Tasmania v QRS [2013] TASSC 7

ALEX FOSTER·

I INTRODUCTION

In February 2013 the Tasmanian Supreme Court ruled on the contentious issue of the defence of honest and reasonable mistake as to age in sexual offences with young people. In *Tasmania v QRS* ('*QRS*'),[1] Evans J held that the accused could not rely upon mistake as to age pursuant to s 14 of the *Criminal Code* (Tas) to activate the defence of consent under s 124(3). While the ruling may have been in keeping with the historical interaction of these sections, it runs contrary to the current High Court authority on the construction of such provisions from *CTM v R* ('*CTM*').[2] It also fails to take into account one of the most fundamental presumptions of statutory interpretation – the interpretive principle of legality.

II FACTS

The accused was charged with sexual intercourse with a young person under s 124(1) of the *Criminal Code*.[3] At the time of the offence the accused was aged 17 and the complainant was aged 13. The accused pleaded not guilty and sought to rely on the defence of consent under s 124(3)(a). He argued that he honestly and reasonably believed that the complainant was 15 and, had she in fact been so, her consent would have been a defence to the charge.

III DECISION

The accused was convicted. Evans J held that the defence of mistake of fact under s 14 and the defence of consent under s 124(3) could not operate in combination. His Honour relied upon the clear authority from the earlier Supreme Court decision in *R v McCabe*,[4] based on similar facts, in which Crawford J held that the accused's mistaken belief as to age was irrelevant to establishing guilt. Evans J felt it necessary to follow

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[1] [2013] TASSC 7.

[2] (2008) 236 CLR 440.

[3] *Criminal Code Act* (Tas) Sch 1 ('*Criminal Code*').

[4] *R v McCabe* [1980] Tas R 134.

that decision on the basis of judicial comity and desirability of uniformity in statutory construction, unless the decision was 'clearly wrong'. He did not think this was the case.

In order to reach this conclusion, his Honour had to distinguish the decision of the High Court in *CTM*. There it was held that, on the construction of the equivalent NSW provisions, the defendant could rely on the combination of defences. Evans J acknowledged that this meant that the UK decision in *Prince*,[5] which was relied upon in *McCabe*, was no longer good law. He then went on to conclude that this was not sufficient reason to find that Crawford J's interpretation of the relevant provisions in the *Code* in *McCabe* was 'clearly wrong'.[6]

A *Decision in Prince*

There were two bases for reaching that conclusion. The first was the decision in *Prince* itself. That case established that the starting point when construing sexual offences against young people was that they were offences of strict liability. Such provisions should not be construed so as to allow culpability to depend upon knowledge of the complainant's actual age. The 'act' of having sex with a minor was seen as intrinsically wrong; people who have sex with young girls do so at the risk that they are under age.[7]

In *CTM*, Hayne J examined the decision in *Prince* and concluded that it did not have any bearing on the construction of s 66C *Crimes Act* 1900 (NSW), the equivalent provision to s 124 of the *Code*. The decision in *Prince* 'depended upon the construction given to the relevant provision,'[8] and did not override one of the core principles of criminality which had been conclusively adopted in Australia in *Thomas v The King*[9] – that 'an alleged offender is deemed to have acted under that state of facts which he on good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence.'[10] Therefore, if the state of facts were different to that believed to be in existence by the defendant, he or she would be exonerated. *Prince* did not prevent Hayne J from reading the *Crimes Act* in light of this principle. This had the effect of overruling the strict liability approach in *Prince*. However, as the decision in *McCabe*

[5] *R v Prince* (1875) LR 2 CCR 154.
[6] *QRS* [2013] TASSC 7, [9].
[7] Ibid [10].
[8] *CTM* (2008) 236 CLR 440, [160].
[9] *Thomas v The King* (1937) 59 CLR 279.
[10] *CTM* (2008) 236 CLR 440, [159] citing Sir James Stephen in *R* v *Tolson* (1889) QBD 168, 183.

also relied on a construction of s 124 of the *Code*, Evans J found he could still apply it in this case.[11]

B *The Legislative History of s 124*

The second basis was the fact that the NSW *Crimes Act* considered in *CTM* had a legislative history that differed substantially from the Tasmanian *Code*. While examining that history closely in his judgment, his honour did not specify exactly which aspects were materially different to warrant distinguishing the current case from *CTM*.

Both provisions originated from a UK legislative response to the strict liability approach in *Prince* where provisions were enacted specifically allowing the defence of mistake where the victim was near the age of consent. The relevant sections of the Acts differ in an important respect. In 2003 s 77 of the *Crimes Act* (NSW) was amended to remove the provision allowing for the defence of mistake as to age where the victim was between 14 and 16. This provision was removed in the interests of gender neutrality – previously the section provided an express mistake defence that applied only to heterosexual conduct. The key finding in respect to the *Crimes Act* (NSW) in *CTM* was that by repealing the explicit mention of the mistake of age for the purposes of ending discrimination based on sexual orientation, Parliament did not evince sufficient intention to abrogate the fundamental right to rely on mistake of fact.

Significantly, the Tasmanian legislation restricts the express statutory defence of mistake of fact to a mistaken belief that the victim was at least 17 years old. There has never been an express defence that might operate where the mistake relates to a belief that the complainant was younger than the age of consent. Parliament has amended s 124 twice since *McCabe* and has not acted to change that. In *QRS* Evans J considered this an important indication of Parliament's intent.[12] His Honour refused to apply the reasoning in *CTM* to the *Code*, taking a contrary view that by not addressing it directly Parliament evinced an intention not to include the defence.

This conclusion is difficult to reconcile with the existence of an important principle of statutory interpretation – the principle of legality. The effect of this principle has been expressed in the following terms: 'The principle of legality means that Parliament must squarely confront what it is doing and accept the political costs.'[13] It presumes that statutes are to be read as

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[11] *QRS* [2013] TASSC 7, [9].
[12] Ibid [21].
[13] *R v Secretary of State for Home Department; Ex parte Simms* (2002) 2 AC 115, 131 (Lord Hoffman).

preserving fundamental rights. As a core right available to the accused in a criminal trial, the defence of mistake of fact is not something that should be interpreted as being abrogated by a legislative enactment except by express wording or necessary implication. Evans J did not take into account that there may be multiple reasons why Parliament has not specifically addressed the issue of whether mistake of fact is available as a defence in circumstances other than a belief the complainant was over the age of 17.[14] Legislation is all too often driven by political factors rather than pure policy considerations. Sometimes political compromise is achieved in passing controversial legislation by Parliament remaining silent on one aspect a matter.

Equally, it is possible that Parliament simply did not put its mind to the question of whether mistake of fact should be a defence available in relation to these age-based sexual offence provisions. His Honour noted several anomalies in the onus of proof that occur through a strict reading of other sexual offence provisions. For example, if the defence of mistake as to age is argued pursuant to the general mistake provision in s 14, the burden lies on the prosecution to prove that either that the defendant did not honestly or reasonably hold that mistaken belief; if the defendant seeks to rely on an express mistake defence, the onus rests with him. While His Honour did not acknowledge as much, the fact that these anomalies exist may suggest that Parliament simply did not turn its attention to the question of mistake as to age in a broader context.

In the end, the decision in *Tasmania v QRS* may not matter. On 8 October 2013 the *Criminal Code Amendment (Sexual Offences Against Young People) Act 2013* (Tas) came into effect. The Act seeks to clarify the position in relation to the combination of defences. It explicitly allows the defence of mistake as to age in combination with the similar age consent defences in s 124. The second reading speech for the Bill does not indicate why the matter had not been addressed before.[15] This may support the view that, contrary to the conclusion of Evans J, in reality Parliament had previously neglected to put its mind to the matter of whether mistake of fact should or should not apply to the defence of consent in age-based sexual offences.

IV CONCLUSION

[14] *QRS* [2013] TASSC 7, [21].
[15] Tasmania, *Parliamentary Debates*, Legislative Council, 17 September 2013, 5, (Craig Farrell).

The decision in *QRS* cannot be criticised for its application of previous Tasmanian Supreme Court authority on the construction of ss 124 and 14. Evans J was not satisfied that *McCabe* was clearly wrong. Arguably, however, his Honour may have placed too much emphasis on Parliament's silence as evidence of an intention to abrogate an important right in criminal law. In *CTM* the High Court has delivered a strong statement authority about the fundamental importance of the principle of legality in statutory interpretation. If the court in *QRS* had adopted an interpretive approach to the Tasmanian legislation which aligned with that taken by the High Court, it may have reassessed the correctness of applying *McCabe*.