

# THE HIGH COURT

[2022] IEHC 336

Record No. 2021 3473 P

**BETWEEN**

**C.W.**

**PLAINTIFF**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND, THE ATTORNEY**

**GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Stack delivered on the 1<sup>st</sup> day of June, 2022.**

## **Introduction**

1. In these proceedings, the plaintiff seeks a declaration that the offence of defilement of a child contrary to s.3 of the Criminal Law (Sexual Offences) Act, 2006, as substituted by s.17 of the Criminal Law (Sexual Offences) Act, 2017, is invalid having regard to the provisions of the Constitution, and in particular Article 38.1. Section 3 makes it an offence to engage or attempt to engage in a “sexual act”, as defined in the Act with a child who is under

the age of 17, but subs. 3 provides a defence where the accused proves that he or she was reasonably mistaken that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 17 years. Subs. 5 provides that the standard of proof required to prove that the defendant was reasonably mistaken as to the child's age "*shall be that applicable in civil proceedings.*"

2. While the plenary summons sought a declaration of invalidity in relation to the entire section, at the opening of the hearing, the plaintiff confirmed that the declaration of invalidity was sought only in relation to subs. 5 of s. 3. As a result, the case raises a single, but important issue as to whether it is constitutionally permissible to impose a legal burden on an accused in a criminal trial, as opposed to an evidential burden only. I am using those terms in the sense in which they are used in chapter 2 of McGrath, *Evidence*, (2<sup>nd</sup> Ed., Round Hall, 2014) and adopted by O'Malley J. in *The People (Director of Public Prosecutions) v. Forsey* [2019] 2 I.R. 417, where (at paras. 124 and 126) she stated:

*"The 'legal burden' is a burden of proof 'properly so called' and is the burden fixed by law on a party to satisfy the tribunal of fact as to the existence or non-existence of a fact or matter. Where the legal burden is borne by a party in relation to an issue, he or she is required to persuade the tribunal of fact to the criminal or civil standard of proof, as appropriate.*

...

*An 'evidential burden' is the burden borne by a party who contends that a particular issue should be put before the decision-maker. It is discharged by adducing (or by pointing to relevant evidence adduced by the other party) sufficient evidence for that purpose, to the point that the trial judge is satisfied that it should be left for consideration."*

3. In practice, if the section provided that the accused should only discharge an evidential burden, he or she would be acquitted if the jury had a reasonable doubt as to whether or not the accused was reasonably mistaken as to the child complainant's age, but because subs. 5 provides that the accused must establish to the civil standard that he or she was mistaken, the jury may convict even if they entertain a reasonable doubt, or even if they think it is as likely as not that the accused was reasonably mistaken as to the child complainant's age.

4. Section 3 of the 2006 Act was enacted in response to the Supreme Court decision in *C.C. v. Ireland* [2006] 4 I.R. 1, where the Supreme Court declared the offence of unlawful carnal knowledge of a female under 15 years of age contrary to s. 1 (1) of the Criminal Law (Amendment) Act, 1935, invalid because it wholly abrogated the right of an accused not to be convicted of a true criminal offence in the absence of any proof of culpability. The judgment is based on the old maxim, very recently referred to by Charleton J. in *Abdi v. Director of Public Prosecutions* [2022] IESC 24, where he stated (at para. 50):

*“[C]riminal liability is constructed on the basis of an external element coupled with a mental element, as in the old maxim in Latin actus reus non facit reum nisi mens sit rea, meaning that the act is not culpable unless the mind is guilty.”*

The State defendants in this case placed great reliance on an interpretation of the “*reasonable mistake*” defence as relating to *mens rea* and I return to that issue below, but suffice it to say at this point that the concept of the “*guilty mind*”, while it overlaps to a considerable degree with *mens rea*, is not exactly equivalent and the defence was introduced so as to satisfy the constitutional requirement that criminal liability could not be imposed where no culpability could be proven.

5. Section 3 of the 2006 Act, as substituted by s. 17 of the 2017 Act, provides as follows:

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

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

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

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

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

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

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

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

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

*(6) Subject to subsection (8), it shall not be a defence to proceedings for an offence under this section for the defendant to prove that the child against whom the offence is alleged to have been committed consented to the sexual act of which the offence consisted.*

*(7) No proceedings for an offence under this section against a child under the age of 17 years shall be brought except by, or with the consent of, the Director of Public Prosecutions.*

*(8) Where, in proceedings for an offence under this section against a child who at the time of the alleged commission of the offence had attained the age of 15 years but was under the age of 17 years, it shall be a defence that the child consented to the sexual act of which the offence consisted where the defendant—*

*(a) is younger or less than 2 years older than the child,*

*(b) was not, at the time of the alleged commission of the offence, a person in authority in respect of the child, and*

*(c) was not, at the time of the alleged commission of the offence, in a relationship with the child that was intimidatory or exploitative of the child.”*

**6.** Section 3, as substituted in 2017, made a number of significant changes from the provision as originally enacted. It altered the maximum term of imprisonment on conviction from a term of five years on a first offence and ten years on a subsequent offence for a person other than a “*person in authority*”, to a maximum term of imprisonment of seven years in either case. It also altered the nature of the defence from one of “*honest belief*” to that of “*reasonable mistake*”, a recalibration of the defence which placed a greater emphasis on the objective reasonableness of the accused’s state of mind.

7. Most importantly for present purposes, however, subs. 5 was inserted so as to make it clear that, if invoking the “*reasonable mistake*” defence provided for in subs. 3, the accused would have to prove to the standard applicable to civil proceedings that he was in fact reasonably mistaken as to the age of the child complainant.

8. The plaintiff was convicted of an offence contrary to s. 3 after a trial by jury and has been sentenced to a term of one year and ten months, which is being served concurrently with another sentence and for which his release date is in 2025. It appears from the statement of claim that he was born in early 1999, and the complainant was born in mid-2002. (I will not state their precise dates of birth in case that should serve to identify either of them.) The events giving rise to the trial took place in mid-June, 2018 at which time the complainant was more than 15 years and 10 months old, and the plaintiff was 19 years and four months old.

9. Although the respective ages of the complainant and the plaintiff were stressed in submissions on his behalf, implicitly perhaps for the purpose of indicating that the age gap between them was not that large, that the plaintiff was not that old, or that the complainant was not that young, I would reject any attempt to imply that the commission by a person of the plaintiff’s age of an offence contrary to s. 3, was not that serious. As discussed further below, the Oireachtas enjoys a margin of appreciation in the imposition of substantive criminal liability and it has provided in s. 3(8) that it shall be a defence that the child consented to the sexual act of which the offence consisted where the defendant “*is younger or less than 2 years older than the child....*” This is the so-called “*Romeo and Juliet*” defence designed to exempt consensual sexual activity by young people who might be regarded as peers. In the context of the choice by the Oireachtas of an age gap of two years, an age gap of three and a half years is very significant.

10. At the hearing of this challenge, both sides made some comment on the evidence in the case, with the plaintiff alleging that given the standard of proof he had to meet, he had no

hope of acquittal and that the only issue raised against him was the evidence of the complainant that she had actually told him on the night of the offence that she was 15 years of age, whereas the defendants referred to other evidence which they said was material to the issue of whether the accused believed that the complainant was or was not under age.

**11.** In my view, it would be completely inappropriate for me to read the transcripts which have been provided for me and attempt to second guess the reasons why the jury convicted the plaintiff, the necessary corollary being that they did not believe that he had met the threshold for establishing the defence of reasonable mistake. They may have believed that he was well below that threshold and have had no doubts at all, or they may have had some doubt but, on balance, thought that the complainant was more credible. They may even, given that the onus was on the accused and the standard was the balance of probabilities, not have been able to decide the matter one way or another, in which case they may have come to the conclusion that the accused failed to discharge the burden on him. It is not possible for me to trawl through the transcript and try to imagine which of these possibilities occurred, nor is it necessary for me to do so. The kernel of the case is that any one of these possibilities could have occurred and could have led to the conviction.

**12.** It is the possibility that the jury may have convicted even though they may have had a reasonable doubt in their minds as to whether the accused had been reasonably mistaken as to the complainant's age, and therefore a reasonable doubt as to his guilt, that forms the entire basis of the constitutional challenge now brought by the plaintiff.

**13.** The starting point of any consideration of the constitutional validity of a provision of a post-1937 Act of the Oireachtas is of course the presumption of constitutionality, which would require me to interpret subs. 5, insofar as it is possible to do so without doing violence to the words of the section, in a manner which is compatible with the requirements of the Constitution.

14. However, it does not seem that subs. 5 is capable of an interpretation other than that the accused must satisfy the jury on the balance of probabilities that he was reasonably mistaken that the complainant had attained the age of seventeen years. In expressly providing that the standard of proof required to prove that an accused is reasonably mistaken that the child had attained the age of seventeen years is that “*applicable to civil proceedings*”, it seems that the Oireachtas made a clear choice and required that any accused wishing to avail of the defence must discharge the onus on him on the balance of probabilities.

15. The plaintiff’s counsel did not engage in any detailed exposition of the wording of the subsection at the hearing, but given its clarity, I do not think they had to. Similarly, counsel for the defendants did not proffer any alternative interpretation of subs. 5, which I do not find surprising, as it is difficult to see what alternative interpretation could be put on it. In my view, counsel on both sides implicitly recognised the reality that the subsection is quite clear and admits of no interpretation other than that the standard of proof is that applicable to civil proceedings, i.e., the balance of probabilities.

16. Accordingly, if the Constitution requires that, in availing of the “*reasonable mistake*” defence, an accused should only have to establish a reasonable doubt in the minds of the jury as to whether the defence in fact applies to him, then subs. 5 must be declared invalid. There is no alternative interpretation which can be put on it, so as to save it from a declaration of invalidity.

### **The constitutional protection of the presumption of innocence**

17. The issue raised in these proceedings has been the subject of a recent judgment of the Supreme Court in *The People (Director of Public Prosecutions) v. Forsey* [2019] 2 I.R. 417 which is based in large part on the analysis of the constitutional status of the presumption of



innocence and its ramifications for defences to criminal liability as set out in *The People (Director of Public Prosecutions) v. Heffernan* [2017] 1 I.R. 82, which itself endorsed a judgment of the Court of Appeal in *The People (Director of Public Prosecutions) v. Smyth* [2010] IECCA 34. The essential thrust of these cases is that, while it is permissible to have a reverse onus provision in relation to a constituent element of a criminal offence, particularly where the issue of fact to be established is something within the accused's peculiar knowledge, the standard which may be imposed on the accused in those circumstances is an evidential one, and not a legal one.

**18.** *Smyth, Forsey and Heffernan* were all cases involving statutory interpretation and the presumption of constitutionality, where the courts interpreted statutes in a particular way so as to accord with the requirements of Article 38.1. It is useful to set out the essential elements of the reasoning in those cases before applying them to the provision impugned here.

**19.** *Smyth* was the first in time and concerned the offence of possession of controlled drugs contrary to s. 15 of the Misuse of Drugs Act, 1977. The question before the Court of Criminal Appeal was whether the trial judge had been correct in his charge to the jury in that he had not instructed the jury that the accused, in order to rely on the defence provided for in s. 29 (2) of the 1977 Act, had to do more than demonstrate a reasonable doubt, on the evidence, that the defence was applicable to him. Section 29 (2) provided that it was a defence, on a charge contrary to s.15, for an accused to show that he did not know and had no reasonable grounds for suspecting that what he had in his possession was a controlled drug or that he was in possession of a controlled drug. Unlike subs. 5, which is in issue here, the section gave no guidance as to the burden on the accused. The question, therefore, was what onus was on the defendant given that the statute required him "*to show*" that the statutory defence applied to them.

20. At para. 19, Charleton J. (*per curiam*) said that the proper construction of s. 29 (2) derived from Article 38.1 of the Constitution. At para. 20, he continued:

*“The fundamental principle of our criminal justice system is that an accused should not be convicted unless it is proven beyond reasonable doubt that the accused committed the offence. ... It is a matter for the Oireachtas to decide whether on a particular element of the offence an evidential burden of proof should be cast on an accused person. ... Reasons of policy may perhaps require that any reversed element of proof cast on the accused should be discharged as a probability. That should either be stated in the legislation or be a matter of necessary inference therefrom. The construction of a criminal statute requires the court to presume that the core elements of an offence must be proven beyond reasonable doubt; otherwise the accused must be acquitted. A special defence, beyond the core elements of the offence, may carry a different burden; insanity and diminished responsibility are examples of such a defence which casts a probability burden on the accused. Where, however, in relation to an element of the offence itself, as opposed to a defence, a burden is cast upon the accused, the necessary inference that the accused must discharge that burden on the balance of probability is not easily made. The Court notes that bearing the burden of proving a defence as a probability could have the effect that in respect of an element of the offence an accused person might raise a doubt as to his guilt, but not establish it as a probability. This might lead to a situation where the charge was not proven as to each element of the offence beyond reasonable doubt, but nonetheless the accused could be convicted. That would not be right. Proof of a guilty mind is integral to proof of a true criminal offence, in distinction to a regulatory offence.”*

21. As there was no specific provision, such as is contained in subs. 5, that a person accused of an offence contrary to s. 29 of the 1977 Act had to discharge the onus on him

under s. 29(2) to the standard of the balance of probabilities, the court there applied a presumption that, in respect of the elements of an offence, proof of which was necessary for a conviction, only an evidential burden could be imposed as otherwise an accused could be convicted without proof of commission of the offence beyond a reasonable doubt, which would be a breach of Article 38.1.

**22.** In the next case, *Heffernan*, the Supreme Court had to consider whether the defence of diminished responsibility introduced by s. 6 of the Criminal Law (Insanity) Act, 2006 required the accused to discharge a legal burden, or merely an evidential one. In that case, the trial judge had refused an application by the accused that the jury should be told that the legal burden cast on him under the 2006 Act was only to raise a reasonable doubt. The accused was convicted and appealed his conviction. The Court of Appeal had held in that case that the new defence of diminished responsibility created by s. 6 of the 2006 Act was directly referable to the criteria for establishing insanity, and that it would be absurd and unworkable if the two sections carried differing interpretations of the burden or standard of proof on an accused in order to rely on such defence.

**23.** In the Supreme Court, O'Malley J. held that Article 38.1 encompasses the presumption of innocence, but this does not mean that an accused person could never be subjected to a burden of proof on some issue in the trial. If the issue did not relate to the constituent elements of the offence, then the presumption of innocence did not apply. Although the defence of diminished responsibility is explicitly referred to as such in s. 6 of the 2006 Act, O'Malley J. referred with apparent approval to the judgment of Lord Steyn in *R. v. Lambert* [2002] 2 A.C. 545 before stating that this issue should be considered by reference to the substance of the issue under consideration rather than on, for example, the designation by statute of the issue as one relating to a defence, stating (at para. 85):

*“What matters is the substance rather than the drafting technique adopted in a particular instance.”*

24. Charleton J. was of the same view, stating (at para. 22): “[i]n criminal law, the construction of offences and the defences to these are very often mixed up.”

25. In *Heffernan*, therefore, the Supreme Court looked at the substance of the offence with which the accused was charged and found that the statutory defence of diminished responsibility introduced by s. 6 of the 2006 Act was an excusatory, mitigatory defence, and not a constituent element of the offence of murder. At para. 88, O’Malley J. stated that the general position was that both the *actus reus* and *mens rea* must be proved beyond a reasonable doubt whereas diminished responsibility created a new, mitigatory defence that reduced the consequences of a proven offence. The elements of the crime of murder remained as they were, and there was no effect on the common law presumption of sanity or on the statutory presumption in s. 4 (2) of the Criminal Justice Act, 1964, that an accused person is presumed to intend the natural and probable consequences of his conduct. At para. 90, O’Malley J. stated that the placing of a burden on an accused to prove diminished responsibility to the civil standard would be justifiable, in the same manner as in the defence of insanity because of the difficulties the prosecution face in proving beyond a reasonable doubt that the accused did not suffer from diminished responsibility.

26. While Charleton J. approached the matter slightly differently, regarding the defences of insanity and diminished responsibility as amounting to a statement by the accused that *“despite having perpetrated the external elements of a homicide, he or she is seriously ill,”* his judgment is similarly based on the fact that the issues to be proven in availing of the defence of diminished responsibility are not ones going to proof of murder but relate to the mental capacity of the individual accused so as to establish that, although he has committed the offence, he should be excused from criminal liability.

27. *Heffernan* is, therefore, authority for the proposition that the presumption of innocence applies to proof of the offence charged and, in considering whether or not the presumption applies to any particular issue, a court will look at the substance of an offence and its constituent elements, and not any drafting techniques which might describe an issue of fact in terms of an available defence, as has been done in subs. 5.

28. The leading case on the issue in this challenge is *Forsey*, which concerned the presumption contained in s. 4 of the Prevention of Corruption (Amendment) Act, 2001, dealing with the presumption of corrupt intent. The Supreme Court had occasion to reiterate the general position as to the constitutional status of the presumption of innocence, and its meaning insofar as the standard of proof to be imposed on an accused where a reverse onus provision applied in relation to a constituent element of the offence for which he had been charged.

29. At paras. 173 and 174 O'Malley J stated:

*“There is no doubt as to the constitutional status of the presumption of innocence, and the fundamental nature of the concomitant principle that it is for the prosecution to prove the guilt of an accused person beyond reasonable doubt. Equally, it is clear that a reverse burden of proof that imposes an obligation on the accused to disprove a core element of the offence, that would otherwise fall to be proven positively by the prosecution, is capable of amounting to a violation of the presumption of innocence and would, therefore, violate the guarantee of a trial in due course of law protected by Article 38.1. The development of this line of constitutional jurisprudence differs from that in the United Kingdom, where, before the enactment of the Human Rights Act 1998, the courts were constrained by the doctrine of parliamentary supremacy to accept that the *Woolmington v. The Director of Public Prosecutions* [1935] A.C. 462 principle did not apply if Parliament had appeared to intend otherwise.*

*In considering whether a particular statutory provision breaches the presumption of innocence, it must of course be borne in mind that different provisions have different effects. It may be that a legislative provision is intended to establish a special defence or exception, the burden of proof in relation to which is cast upon an accused person who wishes to avail of it. The People (Director of Public Prosecutions) v. Heffernan [2017] IESC 5, [2017] 1 I.R. 82 is an example of such a provision, and this court found that there was no detrimental impact on the presumption of innocence in circumstances where the defence could only arise if the jury accepted that the prosecution had proved the elements of murder in the normal way. However, it is noted in that case that the distinction between a component of the offence and a statutory exception or excuse might sometimes be difficult to discern, and that what matters is the substance rather than the drafting technique.”*

**30.** It therefore seems that it is now quite clear that Article 38.1 of the Constitution, which protects the right of an accused to a trial in due course of law of a criminal offence, means that, at least in relation to the constituent elements of an offence, a reverse onus provision such as that in subs. 5 can only place an onus on the accused to create a reasonable doubt in the minds of the jury as to his or her guilt. The question then is whether subs. 5 can be regarded as a “special defence or exception”, as referred to in *Forsey* and of which *Heffernan* provides an example, or whether subs. 5 relates to a core element of the offence of defilement of a child contrary to section 3.

**31.** When reduced to this question, it seems to me that the answer is relatively clear. Section 3 (1), as substituted, provides that a person who “*engages in a sexual act with a child who is under the age of 17 years shall be guilty of an offence.*” As a general proposition, it is not unlawful to engage in sexual intercourse, which is one of the acts included within the definition of “*sexual act*” in s. 1 of the 2006 Act and which was the conduct material to the

plaintiff's conviction. The core unlawfulness depends entirely on the fact that the child with whom the accused is engaging in a sexual act is "*under the age of 17 years*". Without proof of this fact, no conviction can be entered.

**32.** Section 3 (3) provides that "*[i]t shall be a defence to proceedings for an offence under this section for the defendant to prove that he or she was reasonably mistaken that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 17 years.*" This is referred to as a defence, but it is clear from the decisions in *Heffernan* and *Forsey* that the mere fact that the statute refers to it as such does not prevent the issue as to whether the accused was reasonably mistaken as to the age of the child in question from being a core element of the offence.

**33.** In their submissions, the State defendants relied heavily on the proposition that subss. 3 to 5 did not relate to *mens rea* at all but created a "*due diligence*" type defence. This argument was based principally on the judgment of Dickson J. for the Canadian Supreme Court in *R. v. City of Sault Ste. Marie* (1978) 2 S.C.R. 1299, which was approved in the dissenting judgment of Keane J. (as he then was) in *Shannon Regional Fisheries Board v. Cavan County Council* [1996] 3 I.R. 267, and which was also referred to by the Supreme Court in *C.C.* As explained by Hardiman J. in the latter case (at para. 16), Dickson J. had argued for a tripartite division of offences into those requiring *mens rea* and those of absolute liability, "*where it is not open to the accused to exculpate himself by showing that he was free of fault*" and an intermediate category in which it was unnecessary for the prosecution to prove *mens rea* but it was open to the defendant to avoid liability by proving that he took all reasonable care. This type of defence was described by Dickson J. in the following terms:

*"The defence would be available if the accused reasonably believed in a mistaken set of facts which if true would render the act or omission innocent or if he took all reasonable steps to avoid the particular event."*

**34.** It is clear from the judgment of Dickson J. in *R. v. City of Sault Ste. Marie* that he did not intend to in any way dilute or erode what that court clearly regarded as a basic principle of criminal law which was expressed as follows (at pp. 1302 to 1303):

“The doctrine of the guilty mind expressed in terms of intention or recklessness, but not negligence, is at the foundation of the law of crimes. In the case of true crimes there is a presumption that a person should not be held liable for the wrongfulness of his act if that act is without *mens rea*: (*R. v. Prince* (1875) L.R. 2 C.C.R. 154; *R. v. Tolson* (1889) 23 Q.B.D. 168 ... Blackstone made the point over two hundred years ago in words still apt: ‘...to constitute a crime against human law, there must be first a vicious will, and secondly, an unlawful act consequent upon such vicious will...’ I would emphasise at the outset that nothing in the discussion which follows is intended to dilute or erode that basic principle.” [Emphasis added.]

**35.** That case was relied upon in *C.C.* for the proposition that an offence of absolute liability which provided for no exculpatory defence of any kind was regarded with disfavour by the Canadian Supreme Court even in the case of regulatory offences: see para. 17 of *C.C.* Hardiman J. did not explicitly approve the classification devised by Dickson J. nor did he express any view on precisely how culpability should be established in a trial for an offence contrary to s. 1(1) of the 1935 Act.

**36.** The *ratio* of *C.C.* was that a “*guilty mind*”, that is, some form of moral culpability, was a necessary element for the imposition of criminal liability in the case of a serious criminal offence such as was contained in s. 1(1) of the 1935 Act.

**37.** It is clear from the legislative history of the “*reasonable mistake*” defence, now contained in s. 3(3) of the 2006 Act, that it is an amendment of a defence originally introduced so as to meet the constitutional requirement identified by the Supreme Court in *C.C.* that the offence could not provide for those without culpability in relation to the key



element of the offence, that is, the age of the child, and therefore I find it difficult to see how the “*reasonable mistake*” defence, when it is invoked, is not a critical component in establishing the guilt of the accused.

**38.** It is my view that it follows from the judgment in *C.C.* that the defence of “*reasonable mistake*” is a provision relating to the necessary element of the offence of defilement. As such, the presumption of innocence applies where the defence is invoked so as to require the prosecution to prove its case (that the accused did not make a reasonable mistake as to the age of the complainant) beyond a reasonable doubt. It is therefore constitutionally impermissible to impose more than an evidential burden on an accused who wishes to invoke that defence and the imposition on the accused of a standard of proof to the civil standard, i.e., on the balance of probabilities, is contrary to Article 38.1.

**Whether the requirement in Article 38.1 that a criminal trial be “*in due course of law*” is subject to proportionate restriction**

**39.** Apart from the submission that the reasonable mistake defence was not a core constituent element of the offence such that no breach of Article 38.1 was occasioned by placing a legal burden on an accused, the State defendants, in their submissions, focussed heavily on the proportionality of subs. 5 in light of the objectives which it pursued, while the plaintiff asserted both that the imposition of a civil standard of proof was disproportionate and, in reply, also submitted that the proportionality principle did not apply at all.

**40.** On this issue, counsel for the plaintiff referred me to para. 7.1.52 of *Kelly: The Irish Constitution*, 5<sup>th</sup> ed., 2018, where the authors question whether the doctrine of proportionality has any application to the right pursuant to Article 38.1 to trial in due course of law. This paragraph states:

*“The Heaney test has been held not to apply to certain rights, such as equality, and the right to trial in due course of law.... Courts have not been entirely consistent on trial in due course of law; in Re NIB (No. 1), the Supreme Court held that proportionality should not apply to the right to silence as an element of trial in due course of law, which Costello J. had subjected to proportionality analysis in Heaney.”*

**41.** I am not sure that the point relating to inconsistency is well founded. In *Re National Irish Bank Ltd. (No. 1)* [1999] 3 I.R. 145, Barrington J. stated (*per curiam*) (at p. 180):

*“But it is doubtful if the principle of proportionality – so important in other branches of constitutional law – can have any useful application here. A criminal trial is conducted ‘in due course of law’ or ‘with due process of law’ or it is not. The question then arises would a trial, at which a confession obtained from the accused under penal sanction imposed by statute, was admitted in evidence against the accused, be a trial in due course of law?”*

Barrington J. then went on to specifically approve the Supreme Court decision in *Heaney v. Ireland* [1996] 1 I.R. 580 *“insofar as that case decided that there may be circumstances in which the right of the citizen to remain silent may have to yield to the right of the State authorities to obtain information,”* which seems to me to be a clear endorsement of the application of the principle of proportionality to the right to silence, but which does not disturb the principle that the overall requirement that a trial must be fair and conducted in due course of law is not one which is subject to qualification.

**42.** It must be remembered that, what was in issue in *Heaney* was whether a failure to answer particular questions while in custody could itself give rise to the commission of a minor criminal offence (the plaintiffs there having refused to answer and having been

convicted of an offence contrary to s. 52 of the Offences Against the State Act, 1939, and sentenced to the maximum term of imprisonment of six months.) As O’Flaherty J. pointed out in giving the judgment of the Supreme Court, there was no question of the trial for that offence being said to be unfair, and it therefore dealt with the case by reference to Article 40.6.1<sup>o</sup>, rather than Article 38.1. Article 40.6.1<sup>o</sup> is of course explicitly expressed to be subject to certain public interests, including public order and morality and the authority of the State. In this it is similar to its counterpart in the European Convention on Human Rights, Article 10, which provides in paragraph 2 for restrictions on freedom of expression in pursuance of certain legitimate public interests including “*the prevention of disorder or crime*”.

**43.** There was no finding in *Re National Irish Bank (No. 1)* that the right to silence was not subject to the doctrine of proportionality, which was the issue in *Heaney*. Instead, it was held that the Constitution never permitted the admission at a criminal trial of a forced or involuntary confession as to do so would breach the requirement of Article 38.1 that the trial would be fair.

**44.** The focus of the respective courts therefore appears to me to have been somewhat different, and the subsequent case law dealing with admissibility, inferences, and rules of evidence, and so on is based on an approach whereby proportionality is used as a tool to assess the constitutionality of a particular restriction on the common law presumptions and other rules of evidence as they relate to criminal trials. However, none of the cases go so far as to say that the fundamental fairness of the trial as a whole can be compromised, and the authorities proceed on the assumption that, in order to satisfy Article 38.1, the trial itself must be fair. Article 6 ECHR similarly provides for a fair trial and, in paragraph 3, sets out minimum rights of an accused which are not subject to restriction in the public interest.

45. The question then is whether the presumption of innocence, that is, the requirement that the prosecution prove guilt beyond a reasonable doubt, is a component part of a fair trial which can be legitimately restricted without compromising the overall fairness of the trial or whether it is so essential to that fairness that it cannot be subject to statutory modification.

46. On this issue, *Hardy v. Ireland* [1994] 2 I.R. 550 seems to be directly on point.

There, a majority of the Supreme Court held that an accused charged with an offence contrary to s. 4 (1) of the Explosive Substances Act, 1883 bore only an evidential burden of showing that he had the explosive substance in his possession or under his control for a lawful object. The concluding comments of Egan J., who gave the judgment for the majority (O’Flaherty and Blayney J.J. concurring) were as follows:

*“I believe that this analysis complies with our well-established criminal law jurisprudence in regard to having trials in due course of law. That constitutional requirement applies whether the offence is made an offence under a pre- or post-constitutional enactment. It protects the presumption of innocence; it requires that the prosecution should prove its case beyond all reasonable doubt; but it does not prohibit that, in the course of the case, once certain facts are established, inferences may not be drawn from those facts and I include in that the entitlement to do this by way even of documentary evidence. What is kept in place, however, is the essential requirement that at the end of the trial and before a verdict can be entered the prosecution must show that it has proved its case beyond all reasonable doubt.”*

[Emphasis added.]

47. In my view, that statement indicates that the presumption of innocence is of such fundamental importance to the fairness of a trial that it is not subject to proportionate restriction as are individual rules of evidence relating to admissibility, the drawing of inferences or reverse onus provisions. The requirement that the prosecution prove guilt

beyond all reasonable doubt is an essential requirement of any trial in due course of law and therefore abrogation of it must be regarded as a breach of Article 38.1. Put simply, a trial which permits conviction where there is a reasonable doubt as to the guilt of the accused is not a fair trial. Of course, *Hardy* was decided over a year before the High Court decision in *Heaney*, which is generally regarded as the introduction of the proportionality principle into Irish constitutional law, but it is difficult to interpret the reference to “*the essential requirement*” of proof of guilt beyond a reasonable doubt as anything other than a statement that all trials, to be fair, must require that proof.

**48.** In my view, this conclusion also follows from the decision of the Court of Appeal in *Smyth* and the decision of the Supreme Court in *Forsey*, where the issue was not considered from the point of view of proportionality but rather from the fundamental question of whether the presumption of innocence would be breached if the statutory provision in question were interpreted as placing an onus on the accused to prove a particular issue to the civil standard. As O’Malley J. stated in *Forsey* (at para. 176), if a burden in respect of an essential element of the offence was transferred and if the accused was required to prove that the element did not exist, that could be an inroad into the presumption of innocence, since the accused person might be convicted if he or she could not positively prove that the element is absent.

**49.** Such a provision was distinguished by O’Malley J. from provisions relating to rational inferences from proven facts and admissibility of evidence, which she evidently regarded as acceptable (see para. 175).

**50.** In my view, the decisions in *Hardy*, *Smyth*, *Heffernan* and *Forsey* are all to the same effect: the constituent elements of the offence must always be proven beyond a reasonable doubt. And as subs. 3 is necessary to satisfy the constitutional imperative identified in *C.C.*, that criminal liability can only be imposed where there is moral culpability, then the imposition in subsection 5 of a civil standard of proof places a legal burden on an accused on

an issue which is central to his guilt and is therefore a breach of the presumption of innocence and cannot be justified.

51. In coming to this conclusion, I note that concern was expressed by Lord Steyn in *R. v. Lambert* (at para. 32) as to the extent to which Parliament had “*frequently and in an arbitrary and indiscriminate manner made inroads on the basic presumption of innocence.*” He stated that it had been shown that no fewer than 40% of the offences triable in the Crown Court appeared by the mid-1990’s to have violated the principle and he cited the 1972 Report of the Criminal Law Revision Committee, 11<sup>th</sup> Report, Evidence (General) (1972) (Cmnd 4991), para. 140 where it had been observed that “*we are strongly of the opinion that, both on principle and for the sake of clarity and convenience in practice, burdens on the defence should be evidential only.*”

52. Lord Steyn also referred (at para. 34) to a passage from the judgment of Sachs J. of the South African Constitutional Court in *State v. Coetzee* [1997] 2 LRC 593, para. 220 at 672, which had previously found favour with Lord Bingham in *McIntosh v. Lord Advocate* [2001] 3 WLR 107 and which was in the following terms:

*“There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book... Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system.*

*Reference to the prevalence and severity of a certain crime therefore does not add*

*anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption ... the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.”*

**53.** That statement by Sachs J., interpreted in light of the potential application of the doctrine of proportionality is a statement that there can, in reality, be no legitimate justification for an outcome where an innocent accused might be convicted of an offence. The proportionality principle applies where the right in question is one which is subject to legitimate restriction in the interests of what the Constitution would refer to as “*the common good*”, ie., a public interest of some kind. However, as stated by Sachs J., it is difficult to identify the public interest in an unsafe conviction, which would only undermine public confidence in the criminal justice system.

**54.** Lord Steyn, of course, then went on to refer to the judgment of the European Court of Human Rights in *Salabiaku v. France* (1988) 13 EHRR 379, 388, at para. 28, where it was held that presumptions of law or fact were permissible, but contracting states were required to remain within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. He therefore held that proportionality applied and went on, as part of the majority, to find that that aspect of the proportionality test which required the legislature to choose the means which was least restrictive of the right required him to interpret the provisions of the 1971 Act as requiring the accused only to discharge an evidential rather than a legal burden.

55. The majority of the House of Lords therefore reached their conclusions on the issue of whether the burden on an accused in a reverse onus provision is legal or evidential from the point of view of proportionality.

56. However, proportionality did not figure in *Hardy* or *Forsey*, where the prospect of any inroad on the presumption of innocence and the requirement of the prosecution to prove guilt was rejected as unacceptable.

57. I acknowledge of course that in *O'Leary v. Attorney General* [1993] 1 I.R. 102, at 110-111, Costello J. (as he then was) indicated that any infringement of the presumption of innocence by the placing of a legal burden on the accused might be justifiable and he referred in his discussion to the fact that the European Convention on Human Rights had been construed as permitting certain restrictions on the presumption. He referred on this point to *X. v. United Kingdom* (appln. 5124/71) which was a reverse onus case, but I have not been able to locate a copy of that decision and it is not clear that it imposed a legal burden on the accused as opposed to an evidential one. It is clear, I think, from *Smyth* and *Forsey* that a reverse onus provision on an issue of fact within the accused's particular knowledge, such as his state of mind or his possession of a licence or lawful authority to commit an act which would otherwise be unlawful, is not repugnant to the Constitution, provided he does not have to discharge a legal burden on that issue. In any event, Costello J. ultimately did not decide that issue in *O'Leary* and his statement is therefore *obiter*.

58. Even if that statement had been part of the *ratio*, the Supreme Court authorities of *Heffernan* and *Forsey* have established as a matter of constitutional law that Article 38.1 does not permit the imposition of a legal burden on an accused in relation to a core element of the offence and these cases were all delivered recently, and therefore at a time when the doctrine of proportionality had become well-established as an analytical tool in Irish constitutional law. It is notable that, in *Forsey*, the suggestion that the prevention of corruption was of such



public importance that the provision in question should be construed as requiring an accused to discharge a legal burden was rejected on the basis that such an argument could be made in relation to any serious criminal offence. This seems to be a rejection of the proposition that justification in the public interest can be advanced so as to dilute the presumption of innocence.

**59.** It is my view, therefore, that proportionality cannot be applied so as to dilute the obligation on the prosecution to prove beyond reasonable doubt all essential elements of an offence contrary to s. 3 of the Criminal Law (Sexual Offences) Act, 2006, that is, the offence of defilement of a child. As subs. 5 is incapable of interpretation so as to provide that the accused bears an evidential, as opposed to a legal burden, it is invalid as being contrary to Article 38.1 of the Constitution.

**60.** However, in case I am wrong in my conclusions on the applicability of proportionality, I propose to consider the arguments made by the State defendants on this basis in any event.

### **Consideration of the State's arguments on proportionality**

**61.** The State defendants relied heavily on the public policy in protecting children as a justification for the dilution of the presumption of innocence in offences contrary to s. 3 of the 2006 Act.

**62.** It goes without saying that a public policy of protecting children from sexual predators or indeed sexual activity at an age where they lack sufficient maturity to judge for themselves the desirability of such activity and to assess its possible consequences for them is not only legitimate, but the formulation of such policy and the steps to be taken to effect it are matters for the Oireachtas. However, the identification of legitimate policy which might

justify a restriction of fundamental rights is not in itself sufficient to satisfy the requirements of proportionality. The judgment of Costello J. in *Heaney*, and his adoption (at p. 607) of the definition of proportionality set out by the Canadian Supreme Court in *Chaulk v. R.* [1990] 3 S.C.R. 1303, 1335-1336, has stood the test of time. It is in the following terms:

*“The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:*

*(a) be ‘rationally connected’ to the objective and not be arbitrary, unfair or based on irrational considerations;*

*(b) impair the right or freedom in question as ‘little as possible’; and*

*(c) be such that their effects on rights are proportional to the objective.”*

**63.** The analysis of provisions similar to subs. 5 by the Canadian Supreme Court and the House of Lords in *R. v. Oakes* [1986] 1 S.C.R. 103, and *R. v. Lambert* [2002] 2 A.C. 545, both of which concern possession of controlled drugs, demonstrated clearly that the putting forward of a justification in terms of a legitimate public policy is far from sufficient to satisfy the test of proportionality.

**64.** This is in any event clear from the test as approved in *Heaney*, from which it is evident that the identification of a legitimate social policy which is said to justify the restriction on a fundamental right is only the starting point of the proportionality analysis.

**65.** In *Lambert*, the House of Lords accepted that difficulties in proving the state of mind of the accused could justify a reverse onus clause. However, they did not accept that a reverse onus provision could impose a legal burden on the accused. As Lord Steyn said, at para. 37, the burden was on the State to show that the legislative means adopted were not more than was necessary. The legislature has a choice as to the nature of the burden to be placed on an

accused. In line, therefore, with the requirement to restrict the rights of the accused as little as possible, the majority of the House of Lords read the provision as imposing an evidential burden only on the accused.

**66.** Similarly, in *R. v. Oakes* [1986] 1 R.C.S. 103, Dickson C.J., at para. 70, set out the requirements for the proportionality test required by s. 1 of the Canadian Charter of Rights and Freedoms. He stated that:

1. the provision must be carefully designed to achieve the objective. It must not be arbitrary, unfair or based on irrational considerations. In short, it must be rationally connected to the objective.
2. it should impair the right or freedom as little as possible.
3. there must be a proportionality between the effects of measures responsible for limiting the right or freedom and the objective which has been identified as of “sufficient importance”.

Application of the third leg of the test must, he stated, go further than looking at the general effects and must look at the nature of the right violated, and the extent of the violation, and the degree to which the measures entrench on integral principles of a free and democratic society. He commented that even if the objective was of sufficient importance and the first two elements of proportionality were satisfied, it was still possible that the provision might not be justified.

**67.** The provision at issue in *Oakes* does not provide an exact analogy for subs. 5, as s. 8 of the Narcotic Control Act, R.S.C. 1970, which was under consideration in *Oakes*, provided that if an accused was found to be in possession of a narcotic, he was presumed to be in possession of it for the purposes of trafficking. It was open to him to establish that he had it for purposes other than those of trafficking, but the case turned on whether it could be

rationally inferred from proof of the fact of possession of narcotics, which might, in any individual case, be in quite small quantities, that that possession was for the purposes of trafficking. The case therefore falls within one of those types of provisions which seek to draw inferences from a proven fact, which have been accepted in this jurisdiction in cases such as *Hardy* and *O'Leary*.

68. However, subs. 5 does not provide that, on proof of a given fact, an inference can be drawn unless the accused demonstrates otherwise. *Oakes* does not therefore provide a precise analogy for the analysis of subs. 5.

69. Nevertheless, in terms of the overall statement of the doctrine of proportionality, it is an important and compelling judgment, which stresses the fundamental importance of the presumption of innocence which, Dickson C.J. commented (at para. 29) was “*a hallowed principle lying at the very heart of criminal law... referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the Charter*”. He continued: “*The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct.*” He also pointed to its fundamental importance in English common law, citing *Woolmington v. DPP*, and to its recognition in United Nations Declaration of Human Rights, 1948, Article 11.1, and in Article 14.2 of the International Covenant on Civil and Political Rights. It is of course also recognised by Article 6.2 of the European Convention on Human Rights and in American constitutional law.

70. In applying the proportionality test it seems to me that care must be taken, in the first instance, in identifying the legitimate objective. On one level, as the State defendants maintain in this case, one can identify the legitimate objective in very broad terms as the protection of children. On another level, one can put forward the objective of adducing

evidence which might otherwise be very difficult, or even impossible, to tender, given that it relates to the intention or knowledge of an accused person.

71. In my view, the objective must be identified in that second, narrower sense. As already stated, when considering the application of proportionality, it goes without saying that the protection of children is a legitimate objective of the State. However, one could identify a similarly laudable objective behind the imposition of criminal liability in any serious criminal offence. There are equally important and legitimate objectives behind, for example, the law which designates murder and rape as criminal acts, for which a person may be incarcerated.

72. Therefore, if such justifications were sufficient to uphold restrictions on the presumption of innocence, the net result would be that the presumption of innocence would be wholly abrogated and would not apply in any trial for a serious criminal offence. This cannot be the law as it would entirely hollow out the presumption of innocence.

73. I am therefore of the view that the legitimate objective in this case is to place an onus on the defendant to show that he made a reasonable mistake, as that is evidence which is peculiarly within his knowledge and therefore difficult, if not impossible, for the prosecution to negate. It is therefore legitimate to put an onus on the accused to point to something in the evidence which would justify a jury in finding that he could avail of the defence.

74. But I think the provisions of subs. 5 cannot be justified on a proportionality basis as the State cannot pass the next hurdle of showing that the presumption of innocence is impaired as little as possible. The question which really arises here is why it is necessary to put a legal burden on the accused at all.

75. In the course of oral argument, the State defendants stressed heavily the detailed consideration which had been given to the laws on statutory rape both after the judgment of

the Supreme Court in *C.C.*, and again prior to the 28<sup>th</sup> Amendment of the Constitution on the Rights of the Child which inserted Article 42A into the Constitution.

76. In relation to the first of these, reference was made to the report of the Oireachtas Joint Committee on Child Protection, November, 2006, but the recommendation of this Committee was that there would be no defence of mistake as to age, though in fairness to the Committee it accepted that the law as thus recommended would be open to constitutional challenge and that a referendum should take place in order to deal with the issue: see para. 13.1.2. Indeed, it was accepted at para. 5.1.8 that an offence of statutory rape which imposed liability on an absolute or even a strict basis, would not include the mental element required by the Supreme Court decision in *C.C.*

77. The only material that I can see in this Report which is relevant to the proportionality of subs. 5 is that the Committee showed a disquiet at the prospect of the cross examination of a child as to her dress or age. However, such a cross examination is at least as likely where the onus on an accused is a legal one which requires him to show on the balance of probabilities that he did not know that the complainant had attained seventeen years of age, so I do not see that this justifies the imposition of the legal burden. There is, in any event, no recommendation in this report that such a burden be imposed, and it therefore does not assist in identifying why the provision was introduced.

78. I was also referred to the Second Interim Report of the Joint Committee on the Constitutional Amendment on Children, of May, 2009, which considered a proposal to include in what subsequently became Article 42A of the Constitution, a provision giving legal authority to the Oireachtas to create offences of absolute or strict liability in respect of sexual offences against or in connection with children. Again, the report is impressive for its thorough, and above all clear, analysis of the legal issues arising in these types of offences. It also demonstrates a concern about the necessity for cross examination, but, as already stated,

this can occur whenever the defence, however calibrated, is available, and whether the culpability of the accused should be assessed by reference to a more or less subjective or objective standard.

**79.** At Section 10 of the Report, the onus and standard of proof is considered. It refers to the wording used in the 2006 Act that: “[i]t shall be a defence ... for the defendant to prove ...”, an apparent reference to s. 2(3) and s. 3(5), as originally enacted. It then comments (at para. 10.1):

*“Having regard to the seriousness of sexual offences against children and the importance of the protection of children, this appears to the Committee to be a reasonable and proportionate adjustment of the normal onus of proof in criminal proceedings. The Committee also notes the preponderance of views expressed in the submissions it received that the onus of proving a mistake as to age should fall on the accused. The imposition of the onus of proof on the accused is, of course, not the only method by which the laws of evidence might be re-balanced to favour the protection of children, and the application of evidential inferences, presumptions or exclusions may prove valuable for that purpose. The Committee is conscious, however, that such a re-balancing exercise can give rise to implications for the presumption of innocence and the right to silence, which warrant further consideration.”*

**80.** The Committee then proceed to recommend that, whatever legislative or constitutional amendments are proposed or enacted in relation to sexual offences against children, the onus of proving a mistake as to age should fall on the accused, that the standard of proof required of an accused in that respect should be proof on “the balance of probabilities”, and that legislation be enacted “*designed to apply appropriate presumptions, exclusions and inferences, as a matter of the law of evidence, in prosecutions for sexual offences against children.*”.

**81.** It did not identify what those presumptions, exclusions and inferences would be, though it did further specifically recommend that legislation would be enacted so as to prevent an accused charged with a sexual offence against a child to rely on the dress and/or demeanour of the child, on consent by the child to sexual activity, or on evidence of previous sexual history of the child to establish or support a defence of mistake.

**82.** It appears that, apart from the recommendation that consent would not be a defence, which was already a feature of s. 2(5) and s. 3(7), as originally enacted, the other recommendations have not been taken up. For example, there was quite a specific recommendation that provision would be made by law to enable an adverse inference to be drawn from the failure of the accused to mention the alleged mistake as to age when questioned by Gardaí, but this does not appear to have been enacted into law.

**83.** It should be noted that the Committee ultimately did not recommend a constitutional amendment to remove the defence of honest belief or reasonable mistake. The reasons for this, as set out at para. 6.28, were:

- There were arguments, including those from the Irish Council of Civil Liberties, that the defence was necessary to prevent injustice;
- While the empirical evidence as to the effect of *C.C.* and the introduction of a defence in the 2006 Act was not, according to Mr. James Hamilton, DPP, in his written submissions to the Committee, entirely clear, it did not appear that complainants were less likely to come forward and the ability to investigate and prepare a case for hearing had not obviously been diminished. At para. 6.24, the Committee stated: “It appears from the available statistics that the current legislative regime is at least capable of operation without undue difficulty.” (It should be noted this comment was made in light of the “honest



belief” test contained in the 2006 Act, rather than the recalibrated defence of “reasonable mistake” now contained in the section as substituted in 2017.)

- At para. 6.26, the Commission noted that the evidence suggested that “*in the vast majority of cases the perpetrator of a sexual offence against a child is a person known to that child.*” Therefore, it was argued that the defence of mistake was relevant only to a small number of cases and the amendment of the Constitution to remove an element of protection of fundamental rights of the citizen would, it is argued, be a disproportionate response.

**84.** At para. 6.27, the Committee noted that they could not entirely remove the need for a child to give evidence, noting that, even in the trial of offences contrary to s.1 (1) of the 1935 Act, there had been occasions where the child complainant had to give evidence that sexual intercourse had taken place.

**85.** Overall, considering both of those thoughtful and considered reports of Oireachtas Joint Committees, it seems to me that there was concern after the judgment in *C.C.* about the prospect of cross-examining child complainants on their dress, demeanour, behaviour, alcohol intake, and so forth. Ultimately it was decided, however, no referendum would be held in order to reverse *C.C.* and this may have been in part because of legitimate concerns about injustice for a minority of those accused charged with offences of this type. That, of course, was precisely the concern which led the Supreme Court to its decision in *C.C.* in the first place.

**86.** The Oireachtas Joint Committee which looked at this issue in 2009 appears to have found that in the great majority of cases, the complainant is already known to the accused and therefore the defence was operating in a minority of the prosecutions brought. Furthermore, insofar as they could tell, though the evidence was somewhat unclear, the introduction of the

honest belief defence in the 2006 Act appeared not to have significantly reduced (or indeed reduced at all) the number of prosecutions.

87. In any event, I am not convinced, notwithstanding the obvious value of these reports for the formulation of legislative proposals and indeed proposals for referenda, that the courts are in any sense obliged to defer to an analysis by an Oireachtas Joint Committee of the social policies underlying provisions which effect the fundamental rights of an accused in a criminal trial. It seems to me that the Oireachtas is entitled to deference in the formulation of social policy, but the protection of the fundamental rights of an accused in a criminal trial is always a matter for the courts.

88. But leaving that aside, I do not see anything in them which puts forward any specific justification for the imposition of a legal burden to the civil standard rather than an evidential burden. It is difficult to avoid the impression that subs. 5 was included simply to make it more likely to get a conviction. However, the presumption of innocence has always been understood as a bulwark against unsafe convictions.

89. It therefore seems that subs. 5 goes further than is necessary to avoid the difficulties which would be posed in requiring the prosecution to lead evidence as to the deceased's knowledge of the complainant's age. Therefore, it seems to me that, even if it were applicable, subs. 5 would be a disproportionate restriction on the presumption of innocence.

#### **Relevance of Fleming and the onus of proof in proportionality**

90. A subsidiary point was made by the State defendants that the argument made in *Fleming v. Ireland* [2013] 2 I.R. 417, in reliance on *R. v. Oakes*, that there was an onus on the State to prove, by way of evidence, the justification of any restriction on the presumption of innocence had been rejected, or at least *Fleming* had been interpreted in this way in *Donnelly*

*v. Minister for Social Protection* [2021] IECA 155, at para. 69. I have to say that I read *Fleming* (at p. 455) as not determining the issue.

**91.** I am not sure that anything turns on it in this case as my principal conclusion is that the presumption of innocence is not subject to proportionate restrictions as are other rights and freedoms which may legitimately be restricted in the interests of the common good.

**92.** There must, in any event, be a question mark as to whether policy issues introduced by the proportionality test are issues of fact to be proven by the tendering of evidence. Generally, as considerations not amenable to forensic proof of the type suitable for the determination of discrete issues of fact which arise in litigation, they are referred to in argument and the proportionality test is applied, where it is relevant, on the basis of submissions.

**93.** Indeed, the 2009 Report of the Joint Committee referred to above suggests that the empirical evidence as to the operation of the defence of honest belief introduced in s. 3 of the 2006 Act as originally enacted was not clear and even the DPP of the day could not give categorical evidence as to whether it had a meaningful effect on the number of complaints, prosecutions and convictions. The substantive law relating to criminal liability is a policy area involving the making of choices on the part of the Oireachtas as to the circumstances in which such liability should be imposed and not a forensic issue capable of secure findings of fact. By contrast, the effect of a provision on a criminal trial is a matter of law which does not require evidence.

**94.** I would therefore doubt whether such a requirement for evidence exists in Irish law but would leave over that issue to a case where it is necessary to decide it.

### **Alleged balancing of constitutional rights and deference to the Oireachtas**

95. The State defendants also relied on *Tuohy v. Courtney* [1994] 3 I.R. 1 for the proposition that there was a need to balance the right of an accused person to trial in due course of law against a countervailing constitutional right, and that it was not for the courts to impose their view of the correct or desirable balance in substitution for the view of the legislature but, as stated by the Supreme Court (*per* Finlay C.J.) (at p. 47) “*rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual’s constitutional rights*”.

96. The difficulty I have with the reliance on that authority is that no countervailing constitutional right was identified in this case. The legitimate interest being pursued by the State in placing a legal burden on an accused in a criminal trial was never identified in anything other than the most general of terms. In *Tuohy v. Courtney*, the Supreme Court analysed the competing constitutional rights, which it identified as the plaintiff’s right to litigate and the defendant’s right “*in his property to be protected against unjust or burdensome claims*”

97. I do not see that there is any such countervailing right in this instance nor do I believe was any such right identified to me. While reference was made to Article 42A of the Constitution, no specific right protected by that provision was identified. In particular, the Oireachtas Joint Committee Report of 2009, referred to above, considered whether the proposed Article 42A should explicitly provide for “*absolute or strict liability in respect of sexual offences against or in connection with children*” and this proposal was not adopted.

98. More importantly, any right of the child which might be identified here is not one which could weigh against the right of an accused not to be convicted where there is a

reasonable doubt as to his guilt, which I have found is a fundamental aspect of the right to trial in due course of law, protected by Article 38.1. Any relevant right of a child would be a substantive right, protected by the imposition of criminal liability for engaging in consensual sexual activity which would normally fall to be protected as an aspect of the unenumerated right to privacy but which would be subject to limitation in the interests of protecting children.

**99.** That, however is a matter for substantive criminal law. In that area, it is accepted that the courts must defer to the legislature: see for example *D.M. (A Minor) v. D.P.P.* [2012] 1 I.R. 697 where the immunity from prosecution contained in s. 5 of the 2006 Act was upheld by the Supreme Court as falling within the legitimate policy choices of the legislature.

**100.** In pursuance of its entitlement to assess the need to criminalise certain conduct which is thought to be contrary to the rights of others, the 2017 Act introduced new offences for the protection of children, such as that in s. 3A of the 2006 Act. A person challenging the imposition of criminal liability for the conduct in question may well find that they have to clear a higher bar in order to convince a court that the legislation is constitutionally infirm.

**101.** However, it does not seem to follow logically that the protection of the rights of others require the very fairness of the criminal trial to be compromised. The rights thought to be inherent in the notion of a fair trial or trial in due course of law, including the presumption of innocence and the related requirement that the prosecution prove guilt beyond a reasonable doubt, though now constitutionally protected, have been developed by the common law in response to the need to prevent the arbitrary conviction of individuals who may in fact be innocent. There is no constitutional right or interest to the conviction of a person in respect of whom there is a reasonable doubt as to guilt. Such a conviction is generally regarded as unsafe and it is not clear why such a conviction would be thought to advance the constitutional rights of others.

**Conclusion**

**102.** I am of the view that it is an aspect of the fundamental fairness of a criminal trial that an accused should not be liable to conviction where there is a reasonable doubt as to his guilt and, as a consequence, a provision such as that in s. 3(5) of the 2006 Act, which deals with the core issue of moral culpability of the accused, and which places an obligation on him to prove on the balance of probabilities that he is not so culpable, is contrary to Article 38.1 of the Constitution.

**103.** As a result, my preliminary view is that I should make a declaration that subs. 5 of section 3 of the 2006 Act is invalid having regard to Article 38.1 of the Constitution.

However, I will list the matter for mention in early course to hear the parties on the form of order.