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SUPREME COURT OF VICTORIA — FULL COURT

R v DOUGLAS

Starke, O'Bryan & Nathan JJ

6, 19 December 1984 — [1985] VicRp 70; [1985] VR 721

CRIMINAL LAW – ONUS OF PROOF – SEXUAL OFFENCE – DEFENCE ON FACTS PECULIARLY WITHIN DEFENDANT'S KNOWLEDGE – WHETHER DEFENDANT BEARS ONUS OF PROOF ON BALANCE OF PROBABILITIES: *CRIMES ACT* 1958 (as amended) S48(1), (4).

Section 48(4) of the *Crimes Act* 1958 (as amended) provides —

> "The consent of a person with or upon whom an offence against this section is alleged to have been committed is no defence to a charge under this section unless at the time the offence is alleged to have been committed—
> (a) the accused believed on reasonable grounds that the person was of or above the age of sixteen years; or
>
> (b) the accused was not more than two years older than the person."

At the trial, D. admitted he had sexual intercourse with a female between ten and sixteen years of age and with her consent but said he believed at the time the female was of or above the age of 16 years. The question then arose whether the onus of proving the Accused's reasonable belief that the female was of or above sixteen years of age was on the Accused on the balance of probabilities or on the prosecution to prove the contrary beyond reasonable doubt. The trial Judge ruled that the burden of proving the statutory defence lay on the accused on the balance of probabilities. D. was convicted. Upon application for leave to appeal against the conviction—

HELD: Application for leave to appeal dismissed.
(1) Except for the defence of insanity and offences where the onus of proof is specially dealt with by statute, the criminal law imposes a duty on the prosecution to prove the accused's guilt beyond reasonable doubt.
***Mancini v DPP* [1942] AC 1; [1941] 3 All ER 272; and**
***Woolmington v DPP* [1935] UKHL 1; [1935] AC 462; [1935] All ER 1; 25 Cr App R 72; 153 LT 232, applied.**

(2) Section 48(4) of the *Crimes Act* 1958 requires one to consider that the state of mind and facts required to be proved under it will ordinarily be peculiarly within the knowledge of the accused.

(3) Notwithstanding that the words of s48(4) of the *Crimes Act* 1958 do not expressly impose the burden of proving mistake of age upon the accused, the onus of proof lies upon the defendant because the facts and matters providing the defence lie peculiarly within his knowledge.
***R v Bonnor* [1957] VicRp 33; [1957] VR 227; [1957] ALR 187; and**
***R v Sciretta* [1977] VicRp 15; [1977] VR 139, applied.**

O'BRYAN J: (with whom Starke and Nathan JJ agreed) *[after setting out the facts, the relevant statutory provisions, the trial proceedings and the ground of appeal, continued]*: ... **[3]** Mr Woinarski of counsel for the applicant submits that the common law rule that the prosecution must prove beyond reasonable doubt all the elements of the crime charged is applicable and it is not for the applicant charged with an offence against s48 to prove that at the time of the offence he believed on reasonable grounds that the female was of or above the age of sixteen years. Mr Woinarski submits, correctly, that save as to the defence of insanity and in offences "where onus of proof is specially dealt with by statute" (*Mancini v DPP* [1942] AC 1 at 11; [1941] 3 All ER 272; (1941) 28 Cr App R 65) the criminal law imposes a duty upon the prosecution to prove the accused's guilt beyond reasonable doubt: *Woolmington v DPP* [1935] UKHL 1; [1935] AC 462; [1935] All ER 1; 25 Cr App R 72; 153 LT 232. The issue here is whether s48(4) introduces a statutory exception by necessary implication because, quite clearly, the words used by the legislature in sub-section (4) do not expressly impose an onus upon the accused person.

Reference was made to comparable English legislation subsisting when *R v Simmons* was

decided [1931] 23 Cr App R 25. The *Criminal Law Amendment Act* 1885 created an offence of carnally knowing a girl under the age of sixteen years. By an amendment in 1922 (12 & 13 Geo V C56), "reasonable cause to believe that a girl was of or above the age of 16 years shall not be a defence to a charge under sections 5 or 6 of the *Criminal Law Amendment Act* 1885 ... provided **[4]** that, in the case of a man of 23 years of age or under, the presence of reasonable cause to believe that the girl was over the age of 16 years shall be a valid defence on the first occasion on which he is charged with an offence under this section". Simmons was convicted of rape and carnal knowledge of a girl under sixteen. Simmons being under twenty-three years of age, relied upon the statutory defence of "reasonable cause to believe". In the Court of Criminal Appeal, the Lord Chief Justice observed that "to make good the defence set up of 'reason to believe' the burden of proof rests upon the appellant". The effect of the amendment in 1922 was to extend the defences which were previously open to a person charged with carnal knowledge of a girl of or above the age of sixteen years but in England it was held that the onus of proof of mistake lay on the defendant. In *Sparre v R* [1942] HCA 19; [1942] 66 CLR 149 three members of the High Court in separate judgments each held that a defence to a charge of carnally knowing a girl above the age of ten years and under the age of 16 years based upon the proviso to s71 of the *Crimes Act* (NSW) 1900-1910 imposed a burden upon the accused of proving the defence. The proviso was in these terms:

> "Provided that it is a sufficient defence to any charge under this section where the girl in question was over the age of fourteen years if it shall be made to appear to the Court or jury before whom the charge is brought that the person so charged had reasonable cause to believe that she was of or above the age of sixteen years."

Each member of the court held, in effect, that the words in the proviso "if it shall be made to appear" meant that the burden of proving the fact mentioned in the proviso was upon the accused. **[5]** A defence to a criminal charge based upon 'an honest and reasonable belief' has been held to impose the ultimate burden of proof upon the defendant. Cf. *Dowling v Bowie* [1952] HCA 63; [1952] 86 CLR 136 at 144-5; [1952] ALR 1001; *Bergin v Stack* [1953] HCA 53; (1953) 88 CLR 248 at 261; [1953] ALR 805. In *R v Bonnor* [1957] VicRp 33; [1957] VR 227; [1957] ALR 187 a man accused of bigamy raised mistake as his defence. Three members of a Bench of five Judges held that the burden lies on an accused charged with bigamy of proving on the balance of probabilities that he believed honestly and on reasonable grounds that his former marriage was dissolved.

There is little or no distinction to be found between the principle applied in *Bonnor's case* in relation to the defence of mistake and the statutory defence introduced by s48(4). The offence defined by s48(1) contains several necessary ingredients both positive and negative which the prosecution must prove before guilt is established. After defining the offence the legislature asserts in sub-section (4) that consent of the victim is no defence unless at the time a certain state of mind and/or a certain state of fact existed. The state of mind of the accused at a particular time is peculiarly within his own knowledge. The age of the accused is a fact which may also lie peculiarly within his knowledge. There is authority that where an accused person relies upon a defence peculiarly within his own knowledge, then the burden of establishing that defence rests upon him. In a recent ruling during the trial of an accused person for murder, Kaye J refers to the relevant authorities. *R v Sciretta* [1977] VicRp 15; [1977] VR 139 at 140-141. The proper construction of s48(4) requires one to take into account that the state of mind and facts **[6]** required to be proved under it will ordinarily be peculiarly within the knowledge of the accused person.

If all the elements of the offence created by sub-section (1) are proved, in order to avoid conviction an accused person must rely upon sub-section (4). It follows, quite logically, that an accused must show at the relevant time either that he believed on reasonable grounds that the victim was of or above the age of sixteen years or that he was not more than two years older than the victim. Because matters peculiarly within the knowledge of the defendant must be proved to avoid the penalty imposed by sub-section (1), the criminal law reverses the burden of proof. Take, for example, a defence based upon the fact that the accused was not more than two years older than the victim. The date and place of birth of the defendant is peculiarly within the knowledge of the defendant, particularly were the defendant born outside the State of Victoria. Similarly, the facts providing a defence of mistake lie peculiarly within the knowledge of the defendant. In my opinion, upon the proper construction of sub-section (4) the onus of proof of the defence of mistake of age lies upon the defendant. Although the legislature did not expressly impose the

burden of proving mistake of age upon the defendant I am satisfied that to fulfil the purposes of the *Crimes (Sexual Offences) Act* 1980 sub-section (4) should be so read. In my opinion, therefore, the ground of appeal relied on must fail and the application for leave to appeal against conviction should be dismissed.

Solicitors for the applicant: DW Hanlon and Assoc. Solicitors for the Crown: JM Buckley, solicitor to the DPP.