Neutral Citation Number: [2008] IEHC 427

THE HIGH COURT

2007 657 P

BETWEEN

Z.S.

PLAINTIFF

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr. Justice Roderick Murphy delivered on the 19th day of December, 2008.

1. Background to the proceedings

1. The facts which follow are agreed between the parties.

2. The plaintiff has been returned for trial before the Circuit Criminal Court. On 20th August 2004 he was charged with unlawful carnal knowledge of a female under the age of 17 years contrary to s. 2 of the Criminal Law Amendment Act 1935 ("the 1935 Act"), as amended by s. 13 of the Criminal Law Act 1997 ("the 1997 Act").

3. The provision has since been repealed and replaced by the Criminal Law (Sexual Offences) Act 2006, though the plaintiff was charged before its repeal.

4. The complainant was at the time of the alleged offence aged 16 and was an employee of the plaintiff. At all material times during his arrest and questioning the plaintiff maintained that he had not engaged in any sexual contact with her. However, he now seeks to challenge the constitutionality of s. 2(1) of the 1935 Act on the basis that if he did have intercourse with her, he honestly and reasonably believed her to have attained the age of consent. He submits that s. 2(1) precludes him from invoking such a defence at trial.

2. Prematurity

5. The defendants assert that the plaintiff cannot maintain this challenge on the ground that it is premature. Although the plaintiff asserts that he reserves the right to invoke a defence of mistake as to age at trial, this differs widely from an assertion that he will plead that defence. In those circumstances it is impossible to say what form the plaintiff's defence would take at trial, and so for the court to entertain these proceedings would violate the general principle that the court should only pronounce on the constitutionality of a statutory provision where it is necessary to do so.

6. The defendants suggested the proceedings raised questions of statutory interpretation which were properly for the determination of the Circuit Court judge at trial. Reliance was placed on *Kennedy v. D.P.P.* (Unreported, High Court, 11th January, 2007) where MacMenamin J. refused to consider the constitutionality of s. 4 of the Prevention of Corruption Act 2001 on the ground that the challenge was premature. The section created a presumption unfavourable to persons accused under the Act, but that presumption had not yet been invoked against the applicant and it might not prove necessary to invoke it. The court could not say how the evidence might evolve at trial. The applicant had not engaged with the evidence nor had he identified the nature of his defence or which facts might be in issue. The trial judge had yet to rule on the proper interpretation of key phrases in the section. MacMenamin J. noted (at p. 36):

> "The applicant assumes (and his case requires one to accept in advance) that the prosecution will establish that both elements identified are in place so as to give rise to the presumption of corruption."

7. The plaintiff relied on *Curtis v. Attorney General* [1985] I.R. 458. There the plaintiff had been charged with offences under s. 186 of the Customs Consolidation Act 1876, as amended by s. 34 of the Finance Act 1963. The latter provided that, in the event of a dispute as to the value of the goods, the District judge would determine the value. That ruling could not be appealed. The defendant argued the plaintiff lacked the requisite *locus standi* to maintain the constitutional challenge because he had suffered no prejudice: the District judge might agree with the plaintiff's valuation. In response to this submission, Carroll J. noted (at 462):

> "I am satisfied that the plaintiff has the necessary interest to bring this suit. While the determination by the District Court…might be in his favour, he is nevertheless in imminent danger of a determination affecting his rights. It is not necessary that a determination adversely affecting rights must first be made before a constitutional challenge can be started. It is sufficient if there is a reasonable apprehension of such determination: see *Cahill v. Sutton* [1980] I.R. 269, at page 286."

8. *Curtis* was approved by the Supreme Court in *Osmanovic v. D.P.P.* [2006] 3 I.R. 504. In that case, like the plaintiff in *Curtis*, the applicants had been charged with offences contrary to s. 186 of the 1876 Act as amended. They contended that the amendment effected by s. 89(b) of the Finance Act 1997, was unconstitutional by reason of the penalty system it provided for. The applicants in the first case had pleaded not guilty and had been sent forward for trial. In the second case the applicant had appeared in the District Court, but no further step had been taken. The respondents argued both cases were moot in that the applicants had not yet been charged or convicted. Indeed, in the second case they had not even been returned for trial or indicated how they would plead. Accordingly, the constitutionality of the sentencing provisions did not arise.

9. Noting that the High Court had considered both applications somewhat premature, Geoghegan J. (with whose judgment on the issue of *locus standi* the other members of the Court agreed) took a different view, saying (at para. 19):

> "I do not accept that locus standi is such a narrow concept or that the views of the trial judge conformed with the principles of this court set out in *Cahill v. Sutton* [1980] I.R. 269. I appreciate that prematurity and *locus standi* are not quite the same thing. In each of these three cases, however, I am of the opinion that if the applicants' complaints based on the Constitution could be arguably justified, they are perfectly entitled to air them at this stage. In each case, prosecutions have at least been instituted."

10. He continued (at para. 20):

> "In expressing the views which I have done, I would prefer to rely on general principle supported by the case which seems to me to be most relevant, that of *Curtis v. The Attorney General*, a decision of Carroll J. in the High Court. *The P.G. v.*

> *Ireland* and *C.C. v. Ireland* cases are distinguishable in that there was a very special reason which is set out in the judgments as to why this court was prepared to consider the validity of a proposed defence ahead of a trial."

11. The "special reason" to which Geoghegan J. referred appears from the judgments in *C.C. v. Ireland* [2006] 4 I.R. 1. In that case the plaintiff instituted judicial review proceedings concerning the proper construction of s. 1(1) of the 1935 Act. The respondents suggested such proceedings were inappropriate because their purpose was to establish the existence in law of a defence to a charge still to be tried and that issue should properly be determined by the trial judge. Geoghegan J. (with whose judgment Hardiman and McCracken JJ. agreed) observed (at para. 95):

> "I am bound to say that I am in great sympathy with this argument. Having regard, however, to the events which have occurred since leave was granted to institute the judicial review proceedings in each case, I am quite satisfied that it would be unjust and wrong in principle for this court not to make its own decision on the issue and simply to leave the matter for the trial judge. The High Court Judge has decided against each of the applicants on the issue relating to mistake of age. In these circumstances it is virtually inconceivable that the Circuit Court Judge who would be conducting the trial would permit himself or herself to express a different view even if this court were to categorise the views of the High Court Judge as *obiter dicta*."

12. Fennelly J. (with whose judgment Hardiman and McCracken JJ. also agreed) was of the same view, saying (at para. 132):

> "By pursuing the route of judicial review, the applicant has sought to have rulings made in advance of his trial as to the interpretation of the applicable statutory provisions. This is not a procedure which the court should approve. The forum for ruling on the law applicable in criminal cases is the court of trial."

13. He continued (at paras. 133-134):

> "I am compelled, however, to agree that, exceptionally, in view of the course events have taken, this court must consider the correctness of the substantive rulings which have, in fact, been made by the High Court Judge….It is…quite inappropriate and a usurpation of the function of the court of trial for an accused person - or the prosecution, for that matter - to seek advance rulings from the High Court as to how any legal provisions should be interpreted in the course of a pending trial. It happens that the present case concerns a trial pending in the Circuit Criminal Court. Judicial review is not available at all in respect of a trial pending in the Central Criminal Court (the High Court). The proper forum for the determination of legal matters arising in the course of trial is the trial court itself, subject to appeal to the Court of Criminal Appeal. The trial judge has, however, ruled on those matters. He has delivered a considered judgment on the interpretation of the relevant sections. As Geoghegan J. says in his judgment, the Circuit Criminal Court may feel bound by the views of Smyth J. They may also be considered binding, rightly or wrongly, not only in this but in other cases. It may be a long time before this court has an opportunity to consider the substance of the matter. In the ordinary way, decisions of the High Court are open to appeal to this court. In these exceptional circumstances, I am satisfied that the court must entertain the appeal."

14. In my view the same considerations apply in this case. The wording of s. 2(1) of the 1935 Act is the same as that of s. 1(1). Their legislative history is also the same and they are contained within the same Act. In addition, the Supreme Court has indicated, albeit *obiter*, that s. 2 is also repugnant to the Constitution, both in *C.C.* and in *G.E. v. D.P.P.* (Unreported, Supreme Court, 30th October, 2008). In the latter case the applicant had been charged with attempted unlawful carnal knowledge of a girl under the age of 17 years contrary to s. 2(2) of the 1935 Act. He had elected for trial on indictment and been sent forward to the Circuit Court, though his trial was adjourned pending the decision of the Supreme Court in *C.C.* Following that decision the State solicitor was instructed not to pursue the s. 2(2) charge and the applicant was instead charged with rape. In relation to that decision, Kearns J. (with whose judgment the other members of the Court agreed) observed:

> "A reconsideration of this case was plainly necessary in the aftermath of the Supreme Court decision in the *CC* case. Section 1 of the Criminal Law (Amendment) Act 1935 had been struck down as unconstitutional and in consequence implications also arose for prosecutions pending under s. 2 of the same Act. The infirmities in s. 1 were present also in s. 2 of the Act of 1935. It was thus both appropriate and, indeed, necessary for the respondent to review this case and in my view it was certainly open to him to substitute some other charge for that of attempted carnal knowledge under s. 2 of the Act of 1935. It is the choice of the charge of rape by way of substitution which creates the difficulty in this case."

15. As the final sentence of that passage indicates, the Court in *G.E.* was chiefly concerned with the fundamental fairness, in the circumstances that arose in that case, of the substitution of a more serious charge for that originally contemplated. The Court did not decide on the constitutionality of s. 2 and, as both counsel very properly accepted, the comments of Kearns J. in relation to the constitutional vulnerability of s. 2 were obiter.

16. The defendants assert that this litigation remains premature in that the question of the interpretation of s. 2 remains open. On the basis of the amendment of s. 2 brought about by the 1997 Act, it was submitted that the presumption of constitutionality properly applied to s. 2. Consequently, the double construction rule would, it was suggested, enable the trial judge to construe s. 2 as permitting a defence of mistake as to age.

17. The fact of the 1997 amendment was adverted to in *C.C.* and in *G.E.* without any hint that it could tilt the balance in favour of finding that a defence of mistake as to age was available. However, I attach little weight to this fact because the question did not arise for decision and does not appear to have been considered in either case. However, unless the issue is determined by this court I consider that it would not be open to the trial court in this case to construe s. 2 otherwise than as an offence of strict liability (for convenience, in this judgment I will use the term 'strict liability' to denote an offence in respect of which there is neither a requirement that knowledge as to age be proved as an element of the offence nor a defence of mistake as to age). The only potentially material distinction between ss. 1 and 2 is that the latter was amended after the entry into force of the Constitution and is said to be entitled to the presumption of constitutionality. For reasons I will indicate later in this judgment, I regard that distinction as material. However, in view of the dicta of the Supreme Court in *C.C.* and *G.E.* concerning s. 2 and recognising that that provision has been amended since 1937, the trial judge would probably feel constrained to interpret the provision in the same manner as s. 1. In this regard I would share the concerns of Geoghegan J. in *C.C.* that even if it were clear to the trial judge that the remarks regarding s. 2 were *obiter*, it would be almost inconceivable for him to take a different view.

18. I would therefore distinguish *Kennedy*, the case relied on by the defendant, on two grounds. Firstly, in the present case the trial judge could not, without a determination by this court, interpret the provision in such a manner as to render it constitutional. Secondly, the statutory provision impugned in these proceedings is the very provision creating the offence with which the plaintiff is

charged, unlike in *Kennedy* where the provision in question merely created a device relating to the reversal of the burden of proof which might never have been used at the trial. It is therefore unnecessary to consider whether, as the plaintiff asserted, the decision in Kennedy is inconsistent with *Curtis* and *Osmanovic*.

19. Reliance was also placed on *Blanchfield v. Hartnett* [2002] 3 I.R. 207, Byrne v. Grey [1988] I.R. 31 and *McNulty v. D.P.P.* (Unreported, High Court, Murphy J., 15th March, 2006). Those decisions, however, cannot assist the defendants. In *Blanchfield* the applicant sought *certiorari* in respect of orders made under s. 7 of the Bankers' Book Evidence Act 1879. On foot of those orders the Gardaí had obtained evidence to ground prosecutions on additional charges. The Supreme Court noted that the trial judge had wide powers to rule on the admissibility of evidence and the authorities did not indicate that he lacked the jurisdiction to adjudicate on the validity of the orders. The matter was therefore properly for the trial judge to determine, and *certiorari* was refused. In Byrne, *certiorari* was also refused on the ground that the admissibility of evidence was a matter for the trial judge. Similarly, in *McNulty* the order of prohibition sought was refused because it was for the trial judge to resolve the questions raised as to the admissibility of evidence or the possible prejudice to the applicant.

20. Each of these cases concerned an attempt to invoke in the superior courts by way of judicial review an argument which was properly within the domain of the trial judge. In contrast, these proceedings raise the constitutionality of a penal provision. They also raise questions as to its proper construction in circumstances where, as I have indicated, the trial judge may feel constrained to adopt an interpretation which renders the provision unconstitutional. Accordingly, this is not a case in which the matter should be left for the determination of the trial judge.

21. In addition, it was suggested that these proceedings are premature because the plaintiff has only indicated he wishes to reserve the right to invoke the defence of mistake as to age. This submission will be addressed below in the context of the *jus tertii* issue.

22. In the view of this court, in the circumstances of this case it follows from *Curtis*, *Osmanovic* and *C.C.* that this challenge is not premature and the plaintiff has the necessary standing to pursue it.

3. *Jus tertii*

23. However, it does not follow from this that the plaintiff can invoke any argument he sees fit in challenging the constitutionality of a statutory provision. In general he will not be allowed to rely on the effect of the provision he impugns on some other person. In *Cahill v. Sutton* [1980] I.R. 269 the plaintiff's action against her doctor for personal injuries resulting from a breach of contract was held to be statute-barred by s. 11(2)(b) of the Statute of Limitations, 1957. The plaintiff challenged the provision unsuccessfully in the High Court. On appeal the Supreme Court held that she had no standing to pursue the claim. It was submitted that, to be constitutionally valid, the provision would have had to incorporate a 'saver clause' allowing for an extension of time in favour of persons who did not become aware of the injury they had suffered until long after the event. In response, Henchy J. (with whose judgment the other members of the Court agreed) noted (at 280):

> "The first thing to be noted about this submission is that even if s. 11, sub-s. 2 (b), were qualified by such a saver, it would avail the plaintiff nothing. At all material times she was aware of all the facts necessary for the making of a claim against Dr. Sutton. Her present claim is founded on breach of contract. Within weeks of the commencement of her treatment in 1968 she knew of the facts which, according to her, constituted a breach of contract, and of their prejudicial effects on her. Yet she did not bring her action within the three-year period. It is clear—indeed, it is admitted —that the plaintiff would still be shut out from suing after the three-year period of limitation even if the suggested saving provision had been included in the Act of 1957."

24. He continued (at 286):

> "The primary rule as to standing in constitutional matters is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that other person's interests have been adversely affected, or stand in real or imminent danger of being adversely affected, by the operation of the statute."

25. Since there were no "weighty countervailing considerations" in the case to justify a departure from this rule nor any "pressing constitutional need to entertain the claim", the plaintiff did not have the requisite *locus standi* to pursue it. Accordingly, the Court allowed the appeal against the finding that s. 11(2)(b) was constitutionally valid but did not invalidate the provision, holding that the issue of constitutionality had to be left undetermined.

26. In *Norris v. Attorney General* [1984] I.R. 36 the plaintiff challenged ss. 61 and 62 of the Offences Against the Person Act 1861, which criminalised buggery between males. O'Higgins C.J. (with whose judgment Finlay P. and Griffin J. agreed) held that he had *locus standi* to challenge the provisions because, although he had not been prosecuted under them, their existence threatened what he asserted was a constitutional right to engage in such conduct. However, he did not have standing to complain of the alleged impact of the provisions on marital privacy, since his evidence was that marriage was not a possible option for him.

27. The *jus tertii* issue was also examined in *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88. In that case the applicant was serving a three year sentence following his conviction under s. 1 of the 1935 Act. He argued that, in light of the decision of the Supreme Court in *C.C.*, s. 1 had not survived the entry into force of the 1937 Constitution and his detention pursuant to that provision was consequently unlawful. The Supreme Court rejected this argument on the basis that the declaration of unconstitutionality in *C.C.* did not apply retrospectively in the manner contended for by the applicant. Hardiman J. noted that, in contrast to the applicant in *C.C.*, the applicant in *A.* had raised his constitutional challenge before trial. The fact the applicant had not done so was a major obstacle in the way of the applicant's attempt to "piggyback" on the decision in *C.C.*, particularly where the applicant had pleaded guilty at trial. Hardiman J. observed (at paras. 196-197):

> "The applicant in this case…positively knew the age of the victim and did not deny this. He could never himself have impugned the subsection on the basis that the applicant did in *C.C.*…because of the operation of the *jus tertii* rule: a person who seeks to invalidate a statutory provision must do so by reference to the effect of the provision on his own rights. He cannot seek to attack the section on a general or hypothetical basis and specifically may not rely on its effect on the rights of a third party: see *Cahill v. Sutton* [1980] I.R. 269. In other words, he is confined to the actual facts of his case and cannot make up others which would suit him better. Because of this rule, the applicant could not have attacked the section on the basis that it excluded a defence of reasonable mistake as to age since that defence would not have been open to him on the admitted facts, even if it had been available in law. He had, accordingly, no *locus standi* on which to challenge the subsection. The applicant in *C.C.*…had this standing."

28. In the present case the defendants argued that the plaintiff was trying to do precisely what the *jus tertii* rule prohibits, in that he was seeking to rely on an infringement of constitutional rights in the abstract that did not disclose any prejudice to his own constitutional rights. He had told the Gardaí in interview that he did not have intercourse with the complainant. Now he sought to assert that he was mistaken as to her age, and to reserve the right to invoke a defence of mistake as to age at trial. While the defendants conceded these inconsistent defences could be advanced in the course of a criminal trial, the plaintiff could not advance such mutually inconsistent assertions in these proceedings. He had also admitted that he had asked to see a copy of the complainant's CV. It was submitted that the burden was on him to establish that he had the requisite standing to rely on the absence of a mistake as to age defence, and on the basis of the above he had not shown this.

29. However, the court accepts counsel for the plaintiff's submission that, at the time of the Garda interview, the prevailing understanding of the law was clearly that a mistake as to age was immaterial to a conviction for an offence of statutory rape. For the plaintiff to have confessed to having had intercourse with the complainant would have constituted an admission of guilt regardless of any belief he might have had as to her age. Whether the plaintiff was aware of this understanding of the law or not, it is entirely possible he would have considered the admission of having had intercourse with the complainant sufficient to ground a conviction, perhaps not being familiar with the requirement of both *actus reus* and *mens rea* to ground most criminal convictions. In these circumstances his denial of having had intercourse with the complainant is not determinative.

30. The court accepts that it is not open to the plaintiff in these proceedings to plead both that the act did not occur and that, if it did, he believed the complainant was 17. However, in these proceedings he is not attempting to do so. He asserts that he honestly and reasonably believed the complainant to be of sufficient age, and there is nothing to refute that belief, either by way of an admission or otherwise. While he admitted having asked for the complainant's CV there is no evidence before the court that he had seen it, or that it stated the age of the complainant.

31. Accordingly, the court is satisfied that the plaintiff is not relying on a *jus tertii* and is therefore entitled to litigate the constitutionality of s. 2 of the 1935 Act on the basis of a contention that it excludes a defence of mistake as to age.

4. Criminal Law Act 1997

32. The defendants conceded that if s. 2 created an absolute offence it was to be regarded as unconstitutional on the basis of the decision in *C.C.* However, it was submitted that s. 2, correctly construed, did not exclude a defence of mistake as to age. Section 2 could in this regard be distinguished from s. 1 on the basis that it had been amended after the coming into operation of the Constitution. Unlike s. 1, which had not been so amended and therefore did not enjoy the presumption of constitutionality (*The State (Sheerin) v. Kennedy* [1966] I.R. 379; *Haughey v. Moriarty* [1999] 3 I.R. 1), s. 2 could avail of that presumption, and of the double construction rule that flows from it.

5. Does the presumption of constitutionality attach to s. 2?

33. The effect on a pre-Constitution statutory provision of a post-Constitution legislative intervention in its application was recently considered in *Representatives of Chadwick (deceased) v. Fingal County Council* (Unreported, Supreme Court, 6th November, 2007). In that case Fennelly J. said (at para. 36):

> "Accepting that section 63 [of the Land Clauses Consolidation Act 1845], *having been applied by a post-Constitution statute, should be construed so as to be consistent with the Constitution*, it is necessary to consider whether the traditional interpretation could, in fact, give rise to a possible infringement of any constitutional right of the appellants." (emphasis added).

34. Similarly, in *ESB v. Gormley* [1985] I.R. 129 the Supreme Court had to consider the question of whether an amendment of a pre-Constitution statute by a post-Constitution Act of the Oireachtas was sufficient to confer on the amended provisions a presumption of constitutionality. The amended provisions in question were s. 53 of the Electricity Supply Act 1927, as amended by s. 46 of the Electricity (Supply) (Amendment) Act 1945, and s. 98 of the 1927 Act, as amended by s. 5 of the Electricity (Supply) (Amendment) Act 1941. Finlay C.J., delivering the judgment of the Court, observed that the re-enactment of pre-Constitution statutes after 1937 would be sufficient to give rise to a presumption of constitutionality. However, he continued (at 147-148):

> "It is equally clear that the mere fact of an amendment of a pre-Constitution statute contained in a statute passed after the coming into force of the Constitution does not of itself give to that pre-Constitution statute a presumption of validity. With regard to s. 53 of the Act of 1927, however, and the amendment made in it by s. 46 of the Act of 1945, the view of the Court is that the nature and terms of that amendment, which extends and expands the nature of the works to which s. 53 originally applied, and the terms of the amendment, which not only made that extension but deemed the meaning of "electric line" in s. 53 of the Act of 1927 to have always had this extended or expanded meaning, effectively re-enacted s. 53 as part of a post-Constitution statute. Similar considerations apply to the amendment of s. 98 of the Act of 1927 contained in s. 5 of the Act of 1941 which, though less extensive than that contained in s. 46 of the 1945 Act, expressly extends the powers of the Board contained in s. 98 to a new event or category of case, namely, its requirement to make a survey only, as distinct from the placing of a line."

35. In the present case the defendants submitted that this passage was apt to extend to the amendment contained in the first schedule to the 1997 Act, and effected by s. 13 of that Act. That amendment consisted of the deletion of the words "of or over the age of 15 years and", so that the s. 2 offence would apply to unlawful carnal knowledge of all girls under the age of 17, rather than being restricted to those aged 15 or over but under 17. The plaintiff contended that this amendment merely broadened the offence without engaging either with the issue of the mental element of the offence or any defence to a prosecution under s. 2. It would, he argued, be unreal to assert that the Oireachtas had intended to introduce a defence of mistake as to age by way of that amendment.

36. While I agree that the Oireachtas appears not to have intended to engage with the issue, it does not follow from this that the presumption of constitutionality does not apply to the provision. In *Gormley* the amendment of s. 98 gave rise to the presumption of constitutionality because the amending Act extended the powers of the Board "to a new event or category of case". It is equally clear that the amendment of s. 2 of the 1935 Act extended the application of that provision "to a new event or category of case", namely the unlawful carnal knowledge of girls under the age of 15.

37. Accordingly, the court finds that the presumption of constitutionality applies to s. 2 of the 1935 Act, as amended.

38. However, it was contended that even if that presumption arose, it was immediately displaced on the ground that s. 2 was patently unconstitutional in light of the decision in *C.C.* concerning s. 1. The plaintiff relied on the decision of the Supreme Court in *Re Equal Status Bill, 1997* [1997] 2 I.R. 387. The Bill under consideration in that case contained two provisions which were in all material terms similar to provisions which the Supreme Court had already held to be unconstitutional in *Re Employment Equality Bill, 1996*

[1997] 2 I.R. 321. Hamilton C.J., delivering the judgment of the Court, observed (at 402):

> "…the Court found itself confronted by a Bill which contains two sections which were and are indisputably repugnant to the Constitution. As a result the Bill enjoys no presumption of constitutionality. There is no presumption for counsel assigned by the Court to rebut and no justiciable issue for the Court to try."

39. However, in my view there is a crucial distinction between that situation and the present. In *Re Employment Equality Bill, 1996* [1997] 2 I.R. 321, the Supreme Court held (at 334):

> "The Bill having been passed by both Houses of the Oireachtas is entitled to the presumption that no provision thereof is repugnant to the Constitution."

40. Accordingly, the Supreme Court in *Re Equal Status Bill* was faced with provisions materially no different from sections which had previously been struck down as unconstitutional despite enjoying the presumption of constitutionality, and despite enjoying the benefit of the double construction rule which follows from that presumption. In this case there is an important distinction. In *C.C.* no presumption of constitutionality could apply and thus no double construction rule could arise in interpreting s. 1. However, the 1997 amendment had the effect in principle of extending the presumption to s. 2. It cannot therefore be said that s. 2 in its amended form is patently unconstitutional, since an additional rule of statutory interpretation falls to be applied in the context of s. 2. That rule (the double construction rule) could potentially bring about an interpretation of s. 2 which differs from the interpretation applicable to s. 1. It is of the essence of the rule that it can result in a different interpretation from that which results from an application of the ordinary rules of statutory interpretation. If it were otherwise the rule would never be invoked as it would be superfluous. In addition, the observations of the Supreme Court in *C.C.* and *G.E.* relating to s. 2 were *obiter* and no argument appears to have been directed to the Court on the question of the effect of the 1997 amendment. Accordingly, in my view s. 2 is not patently unconstitutional and is entitled to the presumption of constitutionality.

6. Has the presumption been rebutted?
Submissions on behalf of the plaintiff
41. The plaintiff regarded as spurious the assertion that the 1997 amendment could save s. 2 from a finding of unconstitutionality. Even if the presumption of constitutionality applied, it was rebutted in this case by the explicit, clear intention of the Oireachtas. It was clear from *C.C.* that the intention of the Oireachtas in enacting s. 1 of the 1935 Act, had been to exclude the possibility of invoking a defence of mistake as to age. It was also clear from the judgments of the majority in *C.C.* that the same was true of s. 2. There was no evidence from which it could be inferred that the Oireachtas had intended in 1997, by means of the amendment of s. 2, to introduce any mental element or defence into the s. 2 offence. The Oireachtas would not have eliminated the protection of strict liability in favour of girls aged under 17 without clear words to that effect and without any debate concerning either the desirability of such a reform or the statutory framework which would replace the old law. To attribute such an intention to the Oireachtas in 1997 would amount to a gross usurpation of that institution. Considering the difficulties Oireachtas members were said to have had in grappling with the decision in *C.C.* in 2006, it could not be said that they were prepared in 1997 to make the alteration in the law contended for. It had to be recalled that the presumption of constitutionality was always qualified by reference to the intention of the Oireachtas. In addition, the double construction rule only applied where there were two interpretations reasonably open to the court. Having regard to the decision in *C.C.* there were not. Section 2 had consistently been applied by the courts, both before and after 1997, in such a way as to render any knowledge or belief as to age irrelevant. Where a particular interpretation of a statute was well-established, it followed from the decision of the Supreme Court in *Chadwick* that strong reason would be needed to depart from it, and no such strong reason appeared in this case.

Submissions on behalf of the defendants
42. The defendants argued that, by applying the presumption of constitutionality to s. 2, the 1997 Act had the effect of "decoupling" s. 2 from the remainder of the 1935 Act, and in particular from the legislative antecedents of that provision which were so crucial to the finding in *C.C.* that s. 1 had created an absolute offence. This was so because, by virtue of the 1997 Act, s. 2 in its amended form had to be regarded as an enactment of the post-1937 Oireachtas, that is the Oireachtas established by the present Constitution. As amended, s. 2 enjoyed the presumption of constitutionality, so that the double construction rule applied: accordingly, if the court were faced with two possible constructions of s. 2 it was obliged to adopt the constitutional one even if not intended by the Oireachtas. In any event, the Oireachtas had to be presumed not to have intended the statute to be construed in such a way as to render it unconstitutional, and it was clear from *C.C.* that to construe it in the manner contended for by the plaintiff would produce this result. There was nothing in s. 2 itself to exclude the mistake defence, but insofar as it evidenced an intention on the part of the Oireachtas in 1935 to exclude that defence, that intention could not be imputed to the post-Constitution Oireachtas in 1997. The double construction rule should 'trump' the ordinary rules of statutory interpretation applied in *C.C.* The double construction rule and the strong presumption at common law that some mental element was required in respect of all 'true crime' meant that s. 2 should be construed as importing a mental element relating to the age of the complainant in the offence, either as an element to be proved or as a defence that could be availed of.

43. Finally, while a strong reason would be required to depart from the consistent interpretation of a statute, in the case of s. 2 the correct interpretation had never been the subject of judicial determination beyond *obiter dicta*. The defendants sought to distinguish *Chadwick* on this ground.

Findings of the Court
44. For the reasons outlined in part 5 of this judgment, s. 2 in its amended form enjoys a presumption of constitutionality. The application of the double construction rule alluded to above is an important consequence of this presumption. The rule has been authoritatively outlined in a number of cases. In *McDonald v. Bord na gCon* [1965] I.R. 217 Walsh J, delivering the judgment of the Supreme Court, noted (at 239):

> "One practical effect of this presumption is that if in respect of any provision or provisions of the Act two or more constructions are reasonably open, one of which is constitutional and the other or others are unconstitutional, it must be presumed that the Oireachtas intended only the constitutional construction and a Court called upon to adjudicate upon the constitutionality of the statutory provision should uphold the constitutional construction. *It is only when there is no construction reasonably open which is not repugnant to the Constitution that the provision should be held to be repugnant.*" (emphasis added)

45. In that case the Court noted that ss. 43 and 44 of the Greyhound Industry Act 1958, provided for an investigation to be carried out, and there was nothing in the wording of either provision to exclude the requirements of constitutional justice from that investigation. Accordingly, the requirements of constitutional justice were read into those provisions. Section 47, which provided for the making of an exclusion order, was construed as requiring such an investigation prior to the making of such an order. Walsh J. said

(at 243):

> "While the Board may determine the manner in which the investigation shall be carried out the clear words or necessary implication which would be required to exclude the principles of natural justice from such investigation are not present in the sections."

46. Hamilton C.J., delivering the judgment of the Supreme Court in *Croke v. Smith (No. 2)* [1998] 1 I.R. 101, to some extent echoed the views of Walsh J. in holding (at 112) that, in determining the constitutionality of s. 172 of the Mental Treatment Act 1945, the Court must:

> "(1) grant to the impugned provision the presumption of constitutionality unless and until the contrary is clearly established;
>
> (2) not declare the impugned provision to be invalid where it is possible to construe it in accordance with the Constitution;
>
> (3) favour the validity of the provision in cases of doubt; and
>
> (4) must have regard to the fact that the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice."

47. In *Re Health (Amendment)(No. 2) Bill, 2004* [2005] 1 I.R. 188, the Supreme Court reiterated the obligation to interpret both Bills and Acts of the Oireachtas "as far as possible so as to bring [them] into harmony with the Constitution."

48. Delivering the judgment of the Supreme Court in *East Donegal Co-operative Livestock Mart Ltd. v. Attorney General* [1970] I.R. 317 at 341, Walsh J. advanced the same view but sounded a note of caution:

> "an Act of the Oireachtas, or any provision thereof, will not be declared to be invalid where it is possible to construe it in accordance with the Constitution; and it is not only a question of preferring a constitutional construction to one which would be unconstitutional where they both may appear to be open but it also means that an interpretation favouring the validity of an Act should be given in cases of doubt. It must be added, of course, that interpretation or construction of an Act or any provision thereof in conformity with the Constitution cannot be pushed to the point where the interpretation would result in the substitution of the legislative provision by another provision with a different context, as that would be to usurp the functions of the Oireachtas. In seeking to reach an interpretation or construction in accordance with the Constitution, a statutory provision which is clear and unambiguous cannot be given an opposite meaning." (emphasis added).

49. An additional limitation on the double construction rule is identified in the judgment of the Supreme Court in *Re Employment Equality Bill, 1996* [1997] 2 I.R. 321, where it was noted (at 369):

> "In the opinion of the Court the "double construction" rule can have no application to this section. The so called rule can only apply where there is an ambiguity or a choice between two constructions. If on a reading of the section the plain words are apparent, then the duty of the court is to give effect to a literal reading of the section. The section refers to "proceedings brought under this Act" which must include all forms of proceedings and that, in turn, includes criminal proceedings."

50. The judgment of the Supreme Court in *O'Brien v. Keogh* [1972] I.R. 144 at 155 is to the same effect in that the double construction rule did not apply because the meaning of the provision in question was clear. In In *re Haughey* [1971] I.R. 217 however, Ó Dálaigh C.J., delivering the judgment of the Supreme Court, gave an indication of the strength of the double construction rule. Considering the constitutionality of s. 3(4) of the Committee of Public Accounts of Dáil Éireann (Privileges and Procedures) Act 1970, he said (at 251):

> "If the Court is to apply the ordinary canons of construction of statute law, the Court would affirm the construction of the subsection first contended for on behalf of Mr. Haughey and in such case, as has already been stated, the sub-section thus construed would offend against the Constitution and the order of the High Court would be set aside in consequence. But, in this instance, the ordinary canons of construction are not applicable. Here the constitutionality of an Act of the Oireachtas established by the Constitution is questioned; in such case the Court must apply different canons of construction."

51. After quoting from the judgment of Walsh J. in *East Donegal Co-operative*, he continued (at 252):

> "Applying this doctrine in the present case, the Court is of opinion that it is its duty to reject the construction which the ordinary canons of construction recommend and to treat the Committee's certificate, not as a certificate of conviction, but as "merely a step preliminary to the commencement of the trial of a criminal offence in the High Court" as Mr. Justice Henchy expressed it in his judgment in the High Court. This construction saves the sub-section from the constitutional infirmity from which, in the first instance, Mr. Haughey's counsel has urged the sub-section suffers."

52. The Court was also prepared to conclude that the words 'after such inquiry as it [the High Court] thinks proper to make' contemplated a trial in the High Court in order to avoid a conflict with the Constitution. However, there were limits to the presumption that the Court would not exceed:

> "In the opinion of this Court the formula "after such inquiry as it [the High Court] thinks proper to make" can be stretched, by presumption of constitutionality, to contemplate a trial in the High Court by a High Court judge or judges but, as has been pointed out, the presumption of constitutionality is not to be applied where it would do violence to the plain meaning of the words. It is, in the opinion of this Court, beyond the reach of the presumption of constitutionality to read into the simple inquiry formula of the sub-section an intention to authorise trial by jury. The statute in this case created an offence which was not prohibited by the common law. It indicated a particular manner of proceeding against the alleged offender by express reference to contempt of court in terms which clearly indicated a summary manner of disposal of the trial and of the offender, if convicted; and the procedure thus indicated clearly excludes that of

> indictment. This interpretation is reinforced by the express provision that the charge is laid by the certificate of the chairman of the Committee."

53. Of perhaps particular relevance to the present case is the judgment of Henchy J. in *McMahon v. Leahy* [1984] I.R. 525. While that case concerned the validity of a statutory discretion, Henchy J. (with whose judgment Griffin and Hederman JJ. agreed) made a significant point in relation to rebutting the presumption of constitutionality. He said (at 541):

> "The presumption of constitutionality extends to both the substance and the operation of a statute: *it is a presumption that admits of rebuttal only by a contrary intention appearing in the terms of the statute itself.*" (emphasis added).

7. Application of the double construction rule

54. Since s. 2 is silent as to any mental element that might apply, there is room for doubt or ambiguity as to its correct construction. Accordingly, the double construction rule applies. In applying the rule the court must guard against "the substitution of the legislative provision by another provision with a different context". A question arises in the present case as to what the context of s. 2 of the 1935 Act in its amended form is: is it deemed to form part of the 1935 Act or of the 1997 Act?

55. The decision of the Supreme Court in *Gormley* is instructive in finding an answer to this question. In that case Finlay C.J. noted that the first question of law for the Court to determine was whether the pre-1937 statutory provisions, by virtue of having been amended by post-1937 Acts,

> "should be *deemed to have been enacted or re-enacted by the Oireachtas since the coming into force of the Constitution* and thus attract a presumption of validity having regard to the provisions of the Constitution ([1985] I.R. 129 at 147)." (emphasis added).

56. The Court then noted that both provisions were entitled to the presumption of constitutionality by virtue of those amendments. Finlay C.J. continued (at 148):

> "This judgment is, therefore, the judgment of the Court."

57. This statement can only have been a reference to the rule whereby, in cases where the Supreme Court must determine the constitutionality of an Act of the Oireachtas enacted subsequent to the coming into force of the Constitution, only one judgment may be delivered. No such rule applies to pre-Constitution statutes (see Article 34.4.5°, as explained in *The State (Sheerin) v. Kennedy* [1966] I.R. 379 at 388). Accordingly, in stating that his judgment was *therefore* the judgment of the Court, Finlay C.J. can only have meant that the statutory provisions, in their amended form, were to be regarded as having been enacted subsequent to the Constitution.

58. This interpretation of the effect of a post-1937 amendment to an earlier statute is confirmed later in the judgment. Finlay C.J. refers (at 151) to s. 53 of the 1927 Act "as effectively re-enacted". Referring to s. 98 of the Act in its amended form, he said (at 152):

> "the Court is satisfied that the defendant has not established her claim to a declaration that this section, as re-enacted, is invalid having regard to the Constitution." (emphasis added).

59. The court has already determined that s. 2 of the 1935 Act, as amended, is entitled to the presumption of constitutionality according to the principles laid down in *Gormley*. It also follows from the judgment in that case that s. 2, in its amended form, should therefore be regarded as having been effectively re-enacted by the Oireachtas after the coming into force of the Constitution. Presumably it should be deemed to have been re-enacted by the Criminal Law Act 1997, since it was that Act that effected the amendment at issue.

60. It is clear from the decision in *C.C.* that s. 2, as originally enacted within the framework of the 1935 Act, was intended, like s. 1, to exclude any mental element or defence as to age. That intention was clear in that the Oireachtas was concerned to replace an Act of 1885 that had provided for a defence of reasonable mistake as to age in the case of the 'older girl offence'. That defence was not repeated in the 1935 Act even though, with the 1885 Act at the forefront of its considerations, the Oireachtas must have adverted to the issue. It was therefore necessary to conclude that the Oireachtas had excluded the defence by design.

70. The same cannot be said of s. 2 in its amended form. It may seem anomalous to conclude that that provision is reasonably open to a construction requiring some mental element when it is apparent from *C.C.* that in its original form it, like s. 1, excluded a defence of mistake as to age by necessary implication. However, these proceedings are not concerned with s. 2 in its original form. The court accepts the submission of the defendants that the intention of the Oireachtas of Saorstát Éireann in 1935 cannot, as a matter of law, be attributed to the Oireachtas established by the Constitution in its 1997 composition. The plaintiff correctly submitted that there was no evidence that the Oireachtas, in enacting the 1997 Act, had considered the issue of *mens rea* or a mistake defence in relation to the s. 2 charge. He submitted that it was the universal understanding that s. 2 had created a strict liability offence, and that the Oireachtas could not be taken to have tampered with that understanding without clear words to that effect.

71. Nevertheless, the court is satisfied that the presumption of constitutionality applies, and it must give effect to the conclusions which flow from its application. The plaintiff is correct in suggesting that there is no indication in the statutory language or otherwise to suggest an intention on the part of the Oireachtas to introduce a new element or defence into the statute. Equally however, no intention can be attributed to it to maintain the pre-existing strict liability position. Unlike the Oireachtas in 1935, there is no question of repealing old statutory provisions and reiterating the offences they contained, but without a defence that had traditionally been available. Since, unlike in the case of that Act, there is no evidence from which it could be inferred that the Oireachtas engaged with the issue of the mental element or defence as to age at all, the court is left with no positive evidence of intention. It is left only with the presumption, mandated as a matter of statutory interpretation in line with the Constitution that the Oireachtas did not in 1997 intend to infringe the Constitution. It is clear from *C.C.* that s. 2 is unconstitutional if it has created an offence of statutory rape in respect of which knowledge as to the age of the complainant is immaterial. In effectively re-enacting s. 2 in an amended form therefore, the Oireachtas must be presumed to have intended not to create an offence so characterised.

72. There is nothing to rebut this presumption in the present case. Neither the words of s. 2 nor of the 1997 Act, which is the broader context in which s. 2 in its amended form is deemed to have been re-enacted, run contrary to the constitutional interpretation of s. 2. Unfounded speculation as to the likelihood or otherwise of the Oireachtas having intended to depart from the traditional understanding of s. 2 cannot avail the plaintiff. As Keane C.J. noted in *Re Illegal Immigrants (Trafficking) Bill, 1999* [2000]

2 I.R. 360 at 372:

> "Even it can be assumed that the speeches of the minister and other members of the Oireachtas are a safe guide as to what the purpose of the Oireachtas collectively was in enacting the provisions in question, this court is solely concerned with the meaning of the legislation as actually passed by the two Houses of the Oireachtas. Irrespective of what may have been in the mind of the minister in piloting the legislation through the Oireachtas or in the minds of those individual deputies and senators who voted for the legislation, the two provisions as passed by them are to be construed in accordance with normal canons of construction: if, as so construed, they are repugnant to the Constitution, the President must be so advised. If they are not, the President must be similarly so advised. Whatever may be the position in other cases, this is not a case in which the court can derive any assistance as to the constitutionality of the two sections from anything that was said concerning them in the course of the debates in the Oireachtas."

73. Although in that case the meaning of the provisions in question was clear, it seems evident from this passage that unfounded speculation as to what the members of the Oireachtas may have had in mind cannot be of assistance in any event.

74. In addition, while the court is mindful of the decision in *Chadwick* to the effect that a long-established interpretation should not be departed from without good reason, the presumption of constitutionality and the double construction rule furnish ample reason for a new interpretation of s. 2. It is clear from the authorities referred to, in particular In *re Haughey*, that those principles can, subject to established limits, lead the court to adopt an interpretation of a post-Constitution statutory provision which is at variance with that which would flow from an application of the normal rules of statutory interpretation. Indeed, in *Chadwick* Fennelly J. expressly held (at paras. 36-37) that he would not depart from the traditional interpretation of the provision under consideration because, among other reasons, such an interpretation would not place the provision in conflict with Article 40.3.2° of the Constitution. The fact that s. 2, as amended, has acquired the status of a post-Constitution statute is therefore sufficient to justify a construction of that provision which differs from that which prevailed in respect of s. 2 in its original form.

75. Accordingly, the court concludes that s. 2, in its amended form, must be interpreted in such a way as to render knowledge as to age a relevant consideration. This may mean that knowledge as to age is to be regarded as an element of the offence, or that a defence of honest or of reasonable mistake as to age may be invoked. The court accepts the submission of the defendants that that question should be determined by the trial court. As the Supreme Court indicated in *C.C.*, any of the three formulations identified above, and perhaps others, would "pass constitutional muster", so that once it has been determined that the provision is not of a strict liability nature, the question of what the provision requires is one of statutory interpretation rather than constitutional law. The duty of the trial court, therefore, is to give to the provision whatever interpretation is consistent with the Constitution and flows from an application of the ordinary rules of statutory interpretation, including the unrebutted presumption at common law that some mental element should be inferred.

76. For the sake of completeness the plaintiff's objection to this course should be noted. It was suggested that to hold that s. 2 entails a particular mental element or defence would involve the court in a legislative policy choice which the Supreme Court held in *C.C.* was not open to the courts. This is a reference to the concluding paragraphs of the judgment of the Supreme Court on the constitutional issue in *C.C.* the Attorney General had invited the Court to declare only that s. 1 was unconstitutional *to the extent to which it excluded a defence of reasonable mistake.* The Court rejected this submission because to accept it would have meant electing in favour of a particular defence which represented only one of the possible courses which could be taken, consistently with the Constitution, in determining the scope of a statutory rape provision. These remarks followed the Court's determination that the provision was unconstitutional in that it could only be interpreted as excluding any form of mental element as to age in prosecutions for the s. 1 offence. Accordingly, to accede to the Attorney General's submission would have meant enacting a mental element of a particular kind into a provision that the Court had already found excluded any such element: the Court would therefore have been legislating to amend s. 1 rather than interpreting it.

77. In contrast, in the earlier judgments on the non-constitutional issues in *C.C.*, the members of the Court had without exception indicated that in general a particular mental element could legitimately be read into a statutory provision that had created a serious offence without having specified any such element. The Court clearly accepted that the drawing of such an inference was a simple matter of statutory interpretation in accordance with a strong common law presumption.

78. This court has already determined that s. 2, as amended, is consistent with the Constitution. For the reasons noted above, the basis relied upon in *C.C.* as excluding the mental element is not present here. Accordingly, it is legitimate and indeed necessary for the trial court to infer a particular mental element under s. 2 as to the age of the complainant by applying the ordinary rules of statutory interpretation.