the behaviour is either relevant or it is not. I believe it is not…In the normal case, therefore, the* actus reus *consists in having sexual intercourse with a girl who is under the statutory age. Under normal principles of criminal law, mens rea would also be necessary."*

74. Having referred to *Murray, Sweet v. Parsley* and *Re B (A Minor)*, Fennelly J. found them to be clear authority for the proposition that, insofar as s. 1(1) of the Act of 1935 was concerned, in the absence of "*compellingly clear*" exclusion of its necessity, the prosecution should have to prove not only that the accused had sexual intercourse with a girl under fifteen, but that he knew that she was under that age. An alternative formulation would be that there was a defence of mistaken belief on reasonable grounds. He stressed that he did not mean that proof of express subjective knowledge would be required. The surrounding circumstances would often provide sufficient *prima facie* proof. The problem, as he saw it, concerned the less obvious cases and, in particular, cases where the girl disguised her youth or lied about her age. In such cases the choice was between strict liability and the need to prove knowledge. However, Fennelly J. found that the legislative history of the provision meant that there was indeed a "*compellingly clear*" implication that the legislature had, as a matter of deliberate policy, deprived accused persons of the defence of reasonable mistake.

(iv) – The judgment in C.C. No. 2

75. The Court then heard arguments on the constitutional validity of the section. The composition of the Court was slightly different for this stage, with Denham J. being replaced by Murray C.J. A single judgment was delivered on behalf of the Court on the 23rd May 2006, by Hardiman J.

76. The passage quoted above from *Re the Employment Equality Bill, 1996*, in relation to the imposition of vicarious liability, was referred to at an early stage in the judgment. The problem there was the possibility of being severely penalised for an act of which one was ignorant. The Court saw no distinction of substance between that situation, on the one hand, and being even more severely penalised for an act of which one was aware but had no reason to think was unlawful. If a person had consensual intercourse with someone whom he honestly and reasonably believed to be over the relevant age, he was not aware that anything unlawful had occurred.

77. Counsel for C.C. had accepted that the Oireachtas could, in principle, create offences of strict or even absolute liability in some circumstances. In this context the judgment referred to *Maguire v. Shannon Regional Fisheries Board* and *Shannon Fisheries Board v. Cavan Council*, with particular emphasis on Keane J.'s analysis of *City of Sault Sainte Marie* in the latter. In the *C.C.* judgment, this case was considered relevant mainly because it was seen as showing that the Canadian Supreme Court regarded absolute liability with disfavour even in the case of many regulatory offences.

78. Another Canadian case, *Hess and Nguyen v. The Queen* [1990] 2 SCR 906, was cited in some detail. It concerned a statutory offence pursuant to which a male person who had sexual intercourse with a girl under the age of 14 would be liable to life imprisonment. The statute expressly excluded as a defence any reliance on a belief that the girl was older.

79. Whereas *City of Sault Sainte Marie* (decided in 1978) was based on a common law analysis, the Supreme Court in *Hess and Nguyen* was considering the issue in the context of the Canadian Charter of Rights and Freedoms. It unanimously held that s. 7 of the Charter (the right to liberty) had elevated the requirement of *mens rea*, in the case of an offence punishable by imprisonment, from a presumption to a

constitutionally mandated element of the offence. That was so even in the case of regulatory offences. The consequence was that s. 7 was infringed where a person accused of such an offence was not allowed a defence of due diligence.

80. By a majority, the Court held that the infringement could not be saved by s. 1 of the Charter (whereby the rights and freedoms guaranteed by the Charter may be subject to such reasonable limits as can be demonstrably justified in a free and democratic society). Applying the *Oakes* proportionality test, the Court accepted that the legislation had the legitimate objective of protecting young females from premature sexual intercourse. The provision was also rational, in that, if it was believed that girls under a particular age were not able to make an informed decision for themselves, then it was logical to eliminate the defence of consent. However, the provision failed the third limb of the test – minimal impairment. Firstly, there was no evidence upon which the court could find that the rule had a deterrent effect, and, in any event, it was fundamentally unfair to punish the mentally innocent for the purpose of advancing a particular objective – *"It is to use the innocent as a means to an end"*. Secondly, it would be wrong to leave the question of mental innocence to the sentencing process. Thirdly, by the time judgment was being delivered, newer legislation had replaced the impugned statute. That fact demonstrated that the impairment of s.7 rights could be reduced by providing, as the new legislation did, that a mistaken belief was no defence unless the accused had taken all reasonable steps to ascertain age.

81. At paragraph 32 of the *C.C.* judgment Hardiman J. restated the "*absolute*" nature of the offence under s.1 of the 1935 Act, noting that there was "*absolutely no defence*" once the *actus reus* was established, no matter how extreme the circumstances. There was no doubt that it was explicitly a provision capable of criminalising, and of jailing, the "*mentally blameless*". In this context the proposition that such considerations could be sufficiently taken into account in the sentencing process was rejected.

82. At paragraph 41 it is said that the section did not attempt to balance different rights against each other, but "*wholly removed the mental element*" and expressly criminalised the "*mentally innocent*". The legislation could have proceeded in a

different way by, for example, the use of presumptions which, however strong, afforded scope for rebuttal.

83. Referring again to *Re the Employment Equality Bill, 1996*, Hardiman J. cited the words of Lord Reid in *Sweet v. Parsley*, quoted in that judgment, about "*the public scandal of convicting on a serious charge persons who are in no way blameworthy*". He then noted that the Employment Equality Bill had provided for a defence of due diligence. The following view was stated in paragraph 45 in that regard:

> "*On the existing jurisprudence and in particular the judgment of the Canadian Supreme Court in R. v. City of Sault Sainte Marie (1978) 2 S.C.R. 1299, and the dissenting judgment of Keane J. in Shannon Regional Fisheries Board v. Cavan County Council [1996] 3 IR 267, it might appear that a defence of due diligence would suffice to justify a regulatory offence of strict liability as Dickson J. used that term. Whether it would suffice for a true criminal offence carrying a sentence of life imprisonment is not a matter that arises for decision in this case. There is simply no such defence available here. No form of due diligence can give rise to a defence to a charge under s. 1(1), even where the defendant has been positively and convincingly misled, perhaps by the alleged victim herself."*

84. The following passage is in paragraph 46:

> *"It appears to us that to criminalise in a serious way a person who is mentally innocent is indeed 'to inflict a grave injury on that person's dignity and sense of worth' and to treat him as 'little more than a means to an end', in the words of Wilson J.* [in City of Sault Sainte Marie] *quoted earlier in this judgment. It appears to us that this, in turn, constitutes a failure by the State in its laws to respect, defend and vindicate the rights to liberty and to good name of the person so treated, contrary to the State's obligations under Article 40 of the Constitution."*

85. The judgment noted that the objective of the legislation was the protection of young girls from engaging in consensual sexual intercourse. This was a legitimate end, to be pursued by appropriate means. Reference was made to *B. (A Minor)*, where the

State had contended *inter alia* that there was a special rule of construction in respect of age-based sexual offences, such that the presumption addressed in *Sweet v. Parsley* did not apply. The House of Lords had rejected that argument. Hardiman J. observed that while the English decisions were addressed to questions of statutory construction rather than compatibility with a constitution,

> *"they, like this Court in the Employment Equality Bill case, and like the Canadian Supreme Court in the cases cited, speak 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."*

86. Consideration was given to the submission by the State that the Court should adopt the dissenting views of McLachlin J. in *Hess* and *Nguyen*. She had accepted that the legislation under challenge meant that a person who was mentally innocent could be convicted and imprisoned and had acknowledged that this was problematic. However, in her view there was a rational connection between the provision and the need to deter men from having intercourse with young girls. If a defence of reasonable belief was available, a man could escape conviction simply by stating that he had believed that the girl was older. If there was a defence of due diligence, the man would have to make enquiries, but the possibility would still be open that the girl might lie about her age. In either case, the deterrent would be less effective. The effect of the legislation in its current form meant that men knew that if they were not certain of the girl's age they ran the risk of imprisonment, so all they had to do to avoid that risk was to avoid having sex with girls of less than adult age in the absence of certainty.

87. This Court considered that a provision that, in McLachlin J's words, meant that a person who was "*mentally innocent*", who had "*no mens rea with respect to an essential element of the offence*", could be convicted and sent to prison could not be reconciled with the Constitution. The Court added that the right of an accused not to be convicted of a true criminal offence in the absence of *mens rea* was not simply qualified or limited by the 1935 Act in the interest of some other right, it was "**wholly abrogated**". (Emphasis in the original.)

88. In his concluding remarks, Hardiman J. stressed in paragraph 67 that the State was entitled to take legitimate means, including the use of the criminal law, to discourage intercourse with very young girls. He noted the recommendation of the Law Reform Commission in 1990 that there should be a defence of "*genuine belief*" available to any person except a person in authority over a minor. It was further recommended by the Commission that the test for determining the genuineness of the belief should be subjective, but that the jury would be entitled to have regard to the presence or absence of reasonable grounds for such belief. It was also noted that there had been ample reason, since at least the decision in *Sweet v. Parsley*, to believe that a statute permitting conviction of a serious criminal offence "*without any requirement of mental or moral guilt*" was constitutionally vulnerable.

89. Finally, the Court considered the proposal by the State that the remedy to be granted in the case should be limited to a declaration that the section had ceased to have force and effect to the extent only that it precluded an accused from advancing a defence of reasonable mistake. In paragraph 70 of the judgment, it was stated that the Court was of the opinion that "*the form of absolute liability*" provided in the section was, in all the circumstances, not consistent with the Constitution. The difficulty seen with the State's proposal was that it would involve the Court in a process akin to legislation.

> "[Counsel] *posits a "reasonable belief" defence on the basis that the existence of such a* [defence] *would save the Section from unconstitutionality. But so too would a defence which left the defendant's knowledge of age to be proved by the prosecution as part of the mens rea of the offence, very likely a defence based on presumptions, and perhaps other forms of defence. It might, for example, be thought desirable to have a law on this subject along the lines proposed by the Law Reform Commission in 1990. But for present purposes it is sufficient to say that there is, obviously, more than one form of statutory rape provision which would pass constitutional muster, and it does not appear to be appropriate for the Court, as opposed to the legislature, to choose between them."*

90. The Court accordingly granted a declaration that s.1(1) of the Act of 1935 was inconsistent with the provisions of the Constitution.

The presumption of innocence and reverse burdens of proof

91. The case law on the relationship between the presumption of innocence and reverse burdens of proof was recently considered in detail by this Court in *People (DPP) v. Forsey* [2018] IESC 55. The principal authorities considered were *People (AG) v. Quinn* [1965] I.R. 366, *Hardy v. Ireland* [1994] 2 I.R. 550, *O'Leary v. Attorney General* [1995] 1 I.R. 254, *People (DPP) v. Smyth* [2010] 3 I.R. 688 and *People (DPP) v. Heffernan* [2017] 1 I.R. 82.

92. It is necessary to start with the terminology used in this area of the law of evidence, since it appears that the previous attempt to clarify matters may not have been entirely successful. As noted in *Forsey*, the terms are not used consistently in the case-law and can add to the complexity of an already difficult topic.

93. Perhaps the first point to make is that any "burden" can only be discharged by evidence, whether that evidence is produced by the party carrying the burden or by another party. It is also necessary to be clear about the fact that in any given case different parties may bear different burdens, for different purposes, at different times.

94. A "legal" burden means the burden fixed by law on a party to satisfy the finders of fact as to the existence or non-existence of a fact or matter. In some of the authorities this is called a "persuasive" burden, because it means that the party in question must persuade the finders of fact that the fact or matter does, or does not, exist. When the legal/persuasive burden is on the prosecution on any issue it must be discharged by proof beyond reasonable doubt. In a criminal trial, the prosecution has the burden of proving the guilt of the accused, and that burden never shifts. Where a legal/persuasive burden is placed on the accused on some other issue it is never required to be discharged by proof to that level. In some cases (classically the defence of insanity) the burden on the defence must be discharged on the balance of probabilities. In other cases where a burden is imposed on the defence by statute

(e.g., as in *Smyth* and *Forsey*) it may be discharged by proving a reasonable doubt. This will be described here as a *Smyth* burden.

95. Since a burden can only be discharged through the production of evidence, the legal/persuasive burden of proving guilt means that the prosecution must adduce sufficient evidence for a properly charged jury to convict (if, of course, they accept the evidence beyond reasonable doubt). If the evidence is insufficient for that purpose – for example, if there is no evidence capable of being accepted as establishing a specific element of the case – the trial judge will find that the burden has not been discharged. The accused will be acquitted by direction.

96. The term "evidential" burden is generally used to describe the burden borne by a party who contends that a particular issue should be put before the decision-maker. It is discharged by adducing evidence (or by pointing to evidence adduced by the other party) sufficient to satisfy the trial judge that the issue should be left for consideration. This can, therefore, describe the burden borne by a defendant who claims, for example, to have acted in self-defence. There has to be some evidence upon which the jury could properly find in favour of the accused on the issue – it cannot simply be raised as a speculative possibility that has not been negatived by the prosecution. The important point is that this burden differs from a legal/persuasive burden, in that it does not carry with it any obligation to "*prove*" anything, to any standard – it simply requires the party to ensure that there *is* evidence.

97. However, it can be seen that in some judgments (see, for example, *O'Leary v. Attorney General*) the term "evidential burden" is used when what is being described is the position of the defence when the prosecution has succeeded in establishing a *prima facie* case, or has under the provisions of a statute adduced sufficient evidence of a specific matter to raise a statutory inference of guilt. It is sometimes said that in these circumstances "the evidential burden has shifted". Such language may be unhelpful if it gives the impression that the defence has come under any form of legal obligation when, in fact, the intention is to convey the practicalities of the situation. The defence may be faced with the *practical* prospect of conviction unless some rebutting evidence can be given. Even in such

circumstances, however, it would still be legally incorrect to suggest either that the defendant is *obliged* to give rebutting evidence, or that the jury *must* convict in the absence of such evidence.

98. A statute may have the effect of allocating different burdens to different parties for different purposes. This happens, for example, if a person accused of murder wishes to raise a defence of diminished responsibility. The prosecution bears, as already noted, a legal burden which requires them to adduce sufficient evidence upon which they can persuade the jury beyond reasonable doubt that the accused caused the death and did so with the requisite intent. By statute, the accused has the legal burden of establishing on the balance of probabilities that, despite the evidence of his or her actions and intentions, he or she should not be convicted of murder because of diminished responsibility by reason of some mental disorder. If there is insufficient evidence for this purpose at the close of the prosecution case, the defence will have to adduce it in order to get it before the jury, and will have to satisfy the jury that it applies.

99. In *Smyth* and *Forsey*, the term "evidential burden" was on occasion used in what now appears to have been confusing fashion. In both cases, the conclusion was that the legislation imposed a burden on the defence to either show that there was already sufficient evidence in the case to create a reasonable doubt as to the particular issue, or to call such evidence themselves. The burden in both these instances is properly categorised as a legal burden, in that it is cast by the legislature on one specific party, and if it is not discharged the finding of the jury must as a matter of law favour the other party *on the issue in question*. It is also evidential, in the sense that the defence will have to offer the evidence if there is none available in the prosecution case.

100. Turning, then, to the caselaw we start with *Quinn*. This Court quashed a manslaughter conviction because of a concern that the trial judge's charge might reasonably have left the jury under the impression that while there was no onus on the defence to establish self-defence beyond reasonable doubt or as a matter of certainty, there was at the same time some obligation to create at least a doubt about the prosecution case. The true position was stated to be as follows:

> "*When the evidence in a case, whether it be the evidence offered by the prosecution or by the defence, discloses a possible defence of self-defence the onus remains throughout upon the prosecution to establish that the accused is guilty of the offence charged. The onus is never upon the accused to raise a doubt in the minds of the jury. In such case the burden rests on the prosecution to negative the possible defence of self-defence which has arisen and if, having considered the whole of the evidence, the jury is either convinced of the innocence of the prisoner or left in doubt whether or not he was acting in self-defence they must acquit. Before the possible defence can be left to the jury there must be some evidence from which the jury would be entitled to find that issue on favour of the appellant. If the evidence for the prosecution does not disclose this possible defence then the necessary evidence will fall to be given by the defence. In such a case, however, where it falls to the defence to give the necessary evidence it must be made clear to the jury that there is a distinction, fine though it may appear, between adducing the evidence and the burden of proof and that there is no onus whatever upon the accused to establish any degree of doubt in their minds. In directing the jury on the question of the onus of proof it can only be misleading to a jury to refer to 'establishing' the defence 'in such a way as to raise a doubt'. No defence has to be 'established' in any case apart from insanity."*

101. This passage describes a purely evidential burden – there must be evidence, from whatever source, before a party can ask for the issue to be considered by the jury. Where a defence such as self-defence is concerned, the burden goes no further than that. The point about the "fine distinction" was that even where the only evidence on the issue came from the defence, the jury should not be left with the impression that the accused was in any way obliged to prove that he or she acted in self-defence, or even to persuade the jury that there was a doubt.

102. However, it is important to observe that *Quinn* was concerned only with a common law defence. The general statement that "no defence has to be established in any case apart from insanity" has to be seen as referring only to such defences

(the defence of insanity being purely common law at that time). The judgment simply does not address the operation of legislation (of which there were plenty of examples at the time) that imposes a legal or persuasive burden on a particular issue, and that may prescribe (either expressly or by necessary implication) a particular standard of proof. There are many statutes (and were at the time) that do so (whether expressly or through the creation of a presumption) in relation to an element of the offence or to a matter of defence.

103. One example of such a statutory burden related to the possession of explosives. In *Hardy*, the statutory provision under challenge was contended to have imposed an unconstitutional onus on the defence. Once the prosecution had proved the making, possession, or control of an explosive substance in circumstances giving rise to a suspicion that it was not for a lawful purpose, it was for the accused to "*show*" that it was in fact for a lawful object. The majority judgment in this Court, delivered by Hederman J., held that the section, properly analysed, meant that the burden was on the prosecution to prove the ingredients of the offence beyond reasonable doubt. It was then open to the accused to demonstrate by any number of means that the *prima facie* situation pointing to guilt should not prevail. On this analysis, there was no need for Hederman J. to consider the validity or potential invalidity of a burden on the defence. The majority judgment does not address the two dissenting judgments delivered in the case, either to agree or disagree with their proposition that in principle a burden on the defence to prove a matter on the balance of probabilities was not unconstitutional.

104. Egan J. who dissented in respect of this analysis, felt that the statute did impose a persuasive burden on the defence, and moreover that it was one to be discharged on the balance of probabilities.

> *"If, however, all the above ingredients are proved beyond reasonable doubt the accused must be convicted unless "he can show that he made it or had it in his possession or under his control for a lawful object". Prima facie these words place an onus on the accused but they are in a saving or excusatory context and this is of relevance. Insanity, for instance, is something which must be*

established by an accused person in a criminal prosecution if he wishes to rely on it…

*…we are dealing with a statute and the words used are very clear. If the saving clause is to be relied upon, I am satisfied that the onus shifts to the accused. The words are "unless he can show ... [*etc*]". These words cannot be construed as meaning that the raising of a doubt would be a sufficient discharge. The onus, not being an onus resting on the prosecution, does not require proof beyond reasonable doubt. It is sufficient if there is proof on the balance of probabilities.*

The conclusion which I have reached to the effect that the onus of proof can shift does not determine the matter. There is nothing in the Constitution to prohibit absolutely the shifting of an onus in a criminal prosecution or to suggest that such would inevitably offend the requirement of due process..."

105. The judgment of Murphy J. was to similar effect:

"The burden of proof that falls on the State in respect of each and every one of those three ingredients is "... proof beyond reasonable doubt". Accordingly, if any reasonable doubt exists in relation to the proof of any of those ingredients or if the facts of the case admit of an innocent explanation as an alternative to a guilty one, then the accused must be acquitted. These principles flow from the presumption of innocence of an accused to any charge made against him. However, the second limb of the section deals not with the charge but with a statutory exoneration or exculpation from a charge already made and sustained beyond reasonable doubt. I am convinced that the burden which the accused must discharge if he is to avail of that procedure is a duty to satisfy the jury of the statutory condition, that is to say, the existence of a lawful object on the balance of probabilities.

However, I do not see that there is any inconsistency between a trial in due course of law as provided for by Article 38, s 1 of the Constitution and a statutory provision such as is contained in s 4 of the Explosive Substances Act, 1883, which affords to an accused a particular defence of which he can avail if, but only if, he proves the material facts on the balance of probabilities."

106. The judgment of Costello J. in the High Court in *O'Leary* ([1993] 1 I.R. 102), a case concerned with evidential provisions in the Offences Against the State Acts, proceeded on the basis of the following important principles.

(i) The right to be presumed innocent was not only an integral part of the common law tradition of this State, but a constitutional right protected by the Article 38 guarantee of a trial in due course of law. A trial in which it was not afforded would *prima facie* not be one held in due course of law.

(ii) A statute that appeared to place upon an accused person the burden of proving his innocence must be examined to see if it infringed the right, but should not be declared invalid if it was capable of being construed in accordance with the Constitution.

(iii) If the effect of a statute was that the failure to adduce exculpatory evidence *must* result in conviction, thus transferring the legal burden as opposed to simply leaving a situation where the inference of guilt could be drawn, there was a possible breach of the accused's constitutional rights.

(iv) However, the Constitution should not be construed as absolutely prohibiting a measure that restricts the right to be presumed innocent, provided that the measure does not have the same effect as a presumption of guilt.

107. In the event, Costello J. found that the measure in question did not affect the rights of the defence in the manner claimed. It did not have the effect that an accused who did not give evidence must be convicted, but simply shifted an "evidential burden". (Here, it is clear that Costello J. meant that the strength of a statutory inference could in some cases be such that the accused would, as a matter of practicality, have to give evidence in rebuttal.)

108. On appeal, this Court agreed that the presumption of innocence was an implicit part of the Article 38 guarantee ([1995] 1 I.R. 254). The double construction test was applied to the statute, and it was not found to alter the burden of proof. It therefore did not infringe the right to be presumed innocent. The Court did not address the broader statements of principle in the High Court judgment.

109. It is worth looking at *People (DPP) v. Smyth* in some detail. The issue in the appeal was the correct instruction for a jury in a case concerning possession of a controlled substance. It would, obviously, have been a defence to prove that the accused did not, as a matter of fact, have possession of the substance. Where possession was proved, s. 29(2) of the Misuse of Drugs Act 1977 provided that it would be a defence for the accused to "prove" that he did not know and had no reasonable grounds for suspecting either that what he had in his possession was a controlled drug or that he was in possession of a controlled drug. The judgment of the Court of Criminal Appeal, delivered by Charleton J., commented on the rationale for the provision in the following terms:

> "*As this court held in The People (Director of Public Prosecutions) v. Byrne [1998] 2 IR 417, s 29(2)(a) was intended to avoid the injustice that might arise out of a person being convicted solely because he was in possession of drugs even though it was clear that he did not know, and had no reason to suspect, that he had drugs in his possession. The possibility of such a conviction arose from earlier English authorities that the court analysed in that judgment. These authorities were considered in that judgment. Innocent people may, from time to time, take into their custody a package without having reason to suspect that it might contain a controlled drug. The circumstances out of which that possession originates may lead to an inference that they knew or that they suspected that they were engaged to carry, or otherwise possess, a controlled drug. It is perhaps the private nature of the motivation or belief that most people have in handling or possessing a closed packet that led the Oireachtas to reverse the burden of proof.*"

110. The intention of the legislature, therefore, was to avoid the creation of an offence of absolute liability but to place a burden on the accused in respect of his motivation or belief. Charleton J. observed that this was not a unique provision, and made it clear that he was not laying down a general principle that would apply to all other instances of a reversed burden of proof. Significantly, he stated that "*Sound reasons of policy*" might dictate that a defence should be proven by the accused as a probability. In particular, the Court was not intending to say anything that would

affect the operation of the reversed burden in respect of insanity or diminished responsibility: -

> "*For these defences, the burden of proof is for the accused to show that he has discharged the burden of proof by showing, as a probability, that he acted within the terms of one or other of those defences. The defence of insanity, as with other defences, is not, however, part of the elements of proof borne by the prosecution in establishing the crime. It is not incumbent on the prosecution to prove that in killing the deceased that the accused was not insane. It is for the accused to raise that defence and to prove it.*"

111. Paragraph 20 of the judgment is here quoted in its entirety (with emphasis added to certain sentences):

> **"** *The fundamental principle of our criminal justice system is that an accused should not be convicted unless it is proven beyond reasonable doubt that the accused committed the offence****. The legal presumption that the accused is innocent, until his guilt is proven to that standard, operates to ensure objectivity within the system. It is a matter for the Oireachtas to decide whether on a particular element of the offence an evidential burden of proof should be cast on an accused person. Of itself, this does not infringe the constitutional principle that the accused should be presumed to be innocent until found guilty****. Reasons of policy may perhaps require that any reversed element of proof cast on the accused should be discharged as a probability.*** *That should either be stated in the legislation or be a matter of necessary inference therefrom. The construction of a criminal statute requires the court to presume that the core elements of an offence must be proven beyond reasonable doubt; otherwise the accused must be acquitted. A special defence, beyond the core elements of the offence, may carry a different burden; insanity and diminished responsibility are examples of such a defence which casts a probability burden on the accused.* ***Where, however, in relation to an element of the offence itself, as opposed to a defence, a burden is cast upon the accused, the necessary inference that the accused must discharge that burden on the balance of probability is not easily made. The court notes that bearing***

the burden of proving a defence as a probability could have the effect that in respect of an element of the offence an accused person might raise a doubt as to his guilt, but not establish it as a probability. *This might lead to a situation where the charge was not proven as to each element of the offence beyond reasonable doubt, but nonetheless the accused could be convicted. That would not be right.* ***Proof of a guilty mind is integral to proof of a true criminal offence, in distinction to a regulatory offence. In s 29 of the Misuse of Drugs Act 1977, as amended, the normal burden of proving the mental element of possession of a controlled drug is removed from the prosecution and the accused is required to prove that it did not exist.*****"**

112. The Court concluded that the statute should be interpreted as casting a burden on the defence so far as the issue of knowledge was concerned. It may be commented here that this was necessarily a legal burden, in that (a) the evidence had to be sufficient to at least prove grounds for doubt as to whether the accused knew or had grounds to suspect the nature of the substance in his possession and (b) if the accused did not discharge it then knowledge could be taken as having been proved. It also necessarily imported an evidential burden – that is, it was for the defence to ensure that there was some evidence on the issue. The burden imposed by the *Smyth* analysis has however frequently been referred to simply as an evidential burden. This may cause some confusion - hence the decision to refer to it here as a Smyth burden. The *Smyth* analysis appears to have been followed in *DPP v. PJ Carey Contractors Ltd* [2011] IECCA 63, [2012] 1 I.R. 234 (Hardiman J.), and *DPP v. Egan* [2010] 3 I.R. 561 (Fennelly J.). It was endorsed by this Court in *Forsey* and must now be taken to be well established in Irish law.

113. Where the *Smyth* burden applies, it has the effect of requiring the accused to either adduce evidence, or point to evidence already in the case, that relates to the specified issue and that is sufficient to "prove" that there is a reasonable doubt as to guilt. As further explained in *Forsey*, it means that the accused cannot rely on the absence, or the weakness, of prosecution evidence on the specified issue – thus, in the case of a drugs trial, the accused cannot simply argue that the prosecution has not negatived the possibility of innocent possession, while in a corruption case the accused cannot simply argue that the prosecution has not proved a corrupt intention.

As Charleton J. says, this is a real burden. In particular, it may in practice require the defence to go into evidence where they would otherwise choose not to. That is a highly significant decision to have to make.

114. The defence of diminished responsibility is set out in s. 6 of the Criminal law (Insanity Act) 2006. Where a person is tried for murder, and the jury finds that he or she (a) did the act alleged, (b) was at the time suffering from a mental disorder, and (c) the mental disorder was not such as to justify a finding of insanity, the person shall be found not guilty of murder but guilty of manslaughter on grounds of diminished responsibility. It is for the defence to "establish" that the accused is, by virtue of the section, not liable to be convicted of murder. The nature of the burden thereby cast on the defence was the subject of the appeal in *Heffernan*, with the accused person contending that the reasoning in *Smyth* should have been applied so as to impose on him only an evidential burden (meaning a burden of adducing some evidence on the issue).

115. The judgments delivered by Charleton and O'Malley JJ. explain the difference between the *Smyth* analysis (which was approved) and the issues raised in cases of insanity or diminished responsibility. Insanity, under s.5 of the Act of 2006, requires the accused to show that he or she suffered from a mental disorder (as defined) such that he or she did not know the nature and quality of the fatal action, or did not know that it was wrong, or was unable to refrain from the act. The Act does not, in terms, deal the burden of proof in relation to insanity. However, it requires a "finding" to be made by the court or jury, which was held to imply a decision made on the balance of probabilities. At common law, it was for the defence to prove insanity on the balance of probabilities, but the statutory picture is complex insofar as the allocation of the burden of proof is not clearcut. In some circumstances, the prosecution may adduce evidence tending to prove insanity despite objection by the defence, and the defendant has in all cases a right of appeal against a verdict of insanity. It may perhaps be assumed that in a case where the issue is disputed the party asserting insanity has the burden of proof.

116. However, for present purposes one important point is that a finding on the issue of insanity does not involve proof of any element of the offence. Rather it relates to

a matter which if established, provides a defence notwithstanding that all elements of the offence have been proved. The question of the defendant's mental state is not relevant unless the prosecution proves the commission of the crime. At that point, the presumption of innocence is no longer engaged and the task of the court is to consider whether the presumption of sanity and personal competence that underpins concepts of criminal liability responsibility has been rebutted. Where insanity is established, the trial does not end with an acquittal *simpliciter* but with an order for detention in a mental hospital for as long as is considered necessary under the procedures provided for.

117. Nonetheless, despite these differences the possibility must be acknowledged that a person could be convicted of murder in circumstances where the jury entertains some reasonable doubt as to their capacity and hence their criminal liability. In *Chaulk*, the Supreme Court of Canada found this situation to be acceptable because it represented an accommodation or compromise between three important societal interests – those of avoiding the imposition on the prosecution of an impossible burden (of proving sanity beyond reasonable doubt), convicting the guilty and acquitting those who truly lack the capacity for criminal intent. Two further considerations might be added to that analysis. The first is that the presumption of sanity is such a fundamental bedrock for the imposition of criminal liability that the operation of the criminal justice system would be very radically altered if all that was required for an acquittal was the raising of a doubt as to the existence of a mental disorder. The second is that, given the consequences of a finding of insanity, it could produce the highly undesirable result that a person would have to be treated as having a mental disorder simply on the basis that there was a doubt as to whether they did or not. As Charleton J. said in *Heffernan*, "*if the illness does not exist, there is nothing to treat*".

118. Diminished responsibility is a special, mitigatory defence that arises only in respect of the offence of murder. It becomes relevant only when the jury has found the necessary facts in favour of the prosecution, including the question of intent, and the accused person is therefore "*liable to be convicted*". At that point, the jury may, rather than convicting of murder, accept that the accused was probably suffering from a state of mental disorder that falls short of insanity but that

substantially diminishes his or her responsibility for the killing. Here, the section explicitly casts the onus on the defence to "establish" that the accused is, by virtue of diminished responsibility, not liable to be convicted of murder and should instead be convicted of manslaughter. The imposition of this burden on the defence was held in *Heffernan* not to affect the presumption of innocence.

119. While it could be said that this meant that an accused could be convicted of murder in circumstances where, as with insanity, a jury had a reasonable doubt as to whether they were fully responsible for their actions, this was not held to offend Article 38. Every element necessary to prove the offence of murder must have been proved beyond reasonable doubt before the defence could even arise. Notwithstanding that proof, an accused could succeed in having the offence reduced from murder to manslaughter if he or she established diminished responsibility. It was not impermissible to provide that this was to be established on the balance of probabilities. Not only is it something which could be seen as entirely subjective, and within the capacity of the defence to prove, but it would be extremely difficult if not impossible for the prosecution to prove (or disprove) beyond any reasonable doubt.

120. Part of the reason for this is that if the defence need only offer some evidence on the issue of mental responsibility, or even sufficient evidence to establish a reasonable doubt, it would in practice be impossible for the prosecution to disprove it without the active cooperation of the accused. That would scarcely be forthcoming and could not be compelled. Additionally, there was no constitutional requirement to provide a defence of diminished responsibility at all. An accused whose responsibility was impaired but who was not insane could have properly been convicted of murder prior to the enactment of the Criminal Law Insanity Act 2006. In those circumstances it was not inconsistent with Article 38 to provide that, notwithstanding proof of an offence beyond reasonable doubt, an accused could escape conviction for that offence if he or she established on a balance of probabilities something most readily within their power to establish rather than the power of the prosecution.

121. In *Heffernan*, O'Malley J. stated that the presumption of innocence was a bedrock principle of the criminal justice system. The judgment refers (in para 60) to the possibility that the legislature may cast a burden on the defence to show the existence of a reasonable doubt but that in other "limited instances" there might be an onus to prove some matter on the balance of probabilities. A burden in those terms might amount to an infringement of the presumption of innocence, if it required the defence to negative an element of the offence. It was expressly noted that the question of justifiability would arise if that were found to be the position.

122. Charleton J. concluded with the following observation:

> *"It can tentatively be argued that legislation may legitimately distribute a burden onto the accused where it is necessitated by the nature of the offence and where it does not fundamentally and unnecessarily undermine the duty of the prosecution to demonstrate culpability. No unified theory, however, prohibiting burdens of proof as to the elements of offences on constitutional grounds or of enabling a persuasive burden for defences is either predictably grossly unfair as to the distribution of proof or is necessarily productive of an unavoidably unjust result. Therefore, no such theory is warranted."*

123. *Forsey* was also an appeal against conviction, and therefore concerned with statutory interpretation rather than with the validity of a statute. At issue was a statutory presumption of corruption in circumstances where it had been proved that the appellant, a member of an urban district council, had received money from a developer. The jury had been instructed that it was for him to prove on the balance of probabilities that he had received the money innocently.

124. Having cited the above authorities, the majority judgment (delivered by O'Malley J.) noted again the constitutional status of the presumption of innocence and the fundamental nature of the concomitant principle that it was the prosecution to prove guilt beyond reasonable doubt. The analysis in *Smyth* and *Heffernan* was expressly endorsed. It was stated that a reverse burden of proof that imposed an obligation on the accused to disprove a core element of the offence, that would otherwise fall to be proven positively by the prosecution, was "*capable of*

amounting to a violation of the presumption of innocence and would, therefore, violate the guarantee of a trial in due course of law protected by Article 38.1". It was proposed that a court considering whether a particular provision breaches the presumption of innocence should consider whether it transfers a burden in respect of an essential element of the offence, that would otherwise have to be proved by the prosecution beyond reasonable doubt, and whether it requires the accused to prove that that element does not exist. If so, it would be an inroad into the presumption of innocence since the accused could be convicted if he or she could not positively prove that the element was absent.

125. It was accepted in *Forsey* that the particular difficulties in proving intent in a corruption case justified the existence of a presumption in that regard. However, the Court concluded that the statute must be read as imposing an "evidential" burden only, to avoid a situation where the accused could be convicted even if the jury believed that his account was as likely as not to be true. As used in the judgment, the term "evidential burden" was intended to convey the *Smyth* burden of proving that there was at least a doubt about intent. The judgment did not expressly consider the potential justifiability of a reverse burden requiring proof on the balance of probabilities – the submissions in the case were largely concerned with the interpretation of the statute, the effect of the older authorities relating to the prosecution of corruption and the applicability of the judgment in *People (DPP) v. Cronin (No.2)* [2006] 4 I.R. 329. However, the judgment follows a line of authority from *O'Leary* through to *Smyth* and *Heffernan*, and the passages quoted from those two judgments both advert to the possibility of justifying such a burden.

126. Other relevant authorities, not considered in *Forsey*, include *McNulty v. Ireland* [2011] 4 I.R. 431 and *McNally v. Ireland* [2009] IEHC 573.

127. In *McNulty*, the plaintiff had been charged with witness intimidation with the intent of causing the course of justice to be obstructed or perverted, contrary to s. 41 of the Criminal Justice Act 1999. The statute provided that proof that the accused did an act referred to (harming, threatening, menacing or otherwise intimidating or putting in fear) would be evidence that the act was done with the required intention. He brought plenary proceedings claiming a declaration that the section was invalid

having regard to Article 38, arguing that the provision did not simply place an evidential burden on him but relieved the prosecution of the obligation to prove half of, or an essential element of, the offence. He relied upon the judgment in *C.C. No. 2.*

128. Two judgments were delivered in the appeal, with all members of the Court concurring or agreeing with both.

129. Denham J. reiterated the importance of the principle that the burden of proof was on the prosecution to prove all elements of an offence beyond reasonable doubt. She then noted that some statutory provisions legitimately permit adverse inferences to be drawn from a failure to account for certain matters, instancing both *Hardy* and *O'Leary* and also *Rock v. Ireland* [1997] 3 I.R. 484. She distinguished *C.C.* for three reasons – firstly, the offence with which *C.C.* had been concerned was unusual in that a male could be guilty even where the female clearly consented and there was a genuine mistake as to age; secondly, the offence was absolute in its nature and provided for no defence once the *actus reus* was established; and thirdly, there was no balance in the provision which removed the mental element.

130. It was conceded by the State in *McNulty* that the prosecution would have to prove in the trial that the accused knew that the alleged victim was a witness or potential witness against him. Referring to *Murray*, Denham C.J. held that this would have to be proved before the actions of the accused could be taken as evidence of *mens rea*. On this construction the presumption of innocence and the burden of proof remained in place.

131. Murray J. agreed. He added that in criminal trials it was not necessary to adduce direct evidence of every particular fact sought to be established beyond reasonable doubt. A jury would be entitled to infer from one established fact the existence of another fact essential to proof of guilt, provided that the inference was one which could be properly and rationally drawn in the circumstances of the case. In principle, the Oireachtas could legislate to that effect in relation to a particular offence. However, there were limits. It would never be permissible to have a rule of law, in a statue or otherwise, which arbitrarily deemed proof of a particular fact to be

evidence of another fact if there was no reasonable connection between the two. In the case before the Court, there was nothing irrational about the connection, once knowledge that the person was a witness was proved.

132. *McNally* concerned the validity of s.99 of the Charities Act 2009. This was a consumer protection measure which made it an offence to sell Mass cards which were not the subject of an "arrangement" made with a bishop or the provincial of an order of priests holding that status within the "Holy Catholic Apostolic and Roman Church". The purpose was to ensure that a Roman Catholic Mass would actually be said for the intentions of the purchaser. The section provided that in a trial for such an offence, it was to be presumed, until the contrary was proved on the balance of probabilities, that the sale to which the prosecution related was not done pursuant to an arrangement. The plaintiff was a businessman who claimed that this would adversely affect his business, which *inter alia* involved the sale of pre-signed Mass cards. The State adduced evidence concerning the number of clerics of the relevant rank in the world, with a view to justifying the imposition of the onus by pointing out the impossibility of proving that an accused did *not* have an arrangement.

133. The judgment of MacMenamin J. covers a wide range of issues. For present purposes, the relevant part concerns only the reversed onus of proof. Having considered *O'Leary*, he found that rights under Article 38.1 were not absolute and that a proportionality analysis could be applied to assess the legitimacy of restrictions on such rights. On the evidence in the case, he held that it would be impossible for a prosecutor to prove that an accused vendor did not have an arrangement with one of the approximately 7,000 bishops or provincials, while the existence of such an arrangement would be easily provable by an accused person. There was a rational connection between the means chosen and the objective of the legislation. The measure was a minimal, attenuated intrusion into the right to trial in due course of law and no other means had been suggested by which the object could have been attained.

The Criminal Law (Sexual Offences) Act 2006 and the 2017 amendments

134. The judgment in *C.C.* was delivered on the 23rd May 2006. The Criminal Law (Sexual Offences) Act 2006 was commenced on the 2nd June 2006, less than a fortnight later.

135. Sections 2 and 3 of the Act deal with the offences known respectively as defilement of a child under the age of 15 and defilement of a child under the age of 17, which are committed by engaging in (or attempting to engage in) a sexual act with a child under the relevant age. A "sexual act" is defined in s.1 as meaning a) an act consisting of sexual intercourse, or buggery, between persons who are not married to each other, or b) an act described in section 3(1) or 4(1) of the Criminal Law (Rape) (Amendment) Act of 1990. Section 3(1) of the Act of 1990 deals with the offence of aggravated sexual assault, being a sexual assault that involves serious violence or the threat of serious violence, or is such as to cause injury, humiliation or degradation of a grave nature to the person assaulted. Section 4(1) creates the offence known as "rape under section 4", which is a sexual assault that includes penetration, however slight, of the anus or mouth by the penis, or penetration, however slight, of the vagina by any object held or manipulated by another person.

136. The Act of 2006 provided that the consent of the child would be no defence. However, provision was made in both s.2 and s.3 for a defence of honest belief as to age. Subsection (5) of s.3, as originally enacted in 2006, provided that it would be a defence to a charge under the section for the defendant to prove that he or she honestly believed that, at the time of the alleged commission of the offence, the child in question had attained the age of 17. Subsection (6) required the court, when considering a defence of this nature, to have regard to the presence or absence of reasonable grounds for such a belief, along with all other relevant circumstances.

137. Both sections were substituted by virtue of the Criminal Law (Sexual Offences) Act 2017. As far as this appeal is concerned, the principal alterations brought about by the Act of 2017 relate to the defence relating to age. Firstly, the reference to the "honesty" of the defendant's mistake was removed. Section 3(3) now provides that it shall be a defence "*for the defendant to prove that he or she was reasonably mistaken that, at the time of the alleged commission of the offence, the child against*

whom the offence is alleged to have been committed had attained the age of 17 years". Section 2 provides for a similar defence where the belief is that the child had attained the age of 15.

138. Secondly, subs. (4) provides that in considering whether or not the defendant was reasonably mistaken, the court is to consider whether, in all the circumstances of the case, a reasonable person would have concluded that the child had attained that age.

139. The third significant change is set out in subs. (5), which is the only part of the provision now challenged in these proceedings. It stipulates that the standard of proof required to prove reasonable mistake on the part of the defendant shall be that applicable to civil proceedings – that is, the balance of probabilities. The burden thereby cast on the defence is a legal, as opposed to evidential, burden.

140. The relevant parts of s. 3 of the Act (as amended) are set out here.

3(1) A person who engages in a sexual act with a child who is under the age of 17 years shall be guilty of an offence and shall be liable on conviction on indictment –

(a) To imprisonment for a term not exceeding 7 years, or

(b) If he or she is a person in authority, to imprisonment for a term not exceeding 15 years.

(2) A person who attempts to engage in a sexual act with a child who is under the age of 17 years shall be guilty of an offence and shall be on conviction on indictment –

(a) to imprisonment for a term not exceeding 7 years, or

(b) if he or she is a person in authority, to imprisonment for a term not exceeding 15 years.

(3) It shall be a defence to proceedings for an offence under this section for the defendant to prove that he or she was reasonably mistaken that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 17 years.

(4) Where, in proceedings for an offence under this section, it falls to the court to consider whether the defendant was reasonably mistaken that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 17 years, the court shall consider whether, in all the circumstances of the case, a reasonable person would have concluded that the child had attained the said age.

(5) The standard of proof required to prove that the defendant was reasonably mistaken that the child had attained the age of 17 years shall be that applicable to civil proceedings.

These proceedings

141. The respondent initially sought a declaration that the entirety of s.3 of the Act of 2006 was invalid having regard to, in particular, Article 38.1 of the Constitution (which provides that no person shall be tried on any criminal charge save in due course of law). By the time of the hearing in the High Court, he had limited his claim to s.3(5). He pleaded that the provision infringed the presumption of innocence by requiring the defence to disprove a key element of the *mens rea* of the offence – that is, by requiring him to prove that he did not know the child's age, as opposed to requiring the prosecution to prove that he did know it. The State defendants denied the claim and pleaded that the overriding public interest in the protection of minors from sexual offences justified any interference with the rights of the plaintiff, and also justified the limited reversal of the burden of proof in respect of the defence of reasonable mistake as to age. In the alternative, the limited reversal of the burden was justified by the nature of the offence, and because it related to an issue exclusively within the knowledge of the plaintiff. It was also pleaded that the defence of reasonable mistake was a special defence to the offence of defilement that only arose in circumstances where the substantive elements of the offence were otherwise proven, namely, that the accused engaged in sexual intercourse with a child under 17.

The High Court judgment

142. It appears that the events giving rise to the two counts on the indictment occurred at a social gathering, at a time when the complainant was just under 16 and the respondent was about three and a half years older. The complainant testified in the trial that the respondent had asked everyone present their age, and that she had told him she was 15. Giving evidence in his defence, the respondent denied this and said that her appearance, behaviour and friendship with another older girl had led him to believe that she was older.

143. Stack J. declined to consider the transcripts of the trial, on the basis that, while it was clear that the jury did not believe that the respondent had met the required standard of proof in relation to the defence, she could not attempt to guess at their reasoning.

> *"They may have believed that he was well below that threshold and have had no doubts at all, or they may have had some doubt but, on balance, thought that the complainant was more credible. They may even, given that the onus was on the accused and the standard was the balance of probabilities, not have been able to decide the matter one way or another, in which case they may have come to the conclusion that the accused failed to discharge the burden on him. It is not possible for me to trawl through the transcript and try to imagine which of these possibilities occurred, nor is it necessary for me to do so. The kernel of the case is that any one of these possibilities could have occurred and could have led to the conviction."*

144. Stack J. saw the *ratio* of *C.C. (No.2)* as being that liability could not be imposed in a serious criminal case where no "*guilty mind*" or "*moral culpability*" could be proven. She considered that this meant that there must be culpability in respect of the age of the child, as that was a key element of the offence being examined by the Court. As the defence in s.3 was introduced so as to satisfy this requirement, she saw the "*reasonable mistake*" defence as a critical component in establishing guilt.

145. Having considered the analysis in *People (DPP) v. Smyth* [2010] IECCA 34 and *People (DPP) v. Forsey* [2019] 2 I.R. 417, and the contrasting case of *People (DPP)*

v. Heffernan [2017] 1 I.R. 82, Stack J. concluded that the guarantee of a fair trial set out in Article 38.1 of the Constitution, including the presumption of innocence, meant that the constituent elements of an offence must always be proven beyond reasonable doubt by the prosecution. In her view it followed that, at least in relation to those constituent elements, a provision such as that at issue in these proceedings could go no further than to place an onus on the accused to create a reasonable doubt in the minds of the jury as to his or her guilt. The question, then, was whether s.3(5) of the Act should be regarded as a "special defence or exception", or as relating to a core element of the offence of defilement.

146. In very brief summary, the following were the key findings of the trial judge, based on her consideration of the relevant jurisprudence:

(i) The presumption of innocence does not mean that an accused person can never be subjected to a burden of proof on some issue in the trial.

(ii) However, if the issue in question concerns a core element of the offence, then it is not permissible to impose more than an evidential burden of proof. That burden can be satisfied if there is evidence capable of establishing a reasonable doubt as to guilt.

(iii) It is permissible to place a heavier burden, of proof on the balance of probabilities, if the issue in question concerns a special defence or exception.

(iv) The core unlawfulness of the offence created by s.3 of the Act is that the child was under the age of 17 at the relevant time.

(v) The age of the child is thus a key element of the offence.

(vi) It is therefore necessary to prove that the accused had a "guilty mind" in relation to that element.

(vii) The defence of reasonable mistake is a provision relating to that necessary element, introduced so as to meet the constitutional requirement of proof of moral culpability identified by the Court in *C.C.*, and it is constitutionally impermissible to impose more than an evidential burden in relation to it.

(viii) The only possible interpretation of the section was that it imposed a legal burden, and it was therefore invalid.

147. Stack J. thus rejected the principal argument put forward by the State parties. The appellants had also contended, in the alternative, that if subs. (5) did indeed interfere to some extent with the presumption of innocence, it should be seen as a proportionate restriction on Article 38 rights having regard to the public policy of protecting children. They referred to the reports of certain Joint Committees of the Oireachtas that discussed the issue, and argued that the courts should show deference to the policy choices of the legislature. It was submitted, in reliance on *Tuohy v. Courtney* [1994] 3 I.R. 1, that it was for the legislature to balance the fair trial rights of an accused against a countervailing constitutional right.

148. Stack J. considered that any relevant right of the child was a substantive one that was protected by the imposition of criminal liability. It did not require the fairness of the trial to be compromised. Having considered the *Heaney* proportionality test (*Heaney v. Ireland* [1996] 1 I.R. 580) as discussed in the judgment of Barrington J. in *Re National Irish Bank Ltd.* (No. 1) [1999] 3 I.R. 145, Stack J. concluded that the overall requirement that a trial must be fair, and conducted in due course of law, was not one that was subject to qualification. The importance of the presumption of innocence to the fairness of a trial was such that it could not be subjected to "proportionate restriction". In this regard she cited the majority judgment in *Hardy v. Ireland* [1994] 2 I.R. 550 and the reference therein to the "*essential requirement that at the end of the trial and before a verdict can be entered the prosecution must show that it has proved its case beyond all reasonable doubt*". She considered that a trial which permitted conviction where there was a reasonable doubt as to the guilt of the accused was not a fair trial. The decisions in *Hardy*, *Smyth*, *Heffernan* and *Forsey* were, in her view, all to the same effect – the constituent elements of the offence must always be proven beyond reasonable doubt. The application of the principle of proportionality could not be deployed to dilute this.

149. If, however, a proportionality test was indeed applicable, the trial judge's view was that the provision could not pass the test. She accepted that it had a legitimate objective – in broad terms, this was the protection of children both from sexual predators and from sexual activity at an age where they lack sufficient maturity; in narrower terms it was to place an onus on the accused to show that he made a

reasonable mistake. However, the legislature was required to restrict the rights of the accused as little as possible, and the measure in question did not impair the presumption of innocence as little as possible. A reverse onus might be justifiable but if it was possible to impose a legal rather than an evidential burden then the presumption of innocence would not apply in any serious offence.

150. The appellants had put before the court two Reports of the Oireachtas Joint Committee on Child Protection. The first of these, from November 2006, recommended that there should be no defence of mistake as to age. The other was the Second Interim Report of the Joint Committee on the Constitutional Amendment on Children, from May 2009. The purpose of the Amendment in question was the adoption of what is now Article 42A of the Constitution. The Committee was considering a proposal for the inclusion in the new provision of words enabling the Oireachtas to create offences of strict or absolute liability where sexual offences against children were concerned. It also considered the possibility of amending the Act of 2006 in order to impose a burden of proof on the defence. The Committee expressed its awareness that a re-balancing exercise of this nature could give rise to implications for the presumption of innocence and the right to silence, and that this warranted further consideration. It ultimately did not recommend a constitutional amendment. In that regard it cited the submissions made to it concerning the necessity of a defence as to age to prevent injustice, and the fact that the Director of Public Prosecutions did not appear to have found either that the 2006 changes had made it less likely that complainants would come forward or that the ability to investigate and prepare a case for hearing had been diminished. Further, the evidence available to the Committee suggested that in the vast majority of cases the perpetrator and the child were known to each other and there could be no issue of mistake as to age.

151. The Committee did recommend a legislative amendment whereby the burden on the defence should be proof on the balance of probabilities, and further that legislation should be designed to apply evidential inferences, presumptions or exclusions for the same purpose. There was a specific recommendation that an accused should not be permitted to rely upon the dress, demeanour, consent or previous sexual history of the child.

152. Stack J. accepted that these "thoughtful and considered" reports demonstrated that there was a concern after the *C.C.* decision about the prospect of children being cross-examined about matters such as their dress, demeanour, behaviour, and alcohol intake. However, given the fact that the defence would arise only in a minority of cases, and the further fact that the 2006 Act did not appear to have significantly reduced the number of prosecutions, she did not see the contents of the reports as putting forward any specific justification for the imposition of a legal burden to the civil standard rather than an evidential burden. In any event, the courts were not obliged to defer to the analysis by the legislature of the policy underlying provisions that affected fundamental trial rights. The protection of the fundamental rights of an accused was a matter for the courts. In the circumstances, she held that s.5 of the Act went further than necessary to avoid the difficulties that would be posed if the prosecution had to lead evidence of the accused's knowledge of the child's age. Therefore, even if the concept of proportionality was applicable, the measure was a disproportionate restriction on the presumption of innocence.

The appeal

153. The primary ground of appeal put forward by the appellants is that s.3(5) of the Act provides for a special defence, as considered in *Heffernan*, and should not be interpreted as relating to an essential element of the offence. In their submission, s.3 creates a strict liability offence whereby the *actus reus* of the offence is an act of sexual intercourse with a child who is under 17. The accompanying *mens rea* is the intent to carry out that act and there is no requirement to prove any mental element in respect of age. The limited onus of proof placed on the defence effected by s.3(5) of the Act does not infringe the presumption of innocence, because, they say, its purpose is to provide accused persons with a potential defence in the light of the judgment in *C.C.*

154. The appellants here adopt the classification set out in *City of Sault Sainte Marie.* They read the *C.C.* judgment as holding no more than that it was impermissible to have an offence of this nature based on *absolute* liability (that is, where no defence based on either mistake, or the care taken to avoid committing the offence, could succeed). In declaring unconstitutional the section in question in that case, the

Supreme Court had observed that a person without moral guilt could be criminalised by it. The Court had also referred to the "*absolute*" nature of the offence and the fact that there was "*absolutely no defence*" once the *actus reus* was established. It was acknowledged in the judgment that there were different possible solutions to the problem of the absolute form of liability, and the Court had left it to the Oireachtas to address the matter. The legislation in its current form is said to be within the range of solutions envisaged by the Court.

155. It is submitted that the terms of s.3 as a whole support this interpretation, since if the offence required knowledge of the age of the child, then the specific provision of a limited defence of reasonable mistake as to age would be entirely redundant. Instead, the section creates a special defence for a person who has engaged in a sexual act with a child who was under 17, but who reasonably believed that the child was over that age. On this analysis, a failure by a defendant to discharge the onus of proof does not leave open the possibility that he or she could be convicted notwithstanding the fact that a jury might have doubts as to his or her guilt. The elements of the offence would already have been established beyond reasonable doubt, and the defendant would simply have failed to persuade the jury that he was entitled to the benefit of the special provision.

156. On this basis, the appellants submit that the two indicia of a problematic placement of a burden identified in *Forsey* – an apparent reversal of an onus in respect of an essential element of an offence, and an obligation to prove a negative – do not arise.

157. The appellants also argue that, in any event, the trial judge erred in considering that the authorities are to be read as holding that the presumption of innocence always requires that the constituent elements of the offence must be proven beyond a reasonable doubt, in that they say that it is constitutionally possible to cast at least some burden of proof onto the defence. This submission is made within a broader contention that while the guarantee of a fair trial under Article 38 is unqualified, the presumption of innocence is not, and it can be subject to appropriate restriction. The defendants refer here to the minority judgments in *Hardy v. Ireland* [1994] 2 I.R.

550 (albeit it is accepted that the minority did not develop this line of thought to any great extent in their judgments).

158. It is submitted that the judgment of Charleton J. in *Smyth*, while describing as "*fundamental*" the principle that an accused should not be convicted unless it is proved beyond reasonable doubt that he or she committed the offence charged, recognised that this was not an absolute principle and that for reasons of policy it was open to the Oireachtas to require that any reversed element of proof should be discharged as a probability. Similarly, it is submitted that the judgments in *Heffernan* recognise that the principle that the prosecution must prove every element of a crime might be subject to limitation, since, it is argued, they acknowledge that in some limited instances there could be an onus on the defence to prove some matter on the balance of probabilities. The question of whether an onus on the defence could be justifiable was also referred to in the judgment of O'Malley J. In *Forsey*, the majority judgment referred to the possibility that such an onus "*might*" amount to, or would be "*capable of amounting to*", an infringement of the presumption of innocence, and thus a violation of the guarantee of a trial in due course of law, if it required the defence to negative an element in the offence. The defendants read this as meaning that there is no absolute prohibition if the provision can be justified.

159. It is observed that *Hardy*, *Smyth*, *Heffernan* and *Forsey* were all cases concerned primarily with statutory interpretation, and that the issue presents itself in a different way in the instant appeal given that the statute is entirely clear in relation to the burden being imposed. The appellants submit that the effect of the case law is that the constitutional guarantee requires a statute to be interpreted as imposing an evidential burden only, where it is capable of being so interpreted. If it is not so capable, because of its express terms, the provision is not necessarily to be condemned, because the question of justifiability arises. Justification may be possible, firstly, if the issue is one in which the onus is placed on the defence is not an element of the offence. However, even if the provision in question requires the defence to negative an element of the offence itself, and may thus be seen as an interference with the presumption of innocence, the authorities suggest it may be permissible. This position is said to be consistent with that of the European Court

of Human Rights, as expressed in cases such as *Salabiaku v. France (App no. 10519/83) 7th October 1988.*

160. The appellants accept that the placing of an onus of this nature on the defence, that is an onus to establish something on the balance of probabilities, may require very substantial justification. In this context, they argue that the Oireachtas is entitled to a margin of appreciation in the creation of substantive criminal law. The criminalisation of sexual activity with children gives rise to complex and sensitive issues of social policy that require a balance to be struck between the rights and interests of the child and those of the accused. In this instance, the Oireachtas has engaged in a balancing of competing rights and duties and, in particular, a balancing between the presumption of innocence and the protection of the fundamental rights of the child. Those rights, protected by Article 40 and 42A, include life, bodily integrity, privacy and autonomy, and the State has a fundamental duty to protect them. It is observed that, similarly, the State has a positive duty under the European Convention on Human Rights to protect the physical and moral welfare of the child. The reference here is to *K.U. v. Finland* (App No. 287/02, 2nd December 2008), which held that this duty required the criminalisation, effective investigation and prosecution of offences against the person of a child. There has been a real concern on the part of the Oireachtas that a defence of honest or reasonable mistake would amount to a failure to meet the necessary standard for the protection of children.

161. The appellants acknowledge that, since this part of their argument entails an acceptance that the legislation requires the accused to disprove an element of the offence that would otherwise have to be proved by the prosecution, it entails an acceptance of the possibility that a person might be convicted despite doubts as to their guilt of the offence. They describe this scenario as being "*at or near the limits of what might be permissible*". However, they maintain that an obligation to prove, on the balance of probabilities, a fact that is more readily proved by the accused than disproved by the prosecution does not render a trial unfair and is within the range envisaged by the Court in *C.C.*

162. In this context, it is proposed that in reviewing the result of a balancing exercise of this nature carried out by the Oireachtas, the Court should adopt the standard of

rationality rather than the principle of proportionality. The decision of this Court in *Tuohy v. Courtney* [1994] 3 I.R. 1 is relied upon in this respect. *Donnelly v. Minister for Social Protection* [2022] IESC 31 is referred to as a more recent example of the application of the rationality standard. The appellants submit that the application of this test to s.3(5) will demonstrate that the Oireachtas struck a careful balance between the competing rights at issue and that the provision was a rational means of attaining the objective of protecting children against sexual crime. Given the sensitive and difficult issues involved, the Court should be slow to second-guess the choice made.

163. However, the appellants say that the legislation would in any event meet a proportionality test. They refer to *R. v. Chaulk* [1990] 3 S.C.R. 1303, where the Supreme Court of Canada addressed the question of justifiability by reference to the principle of proportionality, and to the adoption of a proportionality test in *Heaney v. Ireland* [1994] 3 I.R. 593. Reference is also made to the jurisprudence of the ECtHR to the effect that in employing presumptions in criminal law, States are required to strike a balance between what is at stake and the rights of the defence. The appellants say that while the approach of the ECtHR can be described as the application of the principle of proportionality – the means employed must be reasonably proportionate to the legitimate aim sought to be achieved – the test is, at heart, that of rationality. This analysis is based on the principle stated in *Salabiaku* that restrictions on the presumption of innocence must be "*kept within reasonable limits*".

164. It is submitted that whatever standard of review is adopted, the Court must afford deference to the primary role of the legislature in determining complex questions of law and policy.

165. The respondent maintains that the age of the child is an element of the offence, since it is age that makes the conduct criminal, and argues that there must be *mens rea* as to that element. He does not, however, contend that the prosecution should have to prove actual knowledge of the age on the part of an accused and would accept that recklessness as to the possibility that the complainant was under 17 would suffice.

166. The respondent refers to the submission of the appellants that all of the elements of the offence are established if the prosecution proves that sexual activity took place with a child under the age of 17. It is submitted that this would run contrary to the *ratio* of *C.C.*, in that, as the respondent sees it, the principle that *mens rea* was a central component of every truly criminal offence was essential to that decision. This Court, it is argued, was in no doubt that some level of *mens rea* in respect of the age went to the core of what rendered the act a crime and that without such *mens rea*, or with an honest belief that the child was not below the prohibited age, the accused would not have done anything morally blameworthy.

167. He submits that the entitlement to an acquittal of an accused person who proves that he made a reasonable mistake can only be explained if the mistake has negatived *mens rea*. Otherwise, the acquittal would not relate to innocence of the offence. On this analysis, the legislature has, in effect, implicitly included *mens rea* as to age and provided for a presumption of knowledge that has to be rebutted by the defence. That is seen by the respondent as permissible, but only if the burden of rebutting the presumption is pitched at a lower level. This is because the higher burden would permit a person to be convicted even where the tribunal of fact is not satisfied of his guilt beyond reasonable doubt. That would arise because, in a given case, the jury might feel that the defence account was only *as* likely to be true as not, but not *more* likely to be true than not. In that case they would be obliged to find that he had not discharged the onus of proof despite thinking that what he said might be true.

168. The respondent therefore argues that since, on his analysis, it is the age of the child that makes defilement an offence, it is immaterial whether the statute includes the mental element as to age as an ingredient of the offence, or deals with it by way of a statutory presumption, or re-casts it as a defence issue. A person who is reasonably mistaken about the age of the child is morally blameless.

169. The respondent submits that *Forsey* is authority for the proposition that the placing of an onus on an accused to disprove a core element of an offence, on the balance of probabilities, is an infringement of the presumption of innocence. While

it is accepted that *Heffernan* refers to the possibility of justification of a reverse burden, it is emphasised that the context there was one involving the special defence of diminished responsibility and it is submitted that the reference in the judgment to justification is otherwise *obiter*. The judgment is said to make it clear that the imposition of an onus to disprove an element of the offence would amount to an infringement of the presumption of innocence.

170. As far as the applicability of the principle of proportionality is concerned, it is submitted in the first instance that the High Court judge was correct and that the conviction of a person whose guilt has not been proved beyond reasonable doubt cannot be justified by reference to that principle or otherwise. That position necessarily follows, of course, from the view that a mental element as to age is an ingredient of the offence. However, the respondent maintains an alternative argument that the provision in question could not in any event be found proportionate.

171. In this context, the respondent argues that in general the appropriate test in respect of measures that interfere with fundamental rights is not rationality but proportionality, which includes a test for internal rationality or a rational connection between the objective of the measure and the means employed. In *Donnelly v. Minister for Social Protection*, the judgment referred to the *Heaney* test as the appropriate tool for analysing the lawfulness of interference with a constitutional right, while finding that rationality was more appropriate in the context of a pure equality claim.

172. It is accepted that there is a strong public interest in protecting minors from involvement in sexual activity, but it is contended that the imposition of a legal burden on the defence to negative a core element of the offence goes too far and represents too great an interference with Article 38 rights. There are many other statutory offences which have the same objective, but which do not create a reverse onus of this nature.

173. The respondent characterises the submission made by the appellants in relation to the need for deference to the views of the Oireachtas as being premised on a

contention that it is for the Oireachtas to set the parameters for an infringement of constitutional rights, and that the courts should not interfere unless there is a near total absence of reason. It is argued that this is not consistent with the separation of powers. The Oireachtas decides upon policy and the content of legislation, but the courts must be the final arbiters of issues of fundamental rights. The fact that the Oireachtas gave careful consideration to the issues does not alter that.

174. The *amicus curiae*, the Irish Human Rights and Equality Commission, agrees with the conclusions of the High Court in respect of s.3(5). It sees the statute as casting a legal burden onto an accused to disprove an element of the offence. It accepts that such a measure is potentially legitimate but submits that, firstly, compelling justification must be shown and, secondly, the Court must be satisfied that the interference with fair trial rights is not so great as to render a trial other than in "due course of law" as required by Article 38. Justification cannot be demonstrated simply by pointing to the seriousness of the offence, or to social policy considerations, but must show that without a transfer of the burden the prosecution task would be unworkable. The courts should not be unduly deferential to the Oireachtas in determining whether is appropriate to shift the legal burden of proof.

175. The Commission submitted that it is necessary to have regard to the two strands of legal thought which are often interwoven issues in cases such as this – the question of *mens rea* in sexual offending and the question of mistake. Reference was made to three cases illustrating these issues: *R v. Prince*, *R v. Tolson* and *R v. Morgan* [1975] UKHL 3. The Commission endorses the dissenting judgment of Brett L.J. in *Prince* and in particular his conclusion (at p.170) that:

> *"…a mistake of facts, on reasonable grounds, to the extent that if the facts were as believed the acts of the prisoner would make him guilty of no criminal offence at all, is an excuse, and that such excuse is implied in every criminal charge and every criminal enactment".*

176. In the Commission's view the ratio of *C.C. (No.2)* is that proof of a guilty mind is required to be proved by the prosecution. The accused cannot be convicted if he

or she acted on an understanding of the facts that, if correct, would have meant that he had not committed a crime.

177. The Commission accepted that there are some instances where the presumption of innocence can be qualified, and in this regard relied upon the standard applied in *R v. Chaulk*. That standard will enable justification of a transferred legal burden of proof where the prosecution would otherwise be '*encumbered with an unworkable burden'*.

Discussion

178. The issues to be determined are, in sequence, the *ratio* of *C.C.*; the interpretation of s. 3 of the Act of 2006 in the light of that *ratio* and of other relevant considerations; and the consequences that flow from that interpretation in terms of the assessment to be made by the Court.

The Ratio of C.C.

179. The judgment in *C.C. No. 2* is replete with references to "mental innocence", "moral innocence", "lack of blameworthiness" and "absence of guilty intent". It is firmly stated that the requirement for mental guilt before conviction for a serious criminal offence is of central importance in a civilised legal system. However, it seems to us that, read in the light of the judgments in *C.C. No. 1* (in which four of the same members of the Court participated) the judgment does not turn on questions of moral innocence. Certain things are clear. Firstly, the Court accepted that it is a general principle of the common law that a person should not be convicted of a serious criminal offence in the absence of guilty intent. Quite apart from issues concerning the allocation of the burden of proof, that principle underlies the general rule that a person will not be convicted if he or she acts under a mistaken factual belief, such that had the facts been as believed, no offence would have been committed. In this regard, the majority judgment in *C.C. No.1* (Geoghegan J.) endorsed the views of Brett J. in *Prince*. However, the majority accepted that, given the history of the Act of 1935 and the differences between it and the preceding

legislation, the presumption as to *mens rea* in the construction of a criminal offence had been rebutted in "*compellingly clear*" circumstances.

180. Secondly, the references to "*moral innocence*" must be assessed with caution. The appellant C.C. could not have been considered to be a "*morally innocent*" person since he had, even on his own account, committed a criminal offence by engaging in intercourse with an underage girl who he knew did not have the capacity to give a legally valid consent. The Court's analysis must be seen as having been directed, therefore, to his potential innocence, *in legal terms*, of the offence with which he had been charged.

181. Thirdly, the Court's most explicit objection to the provision was that there was "*absolutely*" no defence to the charge. In its view, the right of an accused not to be convicted of a true criminal offence in the absence of *mens rea* was not simply qualified or limited by the 1935 Act in the interest of some other right, but had been "*wholly abrogated*". As one counsel pithily put it in the course of this appeal, "*there was no way out*".

182. In our view this is the *ratio* of the decision. In the circumstances it appears clear that the Court was prepared, in principle, to accept that there could be some qualification of the defence rights. Further, when this is coupled with the acceptance by the Court that there were a number of options for the legislature, including the deployment of presumptions against the accused, it seems clear that the Court would in principle have accepted that a burden of proof could be imposed on the defence in this regard. Indeed, the discussion in *C.C. (No.1)* contained a number of passages which seemed to contemplate the possibility of a provision which required the defendant to prove mistake on the balance of probabilities.

The interpretation of the section

183. Turning to the provision now under consideration, it seems to us that two possible interpretations are open. In the appellant's interpretation, the section creates an offence that consists only of the intentional engaging in sexual activity with a child under the age of 17. It then creates a special defence, provided for the

benefit of a person who proves a belief based on reasonable grounds that the child was 17 or over. In the respondent's interpretation there is, in addition to the intentional physical act, a mental element in respect of the age of the child in respect of which the Oireachtas has transferred a burden of proof to the defence.

184. On this aspect, O'Donnell C.J. prefers the interpretation proposed by the appellants while O'Malley J. favours that of the respondent. Both require examination since it is possible that in a different case the interpretation of a statute might be decisive. Accordingly, we set out below our respective reasoning. However, as already stated we are of the view that in this particular case neither view will conclude the analysis of the issues in the appeal. Either way, the effect of s.3(5) must be examined.

185. It is necessary to mention here the apparently broad statutory statement that "it shall be a defence" to prove a mistake as to the child's age. The offence of defilement can be committed in any of four different ways – vaginal sexual intercourse, buggery, rape under s.4 and aggravated sexual assault. The third and fourth of these are, by definition, offences that are committed without the consent of the victim. We are agreed that, clearly, the legislature could not have intended the section to be interpreted to mean that in all cases, and all circumstances, it would be a full defence to a charge of defilement that the accused person had a mistaken belief that the child was older. As a matter of logic, no belief about the age of a victim could provide a defence to a non-consensual sexual act – there is no rational connection between the two things. The defence arises only in respect of consensual activity.

186. The danger of making broad, over-general statements about the criminal law is discussed above. However, the two interpretations are informed by certain considerations that can be stated at the level of principle.

187. The fact that a criminal offence will normally consist of an *actus reus* and a *mens rea* – the latter described usefully by Glanville Williams as "*the mental element necessary for the particular crime*" (*Criminal Law: The General Part* (2nd ed., Stephens 1961) 31) – or that the onus of proof is on the prosecution to prove

guilt beyond a reasonable doubt, and normally carries the burden of establishing every component of an offence and negativing possible defences cannot be converted into some absolute constitutional principle, which demands that all criminal offences should conform to a single pattern.

188. By the same token, the proposition that at common law there is a strong presumption that the legislature intended *mens rea* to be a component of every offence, and that the prosecution would have the burden of proof in that regard, is a principle of high value in our law but cannot be converted without more into a constitutional principle that every criminal offence must require *mens rea* in respect of *every* element of that offence, and/or that the prosecution must always have the burden of proof in that regard. In fact, Irish criminal law, in both common law and statute, and relating to offences which are prosecutable on indictment, summarily, or hybrid offences, includes a number of instances in which the law does not require that the prosecution should prove every issue which might be considered relevant to an offence and disprove every element which might be thought excusatory or exculpatory. Instead, in some cases, it can place a burden on a defendant to adduce or point to evidence raising an issue which must then, and only then, be negatived by the prosecution. In this jurisdiction it has been held that there can be a burden to establish a reasonable doubt (the "*Smyth*" burden). The law may provide for presumptions of fact and law until the contrary is shown.

189. The common law principle is one of statutory interpretation: unless clear words are used, Parliament is not to be understood to intend to create an offence without a *mens rea* requirement. Silence in that matter will be interpreted to mean that *mens rea* is required, rather than excluded (which would still leave the difficult question as to what exactly was required by *mens rea* and whether intention, recklessness, or in some cases, carelessness, will suffice). We agree with the approach described in the speeches of the members of the House of Lords in *B. (A minor) v. Director of Public Prosecutions* [2000] 2 A.C. 428. The test is not whether there was a *reasonable* implication that the statute ruled out *mens rea* as a constituent part of the crime, but whether it is a *necessary* implication of same. Such implication must be compellingly clear.

190. The corollary of that principle is, nevertheless, that if such clear words are used, the law may in principle create an offence which does not require *mens rea*, and/or does not require *mens rea* in respect of every element of the offence, or that places some onus on a defendant to provide some excusatory matter. Indeed, the law of the United Kingdom, where this interpretive principle has been forcefully expounded, provides many examples. Irish law is no different in this respect. We cannot, or at least should not, convert a principle of statutory interpretation, however strong, which requires clear words to be used to achieve a particular object, and where such an object has been achieved in a significant number of cases, into a constitutional test of validity which precludes that outcome absolutely, without at least explaining why that should be so.

191. There may be circumstances where the law can place on the defendant the onus of proof in respect of certain matters to be established on a balance of probability standard. This is clearly so in the well-established cases of insanity and diminished responsibility, and the possibility of such a burden being upheld in other contexts is not ruled out by any of the authorities including *C.C.*, *O'Leary, Hardy, Smyth, Heffernan* and *Forsey*. For one example, this passage from Lord Reid's judgment in *Sweet v. Parsley* [1970] A.C. 132 was cited by Geoghegan J. at page 49 of the reported judgment in *C.C.*:-

> *"Parliament has not infrequently transferred the onus as regards mens rea to the accused, so that, once the necessary facts are proved, he must convince the jury that on balance of probabilities he is innocent of any criminal intention."*

192. Similarly, the judgment of Hardiman J. relied to some extent on the dissenting judgment of Keane J. in *Shannon Regional Fisheries Board v. Cavan County Council* [1996] IESC 7, [1996] 3 I.R. 267, and its approval of the judgment of Dickson J. in *City of Sault Sainte Marie*. In that case, Dickson J. argued for the tripartite division of offences including an intermediate strict liability class in which it is unnecessary for the prosecution to prove *mens rea* but it is open to the accused to avoid liability by proving that he took all reasonable care. In this intermediate class, such a defence could also be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. There is, as already

noted, a significant difference between these two matters: due diligence may not be the same as mistaken belief. In respect of this intermediate class of strict liability offences, Dickson J., like Lord Reid, expressly contemplated the possibility of an onus being placed on the accused to establish certain issues on the balance of probabilities:

> "*There is nothing in Woolmington's case, as I comprehend it, which stands in the way of adoption, in respect of regulatory offences, of a defence of due care, with burden of proof resting on the accused to establish the defence on the balance of probabilities"*.

193. There are, in the law as it stands, many variants, and some examples which achieve the same result through the use of presumptions. While it is true that this type of intermediate category, described by Dickson J. as "strict liability" is one most often encountered in the field of offences which can be described as regulatory, and is less commonly encountered in more serious offences, that cannot on its own amount to a distinction of constitutional principle. The Constitution does not itself distinguish between regulatory offences and other offences – the Article 38 guarantee is that no person shall be tried "*on any offence*" save in due course of law. The Constitution does distinguish between minor and non-minor offences in relation to mode of trial. However, very many offences are triable both summarily and on indictment, and the definition of the offence and the burden of proof must be the same in both modes.

194. The examples of insanity and diminished responsibility demonstrate that, as a matter of logic, where it is provided by the law that a matter must be established by the defence on the balance of probabilities, it must follow that it is in theory possible for the accused to be convicted of an offence when the jury or other fact finder have a reasonable doubt as to that issue but have not been satisfied on the balance of probabilities of the case made by the defence. It is a well-established feature of our criminal law that it is permissible to impose such an onus on the defence in relation to some issues. Statutory provisions containing such a standard are to be found in, for example, s.9 of the Criminal Justice (Smuggling of Persons) Act 2021, s. 51(2)

of the Workplace Relations Act 2015 and s.68 of the Housing Act 1966. There are numerous examples of presumptions which may operate in a similar way.

195. It is easier to describe the type of cases where such provisions have been employed rather than to identify any single bright line rule. Such cases are often regulatory in nature, or involve proof of a licence or permission. They may relate to matters where disproof would be difficult, if not impossible. They may provide that an offence can be established by the prosecution beyond a reasonable doubt by proving particular specified facts, but the defendant may nevertheless be exculpated on proof of certain matters such as due diligence – for example, that a defendant in a health and safety prosecution had taken all reasonable steps to put in place and operate a safe system. If the machinery of regulatory offences conforms to the requirements of Article 38, it necessarily follows that this type of intermediate category of a strict liability offence is, at least in principle, not inconsistent with the Constitution.

196. There is therefore no simple rule of thumb standard by which such provisions are to be judged and no rule to the effect that any provision which departs from this pattern is even presumptively constitutionally dubious. However, it can be said that the normal case is one where the burden of proof is on the prosecution to prove all matters and negative others by positive evidence beyond a reasonable doubt, and where full *mens rea* is required in respect of every aspect. Careful scrutiny may be demanded where the statute departs from that norm. Where that occurs, then, the more serious the offence, or the more clearly an issue can be said to be an element of the offence, or to be central to the question of liability, the greater the level of scrutiny.

197. Presumptions, of which there are many, may be employed to relieve the prosecution of the burden of proving every aspect of a case by primary fact. Instead, unless the defendant can rebut the presumption, the relevant fact or conclusion may be taken to be established. These are settled features of the criminal law, and no one in this case suggests that they are inconsistent with any constitutional principle. The significant function of a presumption is usually to relieve the prosecution, to some extent, of a burden of proving the specified matter. It can be said that the

presumption of innocence is thereby *affected*, but it cannot be said that the right to be presumed innocent is necessarily *violated* by every such provision. If that were so it would be wrong to find even an evidential burden or a *Smyth* burden to be constitutionally acceptable. The question whether a higher burden is acceptable in a given case must therefore be addressed in a context where *some* interference is permissible.

Reasons for accepting the appellant's interpretation

198. As O'Donnell C.J. sees it, s. 3(3) does not operate as a transfer of an onus of proof (whether persuasive, evidential, or a *Smyth* burden) onto the accused. Rather, the Act creates a defence and allocates the burden of proof thereof, on the balance of probabilities, to the defence.

199. The common law presumption of *mens rea*, as discussed in *Sweet v. Parsley* and *Re B (A Minor)* is accorded due weight but the traditional analysis is applied – the existence of a provision such as ss. (3) precludes the presumption of proof of *mens rea* resting on the prosecution from arising at all. The presumption as to *mens rea* depends on an implication into the legislation, but as the legislation now stands, the Oireachtas has expressly provided that the accused bears the burden of proving the defence of mistake of age to a standard of probability. The consequence of the implication would be to prevent legislation from achieving its expressed effect.

200. That *mens rea* is not an element of the offence itself can be tested and established in a number of different ways, even if ss. (3) stood alone and was understood as imposing an evidential onus only. If no evidence is adduced or could be pointed to in order to discharge the onus, then the accused could be convicted on proof of intercourse and age alone. It follows that *mens rea* is not an element of the offence as drafted. It is rather, a matter of defence. This is all the clearer when s. 3(5) is taken into account. In any event, it is not appropriate to analyse the section one subsection at a time.

201. The issue can be obscured because the defence under s. 3(3) and 3(5) undoubtedly looks at the mental state of the accused, but that does not make *mens rea* an element,

still less a core element, *of the offence*. The analysis can be clearer if instead of the defence of reasonable mistake we consider a possible defence of due diligence. As already observed, this is logically distinct from a defence of reasonable mistake. But an express provision creating a defence of due diligence has always been understood to defeat the *Sweet v. Parsley* presumption of *mens rea*.

202. This conclusion also followed from the historical background to the section. As a matter of history, there has been no equivalent offence in this jurisdiction that imposed an obligation on the prosecution to prove *mens rea*. The 2006 Act and 2017 amendments clearly followed on from the decision in *C.C.* That case can be understood in simple terms as establishing a principle that an offence which was absolute at least in respect of the age of the complainant was contrary to Article 38. The statutory response was clearly to seek to replace it with an offence that was a strict liability offence in respect of age. Strict liability offences were defined by Hardiman J. at paragraph 16 of his judgment in *C.C.* following the taxonomy in *R. v. City of Sault Sainte Marie* and *Shannon Regional Fisheries Board*, as "*an intermediate kind in which it is unnecessary for the prosecution to prove mens rea but open to the defendant to avoid liability by proving that he took all reasonable care*" (emphasis added).

203. Finally, this issue arose in the context of *C.C. No.1* and the conclusion of the majority that the 1935 Act must be understood by reference to the legislative history, and the selective deletion of the defences of mistaken belief from some parts of that Act, as clearly precluding the presumption of *mens rea* arising, or rebutting it. Fennelly J. at paragraph 161 referred with approval to the decision of the House of Lords in *R. v. K.* [2001] UKHL 41, [2002] 1 A.C. 462. That case concerned the offence of indecent assault contrary to the provisions of s. 14(1) of the UK Sexual Offences Act, 1956, and the House of Lords decided that what was described as the established common law presumption that a mental element traditionally known as *mens rea* was an essential ingredient unless Parliament indicated a contrary intention expressly or by necessary implication. The UK court found that this meant that *mens rea* was required to be proved as a component of the offence of indecent assault under s. 14 of the 1956 Act in respect of a complainant under 16, who by s. 14(2) could not give consent.

204. However, Lord Bingham at paragraph 23 of his judgment contrasted s. 14 with ss. 5 and 6 of the 1956 Act. Section 5 re-enacted the offence of unlawful sexual intercourse with a girl under 13. S. 6 re-enacted the offence of unlawful sexual intercourse with a girl between the ages of 13 and 16. S. 6 also contained a proviso known as the young man's defence, first introduced in 1922 in the UK, which provided that a man would not be guilty of the offence if he had unlawful sexual intercourse with a girl under 16, if he was under 24, had not previously been charged with an offence and "*he believes her to be over the age of 16 and has reasonable cause for his belief*".

205. Lord Bingham considered the omission of such a defence from s. 5 as plainly deliberate, since a genuine belief that a child three years under the age of consent was over that age would defy credulity. S. 6(3) which provided for the defence, "*plainly defined the state of knowledge that would exonerate a defendant accused under that section, and this express provision necessarily excluded the more general presumption*" – that is, the *Sweet v. Parsley* presumption that *mens rea* was a component of the offence. That passage was quoted with approval by Fennelly J. in *C.C. (No 1.*). It is clear that the provision of a *defence* of reasonable belief that a complainant was over the relevant age, necessarily excluded the *Sweet v. Parsley* presumption that *mens rea* was a component of the o*ffence*.

206. On this analysis, *mens rea* is not an element of the offence under s. 3(1). Indeed, s. 3(3) and s. 3(5) would be redundant if *mens rea* was a component of the offence, because it would not be necessary for the defendant to establish anything and discharge any onus whether evidential or persuasive. On the contrary it would be necessary for the prosecution to prove *mens rea* as to age, beyond any reasonable doubt, and doing so, necessarily excluding any mistaken belief, whether reasonable or merely honest.

Reasons for accepting the respondent's interpretation

207. O'Malley J. accepts that s. 3 of the Act of 2006 must be construed as a whole, and, indeed, in the context of its relationship with s.2. However, it is legitimate to note the acceptance by counsel for the appellants that, in the absence of subs. (3), the offence would be seen as one entailing a full *mens rea* whereby the prosecution

would have to prove intention or recklessness. If the drafters of the section had stopped after s.3(1), and the measure had fallen to be construed post-*C.C.*, the ordinary, centuries-old presumption as to *mens rea* could readily have been applied in the following combination of circumstances.

208. Firstly, the offence of defilement is a new offence that is quite different to the 1935 offence of unlawful carnal knowledge. The latter consisted only in vaginal intercourse with a female child, whereas the new offence encompasses a greater range of sexual activities and can be committed against *any* child under the age of 17. It is not a question of simply renaming or repackaging the old offence. The considerations identified in respect of the creation of a new offence in *Murray* therefore come into play. Secondly, none of the members of the Court in *C.C. No.1* considered that the absence from the legislation of express words such as "*knowingly*" were particularly relevant, given that the legislature rarely makes explicit provision for *mens rea* when defining a crime. Thirdly, the legislative history would be significantly different to that considered in *C.C. No.1*, given the outcome in that case and the reasons for introducing the legislation. Fourthly, there would be no other "necessary implication" or "compellingly clear" circumstances to oust the presumption.

209. Finally, as Lord Nicholls said in *Re B (A Minor)*, the more serious the offence, the greater the weight that should be given to the presumption.

210. Without subs. (3) the provision would therefore have been interpreted as expressly setting out the *actus reus* and as implicitly including a *mens rea* of intention or recklessness as to the age. The next question, then, would be the effect on that interpretation of the fact that the section does include subs.(3) – the provision that it is a defence to prove a reasonable mistake as to age.

211. There is nothing in the structure of the section to support the view that the provision in s. 3(3) is not simply another example of a statutory transfer of a burden to the defence. Thus, in *Smyth* the statute under consideration provided that, where it was proved that the accused had in his possession a controlled drug, it would be a defence to prove that he did not know and had no reasonable grounds for

suspecting that what he had in his possession was a controlled drug. It was not suggested that an accused who was factually in possession of a controlled substance had thereby committed the offence but could be acquitted by virtue of a special defence – rather, the absence of knowledge or reasonable grounds for suspicion would mean that he had not committed the offence. *Smyth* has been approved in this Court and it has not been suggested in this appeal that it was wrongly decided. The statutes are, of course, drafted in different ways but this consideration does not point to a different conclusion.

212. On this analysis, s.3(3) is by no means redundant – it is an essential mechanism for the transfer of the burden of proof in respect of *mens rea* that would otherwise be presumed to fall on the prosecution.

213. The characterisation of s. 3(3) as creating a special defence creates a separate problem relating to the effect of a mistake. Where a defendant asserts that he or she acted under a mistaken fact-related belief, the relevance (assuming the assertion to be true) lies in the fact that he or she did not have the intention of committing the crime. Thus, the man who comes to a restaurant in a black jacket, and later takes home a black jacket in the genuine but mistaken belief that it is his own, does not intend to steal and does not commit the offence of theft. He does not have the *mens rea* for the offence, because had the facts been as he believed them to be no crime would have been committed. That is the longstanding common law – see, for one example, the nineteenth-century case of *R. v. Tolson* (referred to in paragraph 24 above). While the common law may have altered course somewhat on the question whether the mistake must in all cases be reasonable (see, e.g., *R. v. Morgan*, *People (DPP) v. O'R* [2016] IESC 64 and *Re B (A Minor)*) there is nothing inherently objectionable in a statutory provision to the effect that only a reasonable mistake will suffice. The more important point is that the mistake should have some relationship to the elements of the offence.

214. If no *mens rea* is required in respect of the age of the child, a question must then arise as to what the function of the statutory defence of mistake could be. The problem is *why* a belief, in respect of something not essential to the offence and not even related to a matter essential to criminal liability, should entitle the accused to

an acquittal. It is not contended that altering the standard of proof for the defence of mistake made any radical alteration to the ingredients of the offence, so the question must be answerable by reference to either version of the section.

215. The appellants submit that the legislative acknowledgment of the significance of a mistake is for the purpose of recognising that the person who makes a reasonable mistake is not "*blameworthy*" or "*mentally guilty*" and is entitled to an acquittal on that basis. This is problematic in respect of both s.2 and s.3, but particularly the former.

216. Having regard to the need for consistency of interpretation between s.2 and s.3, the mistake that entitles the accused to an acquittal will not necessarily be one that means that he or she is "morally innocent" or "not blameworthy". That reasoning simply cannot apply if a person charged under s.2 with having intercourse with a child under the age of 15 says that he or she believed the child to be 16. If the defence account is established to the requisite standard, the accused will be entitled to be acquitted of the s.2 charge but will be guilty of, and convicted and sentenced for, the s.3 offence. This outcome will reflect the *lesser* degree of culpability, but it has little to do with "moral innocence".

217. In this context, it should perhaps be added that the relevance of the mistake is not to show that the accused believed that the child was old enough to give a valid consent. That, too, would be meaningless in the case of a s.2 charge. A defendant might be able to establish a belief that the child was 15 or 16, but a child of that age would not be able to give such a consent to any of the forms of defilement.

218. The mistake must have the same function in both sections. In general, the reason why a person who makes a reasonable mistake of fact is not blameworthy or mentally guilty is that they do not intend to commit a crime – and if the facts were as they believe them to be then no crime would be committed. In the present context, a mistake may not absolve the accused of moral blame or, indeed, all criminal liability, but it may have the effect of negativing criminal intent *in respect of the offence charged*. That can make sense only if some degree of mental awareness of the child's age is a constituent of the defence. This interpretation makes it clearer

that a mistake as to age can have no relevance if the sexual activity is non-consensual.

Analysis on either interpretation

219. In this case, the fact is that the two interpretations are based on very fine distinctions which may, indeed, have far greater theoretical than practical importance. If the respondent's interpretation is correct, then this becomes a case of the reversal or transfer of an onus relating to a core element of the offence and therefore something that would require very strong justification. However, the fact that the distinction is a fine one perhaps emphasises that this issue cannot be approached in a purely formalistic way: whether viewed as an element of the offence or an important matter of defence, the overriding question is whether an onus of proof on the balance of probabilities on this issue is consistent with the fair trial guarantee of Article 38. We therefore now set out the reasons why each of the interpretations leads us in this case to the same conclusion. In so doing, we note the reality that, in the normal course of events, neither the prosecution or the defence in any trial is likely to rely fully on the fact that the other party bears an onus in respect of an issue – they will always do what they can to prove or disprove the case made on that issue and to establish their own case.

220. O'Donnell C.J. has accepted the appellants' interpretation – that the offence does not require *mens rea* in relation to the age of the child. It remains the case, nonetheless, that the effect of the 2006 Act was to introduce a mental element in respect of age into a provision where it had been entirely absent from the 1935 iteration of the offence, and which absence had led to the invalidation of s. 1(1) of the 1935 Act, in circumstances which pointed inexorably to similar invalidity of s. 2 of the same Act. The introduction of this mental element was therefore, considered something of importance by the legislature and in identifying the matters that could be the subject of controversy in a prosecution under the 2006 Act, the possibility of which was necessary to comply with the obligation of providing a fair trial in accordance with Article 38 of the Constitution. If the ratio of *C.C.* was that there was "no way out" for the person who was blamelessly mistaken about age, the

question that arises is whether the "way out" now provided is too narrow and onerous to remedy the problem.

221. It is not necessary to find that an onus of proof is being placed on an accused in respect of a core element of the offence in order to conclude that the requirement to prove a defence on the balance of probabilities would be contrary to the Constitution. It is, therefore, not essential to a finding of unconstitutionality that the defendant's state of mind as to the age of the child should be viewed as an element of the offence. If it is so viewed then it would require compelling justification, as an interference with the presumption of innocence. But the constitutional issue is not avoided by treating the state of mind as a possible defence. The question still would arise, and arises here, whether it is consistent with Article 38 to require that the defence discharge the onus on the balance of probabilities.

222. The applicable test, on this analysis, is essentially similar to that expounded by Lord Bingham of Cornhill in the context of the ECHR in *Sheldrake v. DPP* [2005] 1 AC 264:

> *"From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. 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 rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable."*

Strictly speaking this is not a proportionality test since on this view there is no direct interference with the presumption of innocence, but the essential analysis remains the same. The question is whether it is possible to achieve the justifiable objectives of the legislation by means which are less intrusive of the rights of the defence which relates in turn to the essential fairness of any trial. This question cannot be answered by observing that where a balance of probabilities standard is imposed on the defence a jury or other fact finder may convict while retaining a doubt as to that

issue. That is the logical consequence of providing that any issue may be determined on the balance of probabilities, and which as we have seen, the Constitution permits. The question is the broader one of the essential fairness of any trial under such provisions. For the reasons set out at paragraphs 231-247 *infra*, the provisions of section 3(5) would not meet this test.

223. On the alternative interpretation, accepted by O'Malley J., the Act creates an offence in which the age of the complainant is a key factual element that must be proved by the prosecution. A mistaken belief that the child was in fact 17 or over, if based on reasonable grounds, is a defence because it negatives both knowledge and recklessness. By virtue of s.3(3) the legislature has relieved the prosecution of the burden of proving the *mens rea* of the offence, by imposing on the defence the burden of showing the presence of a reasonable mistake.

224. If this view is adopted, the measure interferes with the right to be presumed innocent, by reversing an onus generally imposed on the prosecution and requiring the defence to disprove to some extent his or her guilt in relation to a core component of the offence. The crucial point here would be the risk that a burden of this nature can, if a defendant fails to prove that their defence was more likely to be true than not, result in defendants being convicted despite the fact that the jury are in doubt as to their guilt. On the face of it, that amounts to an impairment of the constitutional right to the presumption of innocence.

225. This interpretation does not necessarily conclude the debate either, since, as discussed above, the authorities demonstrate that although the placing of a burden on the defence in respect of any aspect of *mens rea* may be seen as an *interference* with the presumption of innocence, not every such interference will amount to a *violation*. A legal burden requiring the accused to prove a defence on the balance of probabilities can, therefore, in principle be justifiable in constitutional terms. The possibility of justifying such a burden is at least left open in the authorities from *O'Leary* through to *Smyth* and *Heffernan*, and *Forsey* did not alter the law in this respect. However, as already noted, (in para. 196 above), a departure from the norm requires careful scrutiny. The appellants have accepted that this case would have to

be seen as being, at best, at or very near the limits of what might in theory be permissible.

Conclusions

226. It is clear that burdens on the defence are common not only in respect of regulatory offences but in certain other forms of serious indictable crime. As Charleton J. says, such burdens are most likely to be capable of justification where they are dictated by the nature of the thing involved (such as dangerous drugs, explosives or firearms), or where the circumstances proven are ancillary to or highly suggestive of serious illegal conduct (such as carrying weapons, or instruments made or adapted for burglary) or where it is legitimate to require the accused to make an answer demonstrating a lawful excuse because of the unduly difficult task the prosecution would have in proving the absence of such excuse (as illustrated in *McNally*). The peculiar knowledge principle may have a role to some extent in relation to certain kinds of offence under this last category. These three categories are not fixed and may overlap.

227. Policy considerations relating to particular kinds of activity are, therefore, legitimate matters to be taken into account. We have no hesitation in holding that a burden of some sort is justifiable in the case of the offence under consideration. We take this view in part because what the accused person is proved to have done is, as a matter of fact, unlawful, since the child was not capable of giving a legally valid consent, and partly because it is an offence where, unusually, it is possible that the victim is in fact a willing participant and may be a reluctant witness. Part of the point of the legislation criminalising sexual activity with the very young is that they may sometimes need protection from their own wishes. Someone who engages in such activity with a young person can fairly be asked to show some basis on which the court of trial can accept that they were not simply exploiting a child, but genuinely and reasonably believed that they were dealing with an older person. The core problem in the case is the standard of proof that must be met.

228. A defence burden carrying a standard of proof on the balance of probabilities cannot be constitutionally justified, on either view of the section, simply on the basis

of the seriousness of the offence, since there are a great many serious offences known to the law. In any event, it can equally be argued that the more serious the crime, and the more significant the consequences of conviction, the more important the protection of the rights of the defence becomes. Nor can justification be found in the subjective nature of *mens rea*, (where the view is adopted that the measure concerns an element of *mens rea*) since that consideration would arise in respect of every offence that requires *mens rea*.

229. On O'Donnell C.J.'s analysis, the question is ultimately one of meeting the constitutional standard of fairness required by Article 38. The formal deployment of the proportionality test is not required because the presumption of innocence has not been interfered with. On O'Malley J.'s interpretation, the measure does interfere to some extent with the presumption of innocence, meaning that the appropriate approach to analysing the issue is proportionality. In the circumstances of this case, the considerations set out below feed into both approaches. Either way, it is not the *Tuohy v. Courtney* rationality test, which may be applicable (in at least some cases) where the issue concerns a legislative choice as to the balancing of the rights of private individuals. This Court did not apply that analysis to the criminal provisions of the Employment Equality Bill 1996, but, as discussed above, looked at the issues in the light of Article 38 and utilised the concept of proportionality in so doing. It is true that rationality was deployed in *Donnelly*, but that was because the proportionality test was, in the view of the Court, inapplicable to a pure equality claim where no breach of a substantive right was claimed. Rationality does, of course, play a part in the proportionality test.

230. In view of the considerations outlined below, it is relevant also to have regard to the Article 40.3.1 guarantee, referred to in *C.C. No. 2*, that the State's laws will respect, and, as far as practicable, defend and vindicate the personal rights of citizens.

231. To put the debate in a broader context, it is clear that social attitudes to sexual activity after the age of consent have changed dramatically. In the late 19th century and early 20th century, such conduct between unmarried persons was regarded as immoral and reprehensible, and it was perhaps easier to justify a law based on the

proposition that a person who intended to sail close to the wind deserved no sympathy if they were blown over. However, nowadays consensual sexual acts, including intercourse, between persons who are over the age of consent is not merely regarded as not unlawful but is widely seen as part of the autonomous right of adult persons to live their lives as they see fit, and an area of private activity with which the State is not entitled to interfere, absent compelling justification.

232. Accordingly, the issue here is much more sharply delineated, and the line now drawn by the law is one between a serious criminal offence and entirely lawful permitted activity which is the right of the person to engage in without State interference. That sharp line is crossed in a single day when the child reaches the age of 17. In this regard, it is relevant in the assessment that, while proof of the belief of a defendant is certainly more easily discharged by the defendant himself or herself, it is not entirely akin to production of a licence or proof of an agreement, and which proves beyond yea or nay the lawfulness of an activity. Instead, belief as to age is less clearcut, and perhaps more open to matters of degree assessment and general contestability. To paraphrase Lord Nicholls in *Re B (a Minor)*, the fact that this offence can embrace conduct from predatory approaches by a much older paedophile and consensual sexual experimentation between young people of roughly the same age, makes it more rather than less important that the law is capable of distinguishing clearly between such cases, and can avoid the possible conviction of someone about whom there is a reasonable doubt that they were reasonably mistaken as to the age of the other party. It is relevant to this analysis that the s. 3 offence creates a sharp divide between a serious criminal offence, and conduct which is entirely permissible, and protected by a constitutionally protected right of privacy.

233. The appellants have argued that the proportionality principle and the requirement for fairness are satisfied because the section creates, in effect, a due diligence defence. The defendant will be acquitted if, in the eyes of the jury, he made reasonable efforts to avoid committing a crime by, for example, making appropriate enquiries as to the age of the person. However, due diligence is not necessarily to be equated with mistake. It will be recalled that Dickson J. distinguished between the two concepts in *City of Sault Sainte Marie*. While one

may feed into the other in a given case, the defence of mistake does not in fact depend on the making of enquiries or taking any particular steps to ascertain age. It is possible for a person to make an entirely reasonable mistake without having made any enquiries or taken any step at all. They could simply have been given, without asking, credible but untrue information. Conversely, it is equally possible that other evidence can demonstrate that the person who made enquiry knew perfectly well that the answer given was untrue**.** All relevant circumstances must be taken into account, but the fact remains that under the Act of 2017 it is the making of a mistake on reasonable grounds that constitutes the defence.

234. The person who is tried on a criminal charge is not, of course, the only person involved in the process who has rights. The prosecution is brought in the name of the People of Ireland, who are entitled to see that criminal actions are prosecuted and appropriately punished where guilt is found. A person who is a victim of crime has suffered a violation of rights, and clearly has not only an interest in the outcome of a trial but also has rights in respect of the way they are treated by the legal system. Witnesses, and especially vulnerable witnesses, have rights of their own in respect of the way the trial is conducted. However, the fundamental focus of a criminal trial is on the determination, by means of a process conducted in due course of law, of the question whether or not the accused is guilty of the offence charged. It is not about the balancing of rights between individuals but about guilt or innocence. The emphasis here must be on the Article 38 guarantee – no person may be tried on a criminal charge other than in due course of law. While there can, in any given case, be a dispute about what is required for a trial to be considered fair, the principle itself is not subject to restriction.

235. There is no question but that the subject-matter of the Act – the protection of children – is a matter of legitimate and indeed serious concern for the legislature. We acknowledge the significance of the finding of the European Court of Human Rights in *K.U. v. Finland* to the effect that Contracting States have an obligation to criminalise, investigate and prosecute crimes of this nature – one can also point out that Henchy J., in his dissent in *Norris v. Attorney General* [1984] I.R. 36, took a similar view of the constitutional obligations of the State to protect children. The first part of the proportionality test is therefore satisfied.

236. The test asks, further, whether the measure enacted by the Oireachtas is rationally connected to the objective of the legislation and is not arbitrary, unfair, or based on irrational consideration; whether it impairs the affected constitutional right as little as possible; and whether the effects of the measure on the right are proportionate.

237. The appellants argue that in considering whether this test is met, the Court must in the first instance show deference to the choices made by the Oireachtas. That is certainly true in respect of the substantive content of criminal legislation – it is for the legislature to determine, for example, the age at which a young person can give valid consent to sexual activity (subject, perhaps to considerations of the duty to protect young children and, conversely, perhaps the need to respect the choices made by young adults as to their own lives). The legislation must be accorded the presumption of constitutionality and, where necessary and possible, the double construction test will be applied. Furthermore, the legislature has in many instances altered the rules relating to criminal procedure and evidence and, obviously, has an entitlement to do so. However, ultimately it is a matter for the Courts to ensure that the protection of the Article 38 guarantee is afforded to persons charged with, and liable to be punished for, breaches of the criminal law.

238. The primary justification put forward by the appellants is based on the particularly sensitive nature of the offence concerned, in the context of the duties of the State towards children. There is a legitimate concern on the part of members of the legislature that being cross-examined in a criminal trial can be very difficult for young witnesses. That is so, but it is worth bearing in mind that many measures have been introduced over the last 30 years that make the experience noticeably less traumatic than it once was. The statement of complaint made by a young person to the gardaí is now generally videotaped and the tape can be used as the witness's evidence in chief. (This has the further advantage that the jury will see them as they were at the time, rather than only as they are at the trial when they are, perhaps, a year or two older.) Evidence can be given from behind a screen, and no doubt there are other ideas and innovations that could make the courtroom experience easier to bear. There are restrictions on the kind of questions that may be asked in cross-

examination without the leave of the trial judge. If accused persons insist on defending themselves, the trial judge may prevent them from cross-examining the complainant at all and may for that purpose appoint a legal representative to carry out the cross-examination. But there are of course limits to what can be done if the principles that the prosecution is obliged to prove its case, and that the accused has a right to make a defence, are both to be respected.

239. It is argued by the appellants that the legislature was entitled to be concerned that a lesser burden on the defence would provide insufficient protection to children, and that it has intervened in a limited way to strengthen that protection. As noted above, on their own case the appellants would concede that the measure is "*at or near*" the limits of what is permissible. They acknowledge that, on one interpretation of the section, it leaves open the possibility of convictions in cases where the jury is in doubt as to guilt, and they can point to no equivalent measure in respect of any other comparably serious offence, but they say that the Oireachtas is not precluded from enacting it and is justified by compelling interests.

240. Here, it is essential to emphasise that in this appeal the Court is concerned only with s. 3 (the older child offence). Any potential challenge in relation to the burden of proof set out in s.2 (the younger child offence) would necessarily be faced with very different proportionality considerations. Quite apart from the already significant policy issues raised in this case in relation to sexual offences against young persons, which would have to be given enhanced weight where the offence concerns a younger age-group, such further considerations would include certain realities of ordinary experience of human life. It is a fact that it is generally easier to assess the age of children under the age of 15 than the age of children in their mid-teens, and also a fact that younger children are even more vulnerable to exploitation.

241. We do not see that it has been established that raising the standard of proof in relation to what the accused believed is rationally related to the wish to reduce the potential courtroom distress to a witness. It does not, of itself, have any effect in reducing either the nature or the extent of the questions that may need to be asked in an attempt to establish grounds for the belief held by the accused. The material

put before us in the form of the Committee deliberations does not go so far as to suggest that the section was otherwise unworkable or even simply unduly difficult to implement effectively, and it is significant that the Director of Public Prosecutions did not suggest that there were grounds for supposing that to be the situation.

242. In this regard, the amendment effected by the 2017 Act is perhaps of particular significance. The mistake must not only be honest but reasonable. The inquiry is not therefore directed entirely to the subjective state of mind of the accused, with an obligation on the prosecution to negative the defence beyond a reasonable doubt. Instead, the legislature introduced an objective element, capable of being assessed by a fact finder, so that the defence cannot simply claim a subjective belief. We note here the evidence before the Joint Oireachtas Committee (referred to in para 150 above) to the effect that in the vast majority of cases that come before the courts the parties will have been previously known to each other and the accused will have had some degree of knowledge of the child's age. In such cases the defence of mistaken belief is unlikely to be raised, or to succeed if it is raised.

243. It is also significant in this regard that there are other mechanisms available to the legislature. The law post *Smyth* may place a burden on the accused to prove reasonable doubt. The Oireachtas is not in the position of having to choose between either, firstly, a persuasive onus on an issue on the balance of probabilities, or secondly, a definition of an offence which requires the prosecution to prove all relevant matters, and disprove any potentially relevant exculpatory matter, all beyond reasonable doubt, and without recourse to any presumptions or other evidential provisions. In particular, most if not all of the permissible objectives of the legislation under consideration could be achieved if the section operates to impose a *Smyth* evidential burden on the accused to show at least a reasonable doubt on the question of reasonable mistake.

244. On the obverse side of the calculation, it must be recognised that this is an offence which has over the past 20 years been treated by the Oireachtas with increasing seriousness. Penalties have become considerably more severe than they were under the 1935 Act and the stigma attaching to conviction is if anything even

more severe. It has to borne in mind that the consequences for the individual accused of what must be regarded as a very serious crime are extremely onerous. A prison sentence is a strong likelihood, combined with a very definite social stigma and the necessity to register as a sex offender. The reputation, family and employment prospects of the accused, as well as his or her liberty, are very much at stake.

245. It is also an offence where a mistake as to the threshold age of 17 is possible. In an era when young adults are much more sexually active than in the past, a genuine mistake is a realistic rather than a remote possibility, if the parties are not known to each other. The issue in respect of which the onus is placed on the defence is one which is not clear cut as, for example, the existence of a licence, permission or other lawful purpose, and is one of degree. The space, in reality, between a reasonable doubt and a balance of probabilities is broader in this context than in those latter cases, and there is accordingly an increased possibility that a person who was genuinely mistaken might nevertheless fail to persuade a fact finder of that fact. For that reason, we consider that if the provision is intended to provide a "way out", a chance of acquittal for the genuinely mistaken, it is unduly difficult to establish, and creates an unnecessarily high risk of conviction of a person who was so mistaken. If it is seen, alternatively, as relieving the prosecution of the onus of proof of *mens rea* and reversing that onus onto the defence, it similarly goes too far in obliging the accused to establish mental innocence.

246. For the Oireachtas to go this far it would be necessary, in our view, to at least demonstrate that the placing of such an elevated burden of proof on the accused was essential to the effective prosecution of the offence and that without such a measure there was a real risk that the rights of victims would not adequately be safeguarded. Given the importance of the burden of proof and the presumption of innocence as core elements of the right to trial in due course of law in Article 38.1, it is not enough for the Oireachtas to consider that such a provision was desirable, convenient, expedient or useful. The case would have to be compellingly established and we are not persuaded that this has been done in the present case.

247. We conclude, therefore, that while the objective of the legislation is certainly a legitimate one, and justifies both the imposition of a burden of proof on the defence

and the requirement that the mistake be reasonable, the pitching of that burden at the level of proof on the balance of probabilities either impairs the right to be presumed innocent to the point where it must be considered disproportionate and contrary to the constitutional presumption of innocence or fails to guarantee a trial in due course of law as required by Article 38 of the Constitution.

248. We would therefore dismiss the appeal.

249. The effect of this judgment should not be overstated. The only part of the section to be found invalid is s.3(5), relating to the standard of proof in relation to the defence available under s.3. The rest of the section remains fully capable of operation. Section 3(3), which imposes a burden on the defence, should now be interpreted as imposing a *Smyth* burden. The burden means that there must be evidence capable of establishing at least a reasonable doubt as to whether the accused was aware of the age of the child. The defence of mistaken belief is only capable of succeeding where the sexual activity was in fact consensual, though of course it remains the case that the consent of an underage child to sexual activity is not a defence in law. Section 2 of the Act, dealing with offences against younger children, is entirely unaffected.