# FACC No. 11 of 2017

[2018] HKCFA 18

**IN THE COURT OF FINAL APPEAL OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**FINAL APPEAL NO. 11 OF 2017 (CRIMINAL)**

(ON APPEAL FROM HCMA NO. 620 OF 2016)

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BETWEEN

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| **HKSAR** | **Respondent** |
| **and** |  |
| **CHOI WAI LUN (蔡偉麟)** | **Appellant** |

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| Before : | Chief Justice Ma, Mr Justice Ribeiro PJ,  Mr Justice Tang PJ, Mr Justice Fok PJ and  Lord Collins of Mapesbury NPJ | |
| Date of Hearing: | | 23 April 2018 | |
| Date of Judgment: | | 9 May 2018 | |

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**J U D G M E N T**

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**Chief Justice Ma:**

1. I agree with the judgment of Mr Justice Ribeiro PJ.

**Mr Justice Ribeiro PJ:**

1. Under section 122(1) of the Crimes Ordinance,[[1]](#footnote-1) a person who indecently assaults another is guilty of an offence and is liable on conviction on indictment to imprisonment for 10 years. If there is consent to the relevant acts, such conduct, although “indecent”, generally does not constitute an assault so that the offence is not committed. However, section 122(2) provides: “A person under the age of 16 cannot in law give any consent which would prevent an act being an assault for the purposes of this section”.
2. The question which arises in this appeal is whether a person commits the offence if he engages in sexual conduct which is in fact consensual with a girl who is actually aged 13 when he honestly and reasonably believes her to be aged 16 or above.[[2]](#footnote-2)

A. The facts

1. In August 2014, the appellant, then a third year university student aged 22, visited an adult website on which the girl (referred to throughout as “PW1”) had posted an advertisement, describing herself as aged 17 and offering sexual services at listed prices. The appellant asked for, and received from her, a half-length photo of herself. They arranged to meet and went to a guest house where they showered together and the appellant ran his hands over her body. PW1 then performed oral sex on him.
2. The appellant testified that he thought that her photo was consistent with her being aged 17 and that he believed that this was borne out when they met, PW1 appearing to him to be relatively tall, with well-developed bodily features, and speaking in a mature manner. He said that he did not suspect that she was under 16. PW1 gave evidence that she would dress more maturely when meeting clients.

B. The magistrate’s decision

1. The deputy magistrate, Mr Peter Hui Shiu-keung,[[3]](#footnote-3) rejected the prosecution’s submission that the offence was one of absolute liability and held, following the House of Lords decision in *R v K*,[[4]](#footnote-4)that where there is actual consent, an honest belief on the defendant’s part that the girl is aged 16 or more results in an acquittal.
2. He found that PW1 “really looked more mature than her actual age, and did not look like a 13-year old girl”[[5]](#footnote-5) in the light “of her appearance, build and speaking tone”.[[6]](#footnote-6) Taking account of PW1 having claimed to be 17 and her “deliberate attempt to appear to be mature when meeting her clients”, the magistrate found that there was “no apparent reason that [the appellant] should have any suspicions about the age PW1 claimed”[[7]](#footnote-7) and concluded that the appellant should be acquitted since “the defence that the defendant honestly and reasonably believed that PW1 was aged 16 or above is not rebutted”[[8]](#footnote-8). The prosecution appealed by way of case stated.

C. The Judge’s decision

1. The magistrate’s ruling was reversed by Deputy High Court Judge Stanley Chan.[[9]](#footnote-9) He relied principally on the decisions of the Court of Appeal[[10]](#footnote-10) and this Court[[11]](#footnote-11) in *HKSAR v So Wai Lun* (involving unlawful sexual intercourse with a girl under 16)[[12]](#footnote-12) and held that, as a matter of necessary implication, the legislative intent was that indecent assault should be an offence of absolute liability. The appellant therefore could not escape conviction on the basis of an honest and reasonable belief as to PW1’s age. I shall return to consider in greater detail the arguments which led his Lordship to that conclusion.

D. Leave to appeal

1. The Appeal Committee[[13]](#footnote-13) granted leave to appeal, certifying the following questions of law as being of the requisite importance, namely:
   * 1. Whether an offence contrary to s 122 (1) & (2) of the Crimes Ordinance, Cap 200, taken together is an offence of absolute liability when the alleged victim is a person under 16 years of age.
     2. Whether an accused charged under s 122 (1) with indecently assaulting a person who was under 16 years of age can legally put forward a defence that the person in fact consented and the accused genuinely believed that he/she was 16 years of age or over.
     3. Whether in a prosecution under s 122 (1) where the alleged victim is a person under 16 years of age the prosecution is required to prove absence of genuine belief on the part of the accused that the person was 16 years of age or over.

E. Determining the mental elements of a statutory offence

1. Those questions fall to be answered in the light of significant developments in this jurisdiction within the last decade as to how the mental elements of a statutory offence are to be determined and, in particular, as to when such an offence is to be treated as one of absolute liability.
2. The absolute liability approach to age-related sexual offences illustrated by nineteenth century English cases like *R v Prince*,[[14]](#footnote-14) had previously held sway. Thus, in *Prince*, a statute made it an offence unlawfully to take an unmarried girl under the age of sixteen out of the possession and against the will of her father but was silent as to the defendant’s required mental state regarding her age. The defendant was convicted although the jury found that he “bonâ fide, and on reasonable grounds, believed that she was above sixteen, viz, eighteen years old.”[[15]](#footnote-15) This was upheld by a Court consisting of 16 judges[[16]](#footnote-16) with Bramwell B, who wrote one of the main judgments, commenting that to require proof of mens rea in respect of her age would mean “reading the statute with some strange words introduced; as thus: ‘Whosoever shall take any unmarried girl, being under the age of sixteen, and not believing her to be over the age of sixteen, out of the possession’, &c”[[17]](#footnote-17). Such a construction of the Act was rejected.
3. That approach was applied in Hong Kong, as is evident from cases decided by the Court of Appeal as late as in 1993 and 1997.[[18]](#footnote-18) However, in *HKSAR v So Wai Lun*,[[19]](#footnote-19) Ma CJHC (as the Chief Justice then was) observed that in the light of more modern decisions,[[20]](#footnote-20) *Prince* had been “largely discredited and all but overruled by the House of Lords” and held that the abovementioned Court of Appeal decisions had to be regarded as of “extremely dubious” authority.
4. As Ma CJHC noted,[[21]](#footnote-21) instead of demanding a justification for reading in a mens rea requirement, the modern starting-point is that mens rea is presumed to be an essential ingredient where the statute is silent on the mental element unless that presumption is displaced expressly or by necessary implication.[[22]](#footnote-22)
5. The presumption of mens rea flows from recognition that it is a cardinal principle of our criminal law that mens rea, involving the intentional or knowing performance of prohibited conduct, is ordinarily an essential ingredient of guilt of a criminal offence. The law therefore assumes that in creating a statutory offence, the legislature does not intend to dispense with that basic principle unless the enactment does so expressly or by necessary implication. This has been said to reflect the principle of legality[[23]](#footnote-23) or to be a principle of statutory interpretation whereby any ambiguity in a penal statute is resolved in favour of the accused.[[24]](#footnote-24)
6. The major developments in this jurisdiction relate to cases where the presumption of mens rea is held to be dislodged. As this Court concluded in *Hin Lin Yee v HKSAR*,[[25]](#footnote-25) it becomes necessary in such event to ask: “By what, if any, mental requirement is the supplanted requirement of mens rea to be replaced?”
7. The English approach (previously followed in Hong Kong) presents a stark choice between construing the statute as requiring full mens rea and construing it as imposing absolute liability.[[26]](#footnote-26) This has led eminent judges to lament the absence of an option to establish liability on some intermediate basis, such as a construction requiring the accused to “convince the jury that on balance of probabilities he is innocent of any criminal intention”.[[27]](#footnote-27) Such an option was, however, thought to have been excluded by *Woolmington v Director of Public Prosecutions*.[[28]](#footnote-28)
8. After considering different approaches in Australia, Canada and New Zealand, this Court decided in 2010 to depart from the confining regime adopted in England and Wales. It was held in *Hin Lin Yee v HKSAR*,[[29]](#footnote-29) that in appropriate cases, the law permits statutes to be construed as intending to displace the presumption of mens rea in favour of an intermediate basis of liability. Five possible bases of liability were recognised, ranging from full mens rea to absolute liability with three intermediate possibilities.
9. *Hin Lin Yee* was a case involving the relatively minor offence of selling a drug intended for use by man but unfit for that purpose[[30]](#footnote-30) where the mental element in question related to the circumstance of the drug’s unfitness. In *Kulemesin v HKSAR*,[[31]](#footnote-31) which involved the more serious offence of endangering the safety of others in a vessel or at sea,[[32]](#footnote-32) the issue concerned the mental element regarding the consequence of endangerment. To accommodate more serious offences and to cater for mens rea as to the consequences of (in addition to the circumstances accompanying or surrounding) the prohibited act, the five possible bases of criminal liability formulated in *Hin Lin Yee* were slightly amended and re-formulated as follows:

“... the five possible alternatives may be stated as follows...:

(a) first, that the mens rea presumption persists and the prosecution must prove knowledge, intention or recklessness as to every element of the offence (‘the first alternative’);

(b) second, that the prosecution need not set out to prove mens rea, but if there is evidence capable of raising a reasonable doubt that the defendant may have acted or omitted to act in the honest and reasonable belief that the circumstances or likely consequences of his conduct were such that, if true, liability would not attach, he must be acquitted unless the prosecution proves beyond reasonable doubt the absence of such exculpatory belief or that there were no reasonable grounds for such belief (‘the second alternative’);

(c) third, that the presumption has been displaced so that the prosecution need not prove mens rea but that the accused has a good defence if he can prove on the balance of probabilities that he acted or omitted to act in the honest and reasonable belief that the circumstances or likely consequences of his conduct were such that, if true, he would not be guilty of the offence (‘the third alternative’);

(d) fourth, that the presumption has been displaced and that the accused is confined to relying on the statutory defences expressly provided for, the existence of such defences being inconsistent with the second and third alternatives mentioned above (‘the fourth alternative’); and

(e) fifth, that the presumption is displaced and the offence is one of absolute liability so that the prosecution succeeds if the prohibited act or omission is proved against the accused, regardless of his state of mind regarding the relevant elements of the offence in question (‘the fifth alternative’).”[[33]](#footnote-33)

1. I shall refer to these reformulated alternatives as “the *Kulemesin* alternatives”. The Court held that all five alternatives should be considered as possible conclusions when construing statutory criminal offences – both serious and regulatory – which are silent or ambiguous as to the state of mind relevantly required.[[34]](#footnote-34)
2. The view has been expressed[[35]](#footnote-35) that “reasonableness of belief” should be rejected as a standard for criminal liability, since such liability is properly concerned with a subjective state of mind and ought not to be displaced by an objective standard akin to one involving negligence.
3. However, in incorporating “honest and reasonable belief” as part of the second and third *Kulemesin* alternatives, a different view was preferred. As Lord Reid pointed out in *Sweet v Parsley*,[[36]](#footnote-36) the court’s choice is “much more difficult if there were no other way open than either mens rea in the full sense or an absolute offence; for there are many kinds of case where putting on the prosecutor the full burden of proving mens rea creates great difficulties and may lead to many unjust acquittals”; and it would often be much easier to infer that the legislature “must have meant that gross negligence should be the necessary mental element than to infer that [it] intended to create an absolute offence”.
4. I might add that objective standards are in any event applicable to an offence like indecent assault, in that the courts have interpreted “indecency” as “conduct that right-thinking people will consider an affront to the sexual modesty of a woman;”[[37]](#footnote-37) or conduct “so offensive to contemporary standards of modesty and privacy as to be indecent;”[[38]](#footnote-38) or conduct “which right-minded persons would clearly think was indecent”.[[39]](#footnote-39)

F. The presumption of mens rea

1. Applying the principles, the analysis should begin by considering how precisely the presumption of mens rea applies to sections 122(1) and 122(2) which provide as follows:

(1) Subject to subsection (3),[[40]](#footnote-40) a person who indecently assaults another person shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.

(2) A person under the age of 16 cannot in law give any consent which would prevent an act being an assault for the purposes of this section.

F.1 The presumption and indecent assaults on persons aged 16 or over

1. As noted above, it is presumed that the prosecution must prove knowledge, intention or recklessness as to every actus reus element of a statutory offence. Where the actus reus ingredient is expressed negatively such as requiring the absence of consent, the presumption is that the prosecution must negative the existence of consent and negative any claimed belief by the defendant in its existence.
2. In indecent assault cases, leaving aside for the moment those involving persons under the age of 16, two main actus reus elements must be proved. First, the prosecution must prove an assault on the other person. For this purpose, “Any intentional touching of another person without the consent of that person and without lawful excuse” constitutes an assault.[[41]](#footnote-41) It follows that where there is genuine consent freely and lawfully given, there is no assault and the offence is not committed.[[42]](#footnote-42) If a potentially believable possibility that there was consent arises on the evidence, the prosecution has the onus of negativing such consent.[[43]](#footnote-43)
3. The second actus reus element which the prosecution must prove is that the assault was “accompanied by circumstances of indecency towards the person alleged to have been assaulted”.[[44]](#footnote-44) This requires proving that the conduct was indecent, applying (as we have seen) objective “right-thinking” standards as to what constitutes indecency.
4. The presumption of mens rea requires the prosecution to prove mens rea corresponding to those two actus reus elements. Thus, the defendant must be shown to have intended to commit an indecent assault on the other person. This means that the prosecution must prove that the defendant intended to lay hands on the victim (or otherwise assault her) without her consent.[[45]](#footnote-45) If there is evidence giving rise to a reasonable doubt as to whether the defendant believed her to be consenting, the prosecution must negative that belief.[[46]](#footnote-46) Insofar as the conduct is equivocal as to whether it is indecent, indecency can be proved by evidence of the defendant’s indecent purpose.[[47]](#footnote-47)

F.2 The presumption and indecent assaults on persons under the age of 16

1. Section 122(2) deprives persons under the age of 16 of the capacity to consent to an act which, if not consensual, would amount to an indecent assault. It operates to modify both the actus reus and mens rea requirements of the offence in relation to persons under 16.
2. Thus, as we have seen, for persons aged 16 or over, actual consent negatives the actus reus and an honest belief in the other person’s consent negatives the mens rea. However, by deeming persons under the age of 16 to be incapable of giving consent, section 122(2) makes an indecent act towards such a person as an assault even though the evidence clearly establishes that there was consent in fact.
3. In cases where the accused asserts that there was actual consent, he will naturally also be asserting that he honestly believed that the other person was consenting. If such a belief were capable of negativing the mens rea of the offence, the protective purpose of the age-related restriction on capacity to consent would be defeated. Section 122(2) thus necessarily implies that it does not avail the accused to establish that he honestly (and correctly) believed that the under-aged person was freely consenting to the acts in question. The effect of section 122(2) is, in other words, to eliminate consent as an ingredient from both the actus reus and mens rea of indecent assault. The presumption of mens rea therefore does not concern any element of consent in cases involving persons under the age of 16.
4. However, the defendant’s mental state regarding the other person’s age stands on a different footing. While in cases involving persons aged 16 or over, the victim’s age is not relevant,[[48]](#footnote-48) the fact that the victim is under 16 is an essential ingredient of the offence as modified by section 122(2). Indecent assault becomes an offence which the defendant commits by doing an indecent act towards the victim, *being a person under 16*, with or without that person’s consent.[[49]](#footnote-49) The age of the victim therefore forms part of the actus reus of the offence as modified by section 122(2) and thus engages the presumption of mens rea.
5. This accords with the analysis by Lord Hobhouse of Woodborough of section 14(2) of the United Kingdom’s Sexual Offences Act 1956 which is replicated by our section 122(2). His Lordship stated:

“Section 14(2) provides a fact-based legal rule which, given the stated factual situation, qualifies the requirement that the indecent act be done without the actual consent of the other person. The additional fact is that the other person is under the age of 16 years. The result is that the actus reus becomes an indecent act done either without the consent of the other person or with or without the consent of the other person being a person under the age of 16 years. The prosecution must therefore prove as regards the actus reus either the fact of the absence of consent or the fact of an age of less than 16 years.”[[50]](#footnote-50)

1. Having concluded that the presumption of mens rea is engaged regarding the alleged victim’s age, the questions which fall to be considered are whether that presumption is displaced and, if so, displaced by what.

G. Is the presumption displaced?

1. As stated above, a statutory offence is presumed to require proof of mens rea unless the presumption is displaced expressly or by necessary implication.[[51]](#footnote-51) Whether such displacement occurs is a matter of statutory construction requiring examination of the statutory language; the nature and subject-matter of the offence; the legislative purpose and any other matters indicative of the statutory intent.[[52]](#footnote-52)
2. As pointed out in *Hin Lin Yee*,[[53]](#footnote-53) the availability of intermediate bases of liability inevitably influences the approach to deciding whether a dislodging of the presumption is intended. A court may recoil from imposing absolute liability for a particular offence and so hold against displacement, while it may be prepared to hold that the presumption is supplanted in favour of the second or third *Kulemesin* alternative. The decision in *R v K*[[54]](#footnote-54) that the offence of indecent assault requires proof of full mens rea, should be viewed in that context. With no intermediate option, it is not surprising that the House of Lords ruled in favour of requiring mens rea instead of absolute liability.
3. In the present case, sections 122(1) and 122(2) are silent as to the mental ingredient, if any, required regarding the other person’s age. It is a serious offence “in terms of penalty and social obloquy”, carrying a maximum sentence of ten years’ imprisonment on indictment which is a feature tending to favour non-displacement of the presumption of mens rea.[[55]](#footnote-55)
4. However, given the manifest purpose of section 122(2) viewed in the light of the Hong Kong courts’ long-standing policy regarding age-related sexual offences, I am of the view that the presumption of mens rea is clearly displaced in respect of indecent assaults on persons under the age of 16 in this jurisdiction.
5. We have seen that the effect of section 122(2) is to deprive persons under that age of the capacity to consent to an indecent act and thus to transform the offence into one of significantly stricter liability. The manifest statutory intention is to confer special protection on a class of vulnerable persons who are potential objects of indecent acts. The long-standing approach of our courts has been to implement such protection by construing age-related sexual offences as requiring potential defendants to take care “to avoid what may be unlawful and steering well away from the line between legality and illegality”, holding that this “would add materially to the protection for young girls” provided for by the relevant statute.[[56]](#footnote-56) Some of those decisions were arrived at before the development of intermediate bases of liability and led to conclusions in favour of absolute liability, indicating the force of that policy. The existence of intermediate options does not affect its continuing vitality. The statutory purpose would plainly be compromised if the presumption of mens rea is not dislodged in respect of the girl’s age and the prosecution were required to disprove, beyond reasonable doubt, any claim made by the defendant that he honestly believed that she was aged 16 or over.

H. Displaced by what?

H.1 Absolute liability

1. Absolute liability departs from basic common law principles of criminal responsibility which generally require some degree of knowledge or intention to accompany the prohibited conduct. As this Court recognised:

“... it is in principle objectionable, especially where the offence is serious, that a person should be made criminally liable where he did not deliberately or recklessly engage in the prohibited conduct or where he was ignorant of circumstances making his conduct criminal or where he acted harbouring an honest and reasonable belief inconsistent with liability.”[[57]](#footnote-57)

1. It is thus never lightly to be inferred that the legislature intended to create an offence of absolute liability since, as Lord Reid put it: “... someone could be convicted of it who by all reasonable and sensible standards is without fault.”[[58]](#footnote-58)
2. Absolute liability is primarily imposed for what are essentially regulatory offences[[59]](#footnote-59) rather than serious criminal offences, and then only where some useful purpose (such as encouraging preventive safety measures) may be served by the imposition of such liability.[[60]](#footnote-60) As was made clear in *Hin Lin Yee[[61]](#footnote-61)* and *Kulemesin*,[[62]](#footnote-62) before concluding that an offence is one of absolute liability, it is necessary to consider whether the statutory purpose can sufficiently be met by construing it as laying down a less Draconian, intermediate form of liability. Absolute liability should only be resorted to if the answer is in the negative.
3. The main reason for the Judge deciding in favour of absolute liability was his application of the Court of Appeal’s judgment in *HKSAR v So Wai Lun*[[63]](#footnote-63) where it was held that absolute liability was applicable to unlawful sexual intercourse with an under-aged girl contrary to section 124 of the Crimes Ordinance. That section provides:

“Subject to subsection (2),[[64]](#footnote-64) a man who has unlawful sexual intercourse with a girl under the age of 16 shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 5 years.”

1. That decision is however clearly distinguishable. It was concerned with unlawful sexual intercourse and not indecent assault, and the Court of Appeal determined that absolute liability was imposed principally on the basis of the legislative history of the section 124 offence which differs significantly from that of section 122.
2. The Court of Appeal traced section 124 back to section 6 of the Women and Girls' Protection Ordinance enacted in 1890,[[65]](#footnote-65) which provided as follows:

“Any person who carnally knows or attempts to have carnal knowledge of any unmarried girl being of or above the age of twelve years and under the age of sixteen shall be guilty of a misdemeanour and on conviction thereof shall be liable to the punishment hereinafter mentioned. Provided that where both parties are Asiatics a girl shall not be deemed unmarried within the meaning of this ordinance if she is duly married according to the laws and customs of the native country of the girl. *Provided also it shall be a sufficient defence to any charge under this section, if it shall be made to appear to the Court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.* Provided also that no prosecution shall be commenced for an offence under this section more than three months after the commission of the offence.”[[66]](#footnote-66) (Italics supplied)

1. That section was replaced seven years later in 1897 by section 5 of the Protection of Women and Girls Ordinance[[67]](#footnote-67) which deleted the italicised defence involving “reasonable cause to believe”,[[68]](#footnote-68) leading the Court of Appeal in *So Wai Lun* to conclude that “the reasonable belief defence has been expressly rejected in Hong Kong”.[[69]](#footnote-69) This was regarded as a decisive indication that the presumption of mens rea was supplanted:

“For the above reasons, we are of the view that in relation to a charge under s 124 of the Crimes Ordinance of unlawful sexual intercourse with a girl under the age of 16, the belief of the defendant that the girl was 16 or more does not provide a defence. *In other words, the offence is accordingly one of absolute liability in this respect*.”[[70]](#footnote-70) (Italics supplied)

1. As indicated above, *So Wai Lun* may be distinguished in two important respects. First, in the legislative history of indecent assault, there is no equivalent of an express “reasonable belief” defence later being abolished. Indecent assault is traceable back to the Offences Against the Person Ordinance 1865, section 46;[[71]](#footnote-71) which was succeeded by the Protection of Women and Girls Ordinance 1897, section 7;[[72]](#footnote-72) then, in 1978,[[73]](#footnote-73) by what is essentially the present section 122 of the Crimes Ordinance. That provision was then amended in 1991[[74]](#footnote-74) to increase the maximum penalty from five to ten years’ imprisonment. At no point was there any express reasonable belief defence, much less a later abandonment of such a defence.
2. Secondly, the Court of Appeal’s judgment in *So Wai Lun* was delivered before the recognition of intermediate bases of liability. Thus, as the italicised last sentence of the abovementioned citation indicates, once the Court of Appeal held that the presumption of mens rea was displaced, it concluded that the offence was “accordingly” one of absolute liability. It was a decision reflecting the stark choice then available between full mens rea and absolute liability.
3. If that case had been decided today, the Court would have proceeded to consider whether the statutory purpose of the offence could be sufficiently met by construing section 124 as laying down an intermediate mental requirement in place of full mens rea.[[75]](#footnote-75) It seems entirely possible that a different conclusion would have been reached since the Court was much troubled by its having to decide in favour of absolute liability. This was because its decision logically meant that an offence under section 123,[[76]](#footnote-76) punishable by life imprisonment, ought also to be construed as one of absolute liability:

“The aspect that has taxed us most about this conclusion is that there is no doubt that s 124(1) involves a ‘truly criminal’ offence with serious consequences (a maximum of 5 years' imprisonment). Moreover, our conclusion on s 124 must equally apply to the s 123 offence of unlawful sexual intercourse with a girl below the age of 12. For this latter offence, the maximum penalty is life imprisonment. The provisions of ss 123 and 124 are virtually identical save that in respect of the latter, a statutory defence is available (s 124(2)). It seems at first startling that a crime that carries with it such severe penalties (in fact the severest in the case of s 123) should be one of absolute liability (not even strict liability as defined above). Yet, this remains the position in many common law jurisdictions and is a conclusion that is, given the matters already discussed as to the statutory construction and the legislative history, compelling.”[[77]](#footnote-77)

1. It is true that in this Court, it was later acknowledged[[78]](#footnote-78) that *So Wai Lun* had held a section 124 offence to be one of absolute liability, but the basis of the Court of Appeal’s decision was not subject to argument or scrutiny. It was merely assumed to be correct in its conclusion.
2. The question whether the Court of Appeal’s decision was right, in particular in treating the removal by the 1897 Ordinance of the reasonable belief defence introduced in 1890 as a decisive indication of legislative policy which carries down to the present, should be left open. If it is revisited in the future, it would no doubt be necessary to consider whether the 1890 offence may be said to be a different offence from that created by section 124[[79]](#footnote-79) and also relevant to consider any changes to the general criminal law providing the context in which the two offences operate.
3. The relevance, if any, of *R* *v Brown*,[[80]](#footnote-80) would also have to be considered. The United Kingdom Supreme Court there held that the offence of unlawful carnal knowledge of a girl under the age of 14 under the Criminal Law Amendment Acts (Northern Ireland) 1885-1923, section 4 is one of absolute liability in respect of the girl’s age. While its judgment may be thought to contain some echoes of the reasoning of the Court of Appeal in *So Wai Lun*, *R v Brown* is a case with markedly special features. Section 4 of the Northern Irish Act was held to be a specific response to the decision in *R v Prince*[[81]](#footnote-81) having been enacted some 10 years after that decision, deliberately preserving absolute liability in relation to girls under the age of 13 (later raised to 14).[[82]](#footnote-82) It also involved two directly overlapping provisions,[[83]](#footnote-83) and, when a proviso allowing for a reasonable belief defence was eliminated from one of them (section 5), it was expressly enacted that reasonable cause to believe the girl was 17 or above “shall not be a defence” to a charge under that section.[[84]](#footnote-84) Those features had a weighty bearing on the construction of section 4.
4. The Judge[[85]](#footnote-85) also considered the doubling of the maximum sentence for indecent assault from five to ten years’ imprisonment in 1991 an indication that absolute liability was intended. However, the authorities generally hold that the more serious an offence is in terms of penalty and social obloquy, the more likely it is that the presumption of mens rea is sustained.[[86]](#footnote-86) Hence the doubling of the maximum militates against, rather than in favour of, a construction favouring absolute liability.
5. For the aforesaid reasons and because, as indicated below, I do not consider absolute liability necessary to achieve the statutory purposes of section 122, I would reject the prosecution’s submission that the presumption of mens rea is displaced in favour of absolute liability regarding the girl’s age.

H.2 The fourth Kulemesin alternative

1. Sections 122(3) and 122(4) state as follows:

(3) A person is not, by virtue of subsection (2), guilty of indecently assaulting another person, if that person is, or believes on reasonable grounds that he or she is, married to that other person.

(4) A woman who is a mentally incapacitated person cannot in law give any consent which would prevent an act being an assault for the purposes of this section, but a person is only to be treated as guilty of indecently assaulting a mentally incapacitated person by reason of that incapacity to consent, if that person knew or had reason to suspect her to be a mentally incapacitated person.

1. The Judge[[87]](#footnote-87) furthermore held that because reasonable belief defences are provided for by subsections (3) and (4), defendants falling outside those subsections are not intended to have any defence and are subject to absolute liability. In other words, his Lordship held that the presumption of mens rea was displaced by the fourth *Kulemesin* alternative, subjecting the appellant to absolute liability when he fell outside those defences.
2. A similar argument was rejected by Lord Bingham of Cornhill in *R v K[[88]](#footnote-88)* when construing section 14 of the Sexual Offences Act 1956 which is replicated in section 122 of the Crimes Ordinance.[[89]](#footnote-89) His Lordship summarised the argument (which corresponds to the fourth *Kulemesin* alternative) thus:

“... subsections (3) and (4) define circumstances in which a defendant's belief, knowledge or suspicion exonerate a defendant from liability for what would otherwise be an indecent assault; if it had been intended to exonerate a defendant who believed a complainant to be 16 or over, this ground of exoneration would have been expressed in subsection (2); the omission of such a provision makes plain that no such ground of exoneration was intended.”[[90]](#footnote-90)

1. He commented that this submission would have had great force “[if] the provisions of section 14 were part of a single, coherent legislative scheme and were read without reference to any overriding presumption of statutory interpretation.” However, his Lordship pointed out that it was plainly “not part of a single, coherent legislative scheme” since the 1956 Act was a consolidation Act with its provisions derived from diverse sources, giving the Act a patchwork or “rag-bag” nature.[[91]](#footnote-91) Lord Bingham therefore concluded (after examining the legislative history and decided cases) that:

“... significance cannot be attached to the inclusion of grounds of exoneration in subsections (3) and (4) and the omission of such a ground from subsection (2), although subsections (3) and (4) do reflect parliamentary recognition that a defendant should not be criminally liable if he misapprehends a factual matter on which his criminal liability depends. There is nothing in the language of this statute which justifies, as a matter of necessary implication, the conclusion that Parliament must have intended to exclude this ingredient of mens rea in section 14 any more than in section 1.”[[92]](#footnote-92)

1. His Lordship’s refutation of the argument is equally applicable to the submission made in connection with sections 122(3) and (4) which are an enactment of section 14 of the 1956 Act with its “rag-bag” pedigree. The legislative history of indecent assault and related offences in Hong Kong has no greater coherence. Thus, for instance, the maximum penalty of 10 years’ imprisonment for indecent assault (introduced in 1991) is twice that prescribed for unlawful sexual intercourse with a girl under 16 under section 124, the latter offence potentially being far more serious, involving a risk of unwanted pregnancy.
2. The fourth *Kulemesin* alternative is only adopted if the availability of the expressly enacted defences is inconsistent with the second and third alternatives also being available. No such inconsistency arises here. Subsections (3) and (4) provide defences in narrow and rare circumstances involving an honest and reasonable belief that one is married to the alleged victim; or the absence of any reason to suspect that the alleged victim is a mentally incapacitated person. The existence of such specialised defences is not inconsistent with having a defence based on belief that the victim was aged 16 or over, nor accordingly with construing section 122(2) as accommodating the second or third *Kulemesin* alternatives generally in cases falling outside subsections (3) and (4).

H.3 The second or third Kulemesin alternatives

1. Having decided that the presumption of mens rea is dislodged and that neither absolute liability nor the fourth *Kulemesin* alternative are applicable, the choices devolve down to either the second or the third *Kulemesin* alternative as the appropriate mental requirement for an offence under section 122(2).
2. Both alternatives admit by way of defence, an honest and reasonable belief on the part of the accused that the circumstances or likely consequences of his conduct were such that, if true, he would not be guilty of the offence. The difference between them is that under the second alternative, the defendant bears only an evidential burden whereas the third alternative requires him to discharge a persuasive burden as to his belief.
3. In *HKSAR v Lam Kwong Wai*,[[93]](#footnote-93) Sir Anthony Mason NPJ explains the difference as follows:

“An evidential burden, unlike a persuasive burden, does not expose the defendant to the risk of conviction because he fails to prove some matter on which he bears an evidential onus. An evidential burden: ‘… requires only that the accused must adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case. The prosecution does not need to lead any evidence about it, so the accused needs to do this if he wishes to put the point in issue. But if it is put in issue, the burden of proof remains with the prosecution. The accused need only raise a reasonable doubt about his guilt.’...[[94]](#footnote-94) See also *R v Lambert* [2002] 2 AC 545 at p 588H, where his Lordship said: ‘What the accused must do is put evidence before the court which, if believed, could be taken by a reasonable jury to support his defence.’

A persuasive burden, on the other hand, requires a defendant to prove, on a balance of probabilities, an ultimate fact which is necessary to the determination of his guilt or innocence. The burden relates to an essential element of the offence. It reverses the burden of proof by transferring it from the prosecution to the defendant.[[95]](#footnote-95) It may be either mandatory or discretionary in its operation. With a mandatory persuasive burden, it is possible for a conviction to be returned, even where the tribunal of fact entertains a doubt as to the defendant's guilt.[[96]](#footnote-96)”

1. Under the second alternative, a defendant charged with indecent assault on an under-aged girl is required to put evidence before the court that he honestly and reasonably believed that she was 16 or over, leaving it to the prosecution, if it can, to negative that belief beyond reasonable doubt. And on the third alternative, the defendant must satisfy the court or jury on the balance of probabilities that he did honestly and reasonably believe that she was 16 or over.
2. The Court must determine which of those alternatives most closely reflects the statutory purpose of section 122. It is clear that such purpose is to treat girls (and boys) under the age of 16 as a vulnerable class in need of a high degree of protection against sexual exploitation. Hence, section 122(2) deems them incapable of giving consent to indecent conduct and holds the defendant guilty even though he can prove that consent was, to his knowledge, in fact given. As we have seen, in furtherance of that policy, the Hong Kong courts have construed age-related sexual offences as requiring potential defendants to take care “to avoid what may be unlawful and steering well away from the line between legality and illegality” to the extent of imposing absolute liability (when intermediate bases of liability had not yet been developed).[[97]](#footnote-97) As Lord Kerr JSC put it in *R v Brown*,[[98]](#footnote-98) it is a policy designed to “promote the objects of the statute by encouraging greater vigilance against sexual intercourse with girls under the age of [16].”
3. In my view, that purpose is achieved by construing section 122(2) in accordance with the third *Kulemesin* alternative, imposing a persuasive burden on the accused, in preference over the second alternative.
4. The second alternative provides greater protection than a requirement of full mens rea since guilt is established by the prosecution negativing *either* the accused’s alleged honest belief as to the victim’s age *or* the reasonableness of his alleged belief. [[99]](#footnote-99) However, such protection does not appear to me to go far enough. Since the prosecution bears the burden of establishing the aforesaid negatives, an accused would still be acquitted if the court or jury thinks that it may well be the case that he did not honestly and reasonably believe she was of sufficient age, but that a reasonable doubt remains as to whether he did harbour such a belief.
5. The third alternative better reflects the statutory purpose. A man who says: “I honestly and reasonably believed the girl was old enough to consent” ought to be required to persuade the court or jury that he probably did in fact so believe, a matter which he is best placed to explain. It is a suitably demanding standard designed to encourage men to steer clear of indecent conduct with young girls who may fall within the protected class, placing them otherwise at peril of being unable to discharge the persuasive burden.
6. A reverse onus derogates from the constitutional right to be presumed innocent.[[100]](#footnote-100) For such a derogation to be justified, it must pass the rationality and proportionality tests: the Court must be satisfied that the reverse onus has a rational connection with the pursuit of a legitimate aim and that it is no more than necessary for the achievement of that aim.[[101]](#footnote-101) If those tests are met, the Court must be satisfied overall that adoption of a reverse onus strikes a reasonable balance between the societal benefits promoted and the inroads made into the constitutionally protected presumption of innocence and that it does not place an unacceptably harsh burden on the individual.[[102]](#footnote-102)
7. In my view, construing section 122(2) as imposing a burden on the accused to prove on the balance of probabilities that he honestly and reasonably believed that the girl in question was aged 16 or more passes those tests. It is rationally connected with the legitimate aim of giving heightened protection to vulnerable under-aged girls and is no more than necessary to achieve such a level of protection. The inroad it makes into the presumption of innocence as the price of promoting necessary protection of a vulnerable class strikes a reasonable balance in the context of a fair trial for the accused.

I. Conclusion

1. For the foregoing reasons, I conclude that the Judge was wrong to hold that section 122(2) imposes absolute liability where the victim is in fact under the age of 16. On its proper construction, the presumption has been displaced so that the prosecution does not need to prove mens rea as to the girl’s age, but the accused has a good defence if he can prove on the balance of probabilities that he honestly and reasonably believed that the girl was 16 or over.

J. Disposal of the appeal

1. In acquitting the defendant, the magistrate stated:

“It is my conclusion that the defence that the defendant honestly and reasonably believed that PW1 was aged 16 or above is not rebutted, and as the benefit of doubt -- reasonable doubt should go to the defendant, I find the defendant not guilty of the charge.”[[103]](#footnote-103)

1. It is unclear whether the magistrate regarded the honest and reasonable belief referred to as a defence established by the accused or as an allegation which the prosecution failed to negative. Although *Hin Lin Yee* and *Kulemesin* were not cited, his statement effectively conflates the second and third *Kulemesin* alternatives.
2. If the magistrate held that the defendant discharged the persuasive burden and established a defence along the lines of the third alternative, his acquittal should be upheld as it would be in line with the conclusion reached in this judgment. If, however, the magistrate determined that the prosecution failed to negative the alleged honest and reasonable belief as to the girl’s age beyond reasonable doubt, the question of a possible re‑trial would arise since the defendant would not have been found to have established a reasonable belief defence on a balance of probabilities.
3. However, Ms Anna Y K Lai SC[[104]](#footnote-104) accepted that the acquittal should be upheld on either reading of the Reasons for Verdict. The Court should therefore resolve the ambiguity by assuming that the accused was held to have successfully established a third alternative defence along the lines indicated in this judgment. Ms Lai SC also stated that in such event, she would not oppose an order for costs in the accused’s favour comprising his costs before the magistrate and his legal aid contributions in the Court of First Instance and in this Court.
4. I would accordingly allow the appeal, set aside the Judge’s decision and restore the defendant’s acquittal. I would also make the order as to costs referred to in the preceding paragraph.
5. My answers to the certified questions are as follows:

(i) No.

(ii) No. Actual consent is deemed irrelevant. The defence requires proof of an honest and reasonable belief that the girl was aged 16 or over.

(iii) No.

**Mr Justice Tang PJ:**

1. I agree with the judgment of Mr Justice Ribeiro PJ.

**Mr Justice Fok PJ:**

1. I agree with the judgment of Mr Justice Ribeiro PJ.

**Lord Collins of Mapesbury NPJ:**

1. I agree with the judgment of Mr Justice Ribeiro PJ.

**Chief Justice Ma:**

1. The Court unanimously allows the appeal, sets aside the Judge’s decision, restores the defendant’s acquittal and awards the appellant costs comprising his costs before the magistrate and his legal aid contributions in the Court of First Instance and in this Court.

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| --- | --- | --- |
| (Geoffrey Ma)  Chief Justice | (R A V Ribeiro)  Permanent Judge | (Robert Tang)  Permanent Judge |

|  |  |
| --- | --- |
| (Joseph Fok)  Permanent Judge | (Lord Collins of Mapesbury)  Non-Permanent Judge |

Mr Gerard McCoy SC and Mr Wong Po Wing, instructed by Eli K.K. Tsui & Co., assigned by the Director of Legal Aid, for the Appellant

Ms Anna Y K Lai SC, DDPP, Mr Ned Lai, SADPP and Ms Audrey Parwani, SPP of the Department of Justice, for the Respondent

1. Cap 200. [↑](#footnote-ref-1)
2. It is clear that indecent assault can be committed by a person and on a person of either gender: *R v Hare* [1934] 1 KB 354. As the present case concerns a man charged with the offence in respect of a woman or girl, for brevity, I will generally refer to the defendant as a male and the other person as a female. [↑](#footnote-ref-2)
3. KCCC 388/2015 (12 June 2015). [↑](#footnote-ref-3)
4. [2002] 1 AC 462. [↑](#footnote-ref-4)
5. Reasons for Verdict §16. [↑](#footnote-ref-5)
6. *Ibid* §18. [↑](#footnote-ref-6)
7. *Ibid*. [↑](#footnote-ref-7)
8. *Ibid* §19. [↑](#footnote-ref-8)
9. HCMA 620/2016 (31 July 2017). [↑](#footnote-ref-9)
10. [2005] 1 HKLRD 443. [↑](#footnote-ref-10)
11. (2006) 9 HKCFAR 530. [↑](#footnote-ref-11)
12. Contrary to section 124 of the Crimes Ordinance (Cap 200). [↑](#footnote-ref-12)
13. Ribeiro, Tang and Fok PJJ, FAMC 28/2017 (1 November 2017). [↑](#footnote-ref-13)
14. (1872-75) LR 2 CCR 154. [↑](#footnote-ref-14)
15. At 170. [↑](#footnote-ref-15)
16. With Brett J dissenting. [↑](#footnote-ref-16)
17. At 174. [↑](#footnote-ref-17)
18. *R v Poon Ping Kwok* [1993] 1 HKCLR 56 at 57, holding that *Prince* applies to unlawful sexual intercourse with an under-aged girl and to procuring a woman under 21 to have unlawful sexual intercourse; and *R v Savage (No 3)* [1997] 2 HKC 768 at 772, applying *Prince* in a case involving gross indecency with or towards a child under the age of 16. [↑](#footnote-ref-18)
19. [2005] 1 HKLRD 443 at §25. [↑](#footnote-ref-19)
20. Including the Privy Council’s decision in *Gammon (HK) Ltd v Attorney General of Hong Kong* [1985] AC 1. [↑](#footnote-ref-20)
21. *HKSAR v So Wai Lun* [2005] 1 HKLRD 443 at §12(2). [↑](#footnote-ref-21)
22. *Sweet v Parsley* [1970] AC 132 at 148 and 152; *Gammon (HK) Ltd v Attorney General of Hong Kong* [1985] AC 1 at 14; *B (A minor) v DPP* [2000] 2 AC 428 at 460; *R v K* [2002] 1 AC 462 at 471-472, 477. [↑](#footnote-ref-22)
23. *B (A minor) v DPP* [2000] 2 AC 428 per Lord Steyn at 470, citing Lord Hoffmann in *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115 at 131: “Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.” See also *R v K* [2002] 1 AC 462 at 477. [↑](#footnote-ref-23)
24. *Sweet v Parsley* [1970] AC 132 at 149 and 165. It has however been stressed that the presumption of mens rea is not dependent on there being any ambiguity and operates to supplement the text: *B (A minor) v DPP* [2000] 2 AC 428 at 470; *R v K* [2002] 1 AC 462 at 477. [↑](#footnote-ref-24)
25. (2010) 13 HKCFAR 142 at §45. [↑](#footnote-ref-25)
26. Discussed in *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142 at §§55-61. [↑](#footnote-ref-26)
27. *Sweet v Parsley* [1970] AC 132 per Lord Reid at 150. See also at 157 per Lord Pearce and at 163-164 per Lord Diplock. [↑](#footnote-ref-27)
28. [1935] AC 462, as discussed in *Hin Lin Yee v HKSAR* at §§56-59 and 108-111. [↑](#footnote-ref-28)
29. (2010) 13 HKCFAR 142. [↑](#footnote-ref-29)
30. In breach of section 54(1) of the Public Health and Municipal Services Ordinance (Cap 132) punishable on summary conviction by a maximum fine of $50,000 and imprisonment for 6 months. [↑](#footnote-ref-30)
31. (2013) 16 HKCFAR 195. [↑](#footnote-ref-31)
32. In contravention of s 72 of the Shipping and Port Control Ordinance (Cap 313) punishable on conviction on indictment by a fine of $200,000 and imprisonment for 4 years; and on summary conviction by a fine of $200,000 and imprisonment for 2 years. The Court also noted that conviction was likely to have serious professional ramifications for the mariners involved: *Ibid* §86. [↑](#footnote-ref-32)
33. (2013) 16 HKCFAR 195 at §83. [↑](#footnote-ref-33)
34. *Ibid* at §90. [↑](#footnote-ref-34)
35. For example by Lord Nicholls of Birkenhead in *B (A minor) v DPP* [2000] 2 AC 428 at 462. [↑](#footnote-ref-35)
36. [1970] AC 132 at 150. [↑](#footnote-ref-36)
37. *R v Court* [1989] AC 28 at 33-34. [↑](#footnote-ref-37)
38. *Ibid* at 42. [↑](#footnote-ref-38)
39. *Ibid* at 43. [↑](#footnote-ref-39)
40. Set out in Section H.2 below. [↑](#footnote-ref-40)
41. *R v Court* [1989] AC 28 at 41-42. [↑](#footnote-ref-41)
42. *Ibid* at 44; *R v K* [2002] 1 AC 462 at 468. [↑](#footnote-ref-42)
43. *R v May* [1912] 3 KB 572. [↑](#footnote-ref-43)
44. *R v Court* [1989] AC 28 at 42. As Lord Ackner held, it is not necessary to prove that the person assaulted was aware of the circumstances of indecency or apprehended indecency, and an indecent assault can clearly be committed by the touching of someone who is asleep or unconscious. [↑](#footnote-ref-44)
45. *R v Kimber* (1983) 77 Cr App R 225 at 229. [↑](#footnote-ref-45)
46. *Ibid*. [↑](#footnote-ref-46)
47. *R v Court* [1989] AC 28. [↑](#footnote-ref-47)
48. *R v Hodgson* [1973] QB 565. [↑](#footnote-ref-48)
49. A similar view was taken of the offence of buggery with a girl under 21 contrary to section 118D of the Crimes Ordinance in *HKSAR v Yee Yiu Sam* [2002] 3 HKC 21 at §41 (a sentencing case). [↑](#footnote-ref-49)
50. *R v K* [2002] 1 AC 462 at 478-479. His Lordship proceeded to hold that the presumption of mens rea applied and was not displaced, as discussed in Section G below. [↑](#footnote-ref-50)
51. *Sweet v Parsley* [1970] AC 132 at 148 and 152; *Gammon (HK) Ltd v Attorney General of Hong Kong* [1985] AC 1 at 14; *B (A minor) v DPP* [2000] 2 AC 428 at 460; *R v K* [2002] 1 AC 462 at 471-472, 477; *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142 at §139. [↑](#footnote-ref-51)
52. *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142 at §§140-143. In *B (A minor) v DPP* [2000] 2 AC 428 at 464: Lord Nicholls of Birkenhead explains displacement by necessary implication thus: “‘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.” [↑](#footnote-ref-52)
53. *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142 at §45. See also Lord Reid in *Sweet v Parsley* [1970] AC 132 at 150. [↑](#footnote-ref-53)
54. [2002] 1 AC 462. [↑](#footnote-ref-54)
55. *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142 at §141. [↑](#footnote-ref-55)
56. *So Wai Lun v HKSAR* (2006) 9 HKCFAR 530 at §39; *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142 at §154; *Kulemesin* *v HKSAR* (2013) 16 HKCFAR 195 at §93. [↑](#footnote-ref-56)
57. *Kulemesin* *v HKSAR* (2013) 16 HKCFAR 195 at §92. [↑](#footnote-ref-57)
58. *Sweet v Parsley* [1970] AC 132 per Lord Reid at 153, and per Lord Diplock at 164. [↑](#footnote-ref-58)
59. *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 at 271-272; *Sweet v Parsley* [1970] AC 132 at 149 and156; *Hin Lin Yee* (2010) 13 HKCFAR 142 at §142; *Kulemesin v HKSAR* (2013) 16 HKCFAR 195 at §93. [↑](#footnote-ref-59)
60. *Lim Chin Aik v The Queen* [1963] AC 160 at 174; *Sweet v Parsley* [1970] AC 132 at 163; *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142 at §158. [↑](#footnote-ref-60)
61. (2010) 13 HKCFAR 142 at §151. [↑](#footnote-ref-61)
62. (2013) 16 HKCFAR 195 at §93. [↑](#footnote-ref-62)
63. [2005] 1 HKLRD 443. [↑](#footnote-ref-63)
64. Section 124(2) lays down a defence as follows: “Where a marriage is invalid under section 27(2) of the Marriage Ordinance (Cap 181) by reason of the wife being under the age of 16, the invalidity shall not make the husband guilty of an offence under this section because he has sexual intercourse with her, if he believes her to be his wife and has reasonable cause for the belief.” [↑](#footnote-ref-64)
65. Ord No 11 of 1890. [↑](#footnote-ref-65)
66. Re-enacted in the Protection of Women and Girls Ordinance 1897 (Ord No 9 of 1897), section 5. [↑](#footnote-ref-66)
67. Ord No 4 of 1897. [↑](#footnote-ref-67)
68. *HKSAR v So Wai Lun* [2005] 1 HKLRD 443 at §31(5). [↑](#footnote-ref-68)
69. *Ibid* at §32(2). [↑](#footnote-ref-69)
70. *Ibid* at §37. [↑](#footnote-ref-70)
71. Ord No 4 of 1865. Section 46: “Whosoever shall be convicted of any indecent assault upon any female, or of any attempt to have carnal knowledge of any girl under 12 years of age, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, whether without hard labour.” [↑](#footnote-ref-71)
72. Ord No 4 of 1897. Section 7(1): ““Every person who commits an indecent assault upon any female shall be guilty of a misdemeanor.” 7(2): “It shall be no defence to a charge or indictment for an indecent assault upon a girl under the age of 16 years to prove that she consented to the act of indecency.” This was re-enacted unchanged in section 7 of the Protection of Women and Juveniles Ordinance (Ord 1/ 1951). [↑](#footnote-ref-72)
73. Ord No 1 of 1978. [↑](#footnote-ref-73)
74. Ord No 90 of 1991. [↑](#footnote-ref-74)
75. *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142 at §151; *Kulemesin v HKSAR* (2013) 16 HKCFAR 195 at §93. [↑](#footnote-ref-75)
76. Section 123: “A man who has unlawful sexual intercourse with a girl under the age of 13 shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life.” [↑](#footnote-ref-76)
77. *HKSAR v So Wai Lun* [2005] 1 HKLRD 443 at §38. [↑](#footnote-ref-77)
78. In *So Wai Lun v HKSAR* (2006) 9 HKCFAR 530 at §39; *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142 at §102-103; *Kulemesin v HKSAR* (2013) 16 HKCFAR 195 at §93. [↑](#footnote-ref-78)
79. Bearing in mind that it applied to carnal knowledge of unmarried girls aged between 12 and 16; contained an exception where customary marriages between “Asiatics” were involved; had a three-month limitation period; and made offences punishable (under section 12) by a maximum of two years imprisonment (one year if tried by a single magistrate). Section 124 is set out in Section C above. [↑](#footnote-ref-79)
80. [2013] NILR 265. [↑](#footnote-ref-80)
81. (1872-75) LR 2 CCR 154. Mentioned in Section E above. [↑](#footnote-ref-81)
82. *R v Brown* [2013] NILR 265 at §32. [↑](#footnote-ref-82)
83. Section 4 concerning girls under 14, an offence punishable by life imprisonment, and section 5, a misdemeanour where the girls concerned were under the age of 17. [↑](#footnote-ref-83)
84. *Ibid* at §11. [↑](#footnote-ref-84)
85. Judgment §38. [↑](#footnote-ref-85)
86. *B (A minor) v DPP* [2000] 2 AC 428 at 464; *HKSAR v So Wai Lun* [2005] 1 HKLRD 443 at §16(3). [↑](#footnote-ref-86)
87. Judgment §38. [↑](#footnote-ref-87)
88. [2002] 1 AC 462. [↑](#footnote-ref-88)
89. Section 14 of the 1956 Act provides: “"(1) It is an offence, subject to the exception mentioned in subsection (3) of this section, for a person to make an indecent assault on a woman. (2) A girl under the age of 16 cannot in law give any consent which would prevent an act being an assault for the purposes of this section. (3) Where a marriage is invalid under section two of the Marriage Act 1949, or section one of the Age of Marriage Act 1929 (the wife being a girl under the age of 16), the invalidity does not make the husband guilty of any offence under this section by reason of her incapacity to consent while under that age, if he believes her to be his wife and has reasonable cause for the belief. (4) A woman who is a defective cannot in law give any consent which would prevent an act being an assault for the purposes of this section, but a person is only to be treated as guilty of an indecent assault on a defective by reason of that incapacity to consent, if that person knew or had reason to suspect her to be a defective." [↑](#footnote-ref-89)
90. [2002] 1 AC 462 at §3. [↑](#footnote-ref-90)
91. *Ibid* at §4. [↑](#footnote-ref-91)
92. *Ibid* at §21. [↑](#footnote-ref-92)
93. (2006) 9 HKCFAR 574 at §§26 and 27. [↑](#footnote-ref-93)
94. Citing *R v DPP, ex p Kebilene & Others* [2000] 2 AC 326 at pp 378H-379A, *per* Lord Hope of Craighead. [↑](#footnote-ref-94)
95. Citing *R v DPP, ex p Kebilene* [2000] 2 AC 326 at p 378H, *per* Lord Hope of Craighead. [↑](#footnote-ref-95)
96. Citing Emmerson and Ashworth, *Human* *Rights and Criminal Justice* (2001) para.9‑03. [↑](#footnote-ref-96)
97. *So Wai Lun v HKSAR* (2006) 9 HKCFAR 530 at §39; *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142 at §154; *Kulemesin v HKSAR* (2013) 16 HKCFAR 195 at §93. [↑](#footnote-ref-97)
98. [2013] NILR 265 at §§19, 38-39. [↑](#footnote-ref-98)
99. Reflecting the Australian approach: *CTM v The Queen* (2008) 236 CLR 440 at §§8 and 27; as opposed to the English position requiring only that the mistaken belief be honest, without necessarily being reasonable: *R v K* [2002] 1 AC 462. [↑](#footnote-ref-99)
100. Basic Law Art 87; Bill of Rights Art 11(1). [↑](#footnote-ref-100)
101. *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574; *HKSAR v Ng Po On* (2008) 11 HKCFAR 91; *Lee To Nei v HKSAR* (2012) 15 HKCFAR 162. [↑](#footnote-ref-101)
102. *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372. [↑](#footnote-ref-102)
103. Reasons for Verdict §19 (in translation). [↑](#footnote-ref-103)
104. Appearing for the respondent with Mr Ned Lai and Ms Audrey Parwani. [↑](#footnote-ref-104)