HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

CTM APPELLANT

AND

THE QUEEN RESPONDENT

CTM v The Queen [2008] HCA 25
11 June 2008
S591/2007

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

T A Game SC and A C Haesler SC with J S Manuell for the appellant (instructed by Legal Aid Commission of NSW)

D C Frearson SC with J A Girdham for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

CTM v The Queen

Criminal law – Sexual intercourse with child aged between 14 and 16 years – Whether common law ground of exculpation of honest and reasonable mistake of fact applies to offence under s 66C(3) of the *Crimes Act* 1900 (NSW) – Whether accused entitled to place reliance on honest and reasonable mistake of fact where conduct the subject of charge is denied.

Criminal law – Onus and standard of proof – Whether accused obliged to establish honest and reasonable mistake of fact – Whether accused obliged to "enliven" issue of honest and reasonable mistake of fact – Whether accused obliged to adduce evidence in support of contention of honest and reasonable mistake of fact – Whether there was sufficient evidential foundation for contention of honest and reasonable mistake of fact – Whether issue of honest and reasonable mistake of fact sufficiently raised at trial – Whether trial judge obliged to direct jury on issue of honest and reasonable mistake of fact – Adequacy of trial judge's directions to jury.

Criminal law – Appeal – Application of "proviso" – Whether there occurred substantial miscarriage of justice – Whether appellate court able to conclude that no substantial miscarriage of justice occurred where misdirection on onus and standard of proof is demonstrated.

Words and phrases – "defence", "honest and reasonable mistake of fact", "substantial miscarriage of justice".

Crimes Act 1900 (NSW), ss 66C(3), 66E(1A), 77.
Criminal Appeal Act 1912 (NSW), s 6(1).

1 GLEESON CJ, GUMMOW, CRENNAN AND KIEFEL JJ. In 1897, Sir Samuel Griffith, then Chief Justice of Queensland, prepared for the Government of Queensland a Draft Code of Criminal Law. In a letter to the Attorney-General, enclosing this monumental work, Sir Samuel wrote[1]:

> "*Criminal Responsibility*. – This most important and difficult branch of the law is dealt with in Chapter V. I have appended to several of the sections Notes to which I invite special attention. No part of the Draft Code has occasioned me more anxiety, but I may add that I regard no part of the work with more satisfaction."

2 Chapter V of the Draft Code dealt, among other things, with the mental element necessary to attract criminal responsibility. It included the following provision:

> "26. A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.
>
> The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject."

3 In a marginal note against that provision, Sir Samuel wrote: "Common Law"[2]. The provision was enacted as s 24 of the *Criminal Code* (Q). In *Thomas v The King*[3], Dixon J said that the language of the Code, which was also taken up in the other Code States of Tasmania and Western Australia, in this respect reflected the common law with complete accuracy[4]. Clause 26 appears to have been taken substantially from *Stephen's Digest of the Criminal Law*[5], and was in

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1 Griffith, *Draft of a Code of Criminal Law*, (1897) at x.

2 Griffith, *Draft of a Code of Criminal Law*, (1897) at 13.

3 (1937) 59 CLR 279 at 305-306; [1937] HCA 83.

4 For later acceptance of the common law principle in this Court, see, for example, *Proudman v Dayman* (1941) 67 CLR 536; [1941] HCA 28; *He Kaw Teh v The Queen* (1985) 157 CLR 523; [1985] HCA 43; *Jiminez v The Queen* (1992) 173 CLR 572; [1992] HCA 14; *Macleod v The Queen* (2003) 214 CLR 230; [2003] HCA 24.

5 *Stephen's Digest of the Criminal Law*, 3rd ed (1883) at 26.

accordance with what Cave J said in *R v Tolson*[6] (a bigamy case in which the accused, at the time of the second marriage, believed on reasonable grounds that her husband was dead):

> "At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence."

4 In the same case, Cave J explained the reason for the principle[7]:

> "Now it is undoubtedly within the competence of the legislature to enact that a man shall be branded as a felon and punished for doing an act which he honestly and reasonably believes to be lawful and right; just as the legislature may enact that a child or a lunatic shall be punished criminally for an act which he has been led to commit by the immaturity or perversion of his reasoning faculty. But such a result seems so revolting to the moral sense that we ought to require the clearest and most indisputable evidence that such is the meaning of the Act."

5 What is involved is a basic legal principle of criminal responsibility which informs our understanding, and interpretation, of the criminal law. That law is, to a large extent, although in most Australian jurisdictions not completely, governed by statute. The *Crimes Act* 1900 (NSW) ("the Crimes Act") is not a code, but it contains provisions dealing with most serious offences against the person. The legal effect of some of those provisions, of which those relating to homicide are a well-known example, can be understood only against a background of common law principle[8]. Where the problem is one of interpretation of what Parliament has enacted, general principles of criminal responsibility inform such interpretation, but ultimately it is the language of the statute that is controlling. A principle as to criminal responsibility, such as that described above, as is acknowledged, may be excluded by a sufficiently plain manifestation of legislative intention.

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6 (1889) 23 QBD 168 at 181.

7 (1889) 23 QBD 168 at 182.

8 See, for example, *R v Lavender* (2005) 222 CLR 67; [2005] HCA 37.

6 Cave J's description of a mistaken belief of the kind he was discussing as a "defence", and Sir Samuel Griffith's Draft Code, preceded *Woolmington v Director of Public Prosecutions*[9] by almost 40 years. Questions of onus and standard of proof now need to be considered in the light of later developments in the law. References to arguments raised on behalf of the accused at a criminal trial as a defence, or a ground of exculpation, may be harmless enough if they do not pre-empt questions of onus of proof. People understandably feel the need to call them something, and the adversarial setting of a trial leads judges and practitioners sometimes to refer to any point relied upon by an accused as a defence. So, for example, in the plurality judgment in this Court in *Jiminez v The Queen*[10], honest and reasonable mistake was referred to as an "excuse" and a "defence". By reference to a leading decision of this Court on the subject, it is sometimes called "the *Proudman v Dayman* defence". Such descriptions have their dangers, but the shorthand may be convenient provided it is understood for what it is.

7 Honest and reasonable mistakes of fact do not cover the whole field of risk of criminal liability to which a person may be exposed by making an error. Mistakes of law are not a ground of exculpation: ignorance of the law is no excuse[11]. Moreover, the moral sense invoked by Cave J, at least in Australian law, does not extend to cover unreasonable mistakes[12]. The concept of mistake itself is protean[13]. The state of mind that, in a given set of circumstances, will qualify as a mistaken belief in a fact or state of affairs may be a matter of difficulty. An honest and reasonable belief in a certain fact or state of affairs may be very different from an absence of concern. Even so, the point made by Cave J at the end of the second passage quoted above continues to be of fundamental importance to the function of courts in seeking to find and give effect to the meaning of criminal legislation. While the strength of the consideration may vary according to the subject matter of the legislation[14], when

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9 [1935] AC 462.

10 (1992) 173 CLR 572 at 581-582.

11 See, for example, *Ostrowski v Palmer* (2004) 218 CLR 493; [2004] HCA 30.

12 *Thomas v The King* (1937) 59 CLR 279; *Proudman v Dayman* (1941) 67 CLR 536; *He Kaw Teh v The Queen* (1985) 157 CLR 523.

13 *State Rail Authority of NSW v Hunter Water Board* (1992) 28 NSWLR 721 at 724.

14 As explained by Dixon J in *Proudman v Dayman* (1941) 67 CLR 536 at 540.

an offence created by Parliament carries serious penal consequences, the courts look to Parliament to spell out in clear terms any intention to make a person criminally responsible for conduct which is based on an honest and reasonable mistake. This appears to us to be closely related to the principle of statutory interpretation which was discussed in *Plaintiff S157/2002 v The Commonwealth*[15], *Al-Kateb v Godwin*[16], and *Electrolux Home Products Pty Ltd v Australian Workers' Union*[17], and which was applied by the whole Court in the several judgments in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[18]. There is no present need to expand upon that discussion.

8 Where it is a ground of exculpation, the law in Australia requires that the honest and reasonable, but mistaken, belief be in a state of affairs such that, if the belief were correct, the conduct of the accused would be innocent. In that context, the word "innocent" means not guilty of a criminal offence. In the case of an offence, or a series of offences, defined by statute, it means that, if the belief were true, the conduct of the accused would be "outside the operation of the enactment"[19]. As explained in *He Kaw Teh v The Queen*[20], the evidentiary onus of raising the ground of exculpation is on the accused, but, once that occurs, the ultimate legal onus of displacing the ground lies on the prosecution. The concept of evidentiary onus itself needs to be understood in the light of the subject matter to which it applies; here, honest and reasonable belief, a concept that has a subjective element of a kind that ordinarily is peculiarly within the knowledge of the accused, and an objective element that must be capable of being measured against the evidence by a tribunal of fact.

9 Sir Samuel Griffith's qualification, that the operation of the rule stated in the first paragraph of cl 26 (later s 24) may be excluded by the express or implied provisions of the law relating to the subject, was exemplified by the provisions of

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15 (2003) 211 CLR 476 at 492 [30]; [2003] HCA 2.

16 (2004) 219 CLR 562 at 577 [19]; [2004] HCA 37.

17 (2004) 221 CLR 309 at 328-329 [19]-[21]; [2004] HCA 40.

18 (2002) 213 CLR 543 at 553 [11], 562-563 [43], 576 [88], 592-593 [134]; [2002] HCA 49.

19 *Proudman v Dayman* (1941) 67 CLR 536 at 541.

20 (1985) 157 CLR 523 at 534-535.

his Draft Code concerning the topic with which the present appeal is concerned, a topic which used to be described as carnal knowledge by a male of a female under the age of consent.

10 There is a long history, in Australia, of criminal statutes which punished not only rape, that is, unlawful carnal knowledge of a female of any age without her consent, but also any unlawful carnal knowledge of a female below a certain age. (We are not presently concerned with sexual abuse of infants of tender years, or others for whom the concept of consent may have no practical meaning.) There is an obvious question which arises in the case of any such law: when Parliament specifies an age below which consent is no answer to a charge, what is the position of an accused who honestly and reasonably believed that the female concerned was above that age?

11 In the Draft Code, there were two provisions that illustrate how the problem may be approached. They also exemplify the qualification in the second paragraph of cl 26. Rather than rely on the general operation of the rule in the first paragraph of cl 26, a cognate, but different, provision, more carefully tailored to the particular subject matter, was included. Chapter XXII in Pt IV dealt with "Offences against Morality". Clauses 219, 221 and 222 dealt with certain conduct in relation to girls under 12 and 10, and between the ages of 12 and 14, respectively. Clause 219 provided, relevantly:

> "Any person who has unlawful carnal knowledge of a girl under the age of twelve years is guilty of a crime, and is liable to imprisonment with hard labour for life, with or without whipping."

The clause said nothing about any defence. It did, however, provide a special penalty regime for offenders who were themselves under the age of 16. The court was empowered, instead of sentencing these offenders to any term of imprisonment, and with or without ordering any whipping, to order detention for a period not exceeding three years in an industrial or reformatory school.

12 Clause 221 provided, relevantly:

> "A person who attempts to have unlawful carnal knowledge of a girl under the age of ten years is guilty of a crime, and is liable to imprisonment with hard labour for fourteen years, with or without whipping, which may be inflicted once, twice or thrice."

13 Clause 222 provided, relevantly:

> "Any person who –

> (1) Has or attempts to have unlawful carnal knowledge of a girl under the age of fourteen years and of or above the age of twelve years …
>
> is guilty of a misdemeanour, and is liable to imprisonment with hard labour for two years.
>
> It is a defence to a charge of either of [such] offences ... to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of fourteen years."

14 Those provisions reflected then current United Kingdom legislation. The following comments may be made. First, the penalty provisions of cl 219 referred to the fact that, in the case of consensual sexual activity with under-age females, the male party may be of approximately the same age as the female. Secondly, the defence, based on honest and reasonable mistake as to age, provided by cl 222, was absent from cll 219 and 221: a clear indication of intention that the general exculpatory provisions of cl 26 were not to apply to cl 219 or cl 221, and that there was to be a special regime for offences of this kind. Thirdly, the terms of cl 222 put on the accused the onus of establishing the defence provided. The term "defence" was used with technical accuracy.

15 We have referred to Sir Samuel Griffith's Draft Code as a convenient reference point to illustrate certain considerations that might reasonably be expected to be present in the mind of anyone framing legislation on this topic. Legislation making it an offence for a male to have sexual relations with a female under a certain age commonly has differentiated between females of various ages, ranging through degrees, from infants of tender years, to people who might be mature adolescents. (Concepts of maturity themselves vary over time. There was a time when the age at which a female could marry was 12[21]; hence the need to distinguish "unlawful" carnal knowledge.) We leave to one side, for the moment, the way in which such laws differentiated between heterosexual and homosexual activity. In dealing with conduct involving sexual relations with a female at the higher end of whatever range is chosen, such legislation typically addressed the possibility of an honest and reasonable mistake as to age. This is a problem inherent in the nature of the issue with which such legislation is concerned. When Parliament stipulates that, regardless of any question of consent, it is a serious crime for a male to have sexual relations with a female under a certain age, it is impossible to ignore the case of an alleged offender who

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21 Joske, *Matrimonial Causes and Marriage: Law and Practice*, 5th ed (1969) at 149.

honestly and reasonably believes that the female is above the specified age. It would be absurd to suggest that honest and reasonable mistakes of that kind are never made. When they occur, how is the law to deal with them? A similar (but not identical) answer was given in almost all examples of legislation on this topic in Australian jurisdictions, and in countries of a similar legal background.

16 A related matter is how the law is to deal with the not uncommon case of the offender who is approximately the same age as the victim. The present appeal provides an example. At the relevant time, the appellant was 17, and the complainant was 15. The term "sexual predator" may be appropriate to describe some people who engage in sexual activity with consenting 15-year old females, but it is hardly of universal application. The present appellant was himself, in the eyes of the law, a child, and this was potentially relevant both to the procedures that governed his prosecution and to questions of penalty. The facts of the present case illustrate a kind of adolescent behaviour that lies within the spectrum of conduct which the New South Wales Parliament must have had in contemplation when it enacted the legislative changes that give rise to the primary issue in this appeal.

17 It is unnecessary to examine the various ways in which Parliaments in comparable jurisdictions have responded to the issues identified above. The history of United Kingdom legislation on the topic was described, without admiration, by Lord Bingham of Cornhill in *R v K*[22]. Section 5 of the *Criminal Law Amendment Act* 1885 (UK) made it an offence to carnally know a girl over 13 years but under 16 years, subject to a proviso that it was a defence if the accused had reasonable cause to believe that the girl was over 16 years. In 1922, the legislation was amended to provide that reasonable cause to believe that a girl was over 16 years should not be a defence. This, however, was subject to the further proviso that, in the case of a man of 23 years or under, reasonable cause to believe that the girl was over 16 years was a valid defence on the first occasion on which he was charged with such an offence.

18 In most common law jurisdictions, homosexual offences involving males were the subject of a different legislative regime. However, in setting the historical context for a consideration of the New South Wales legislation which governs the present appeal, it is important to note a New South Wales decision of which the framers of the legislation must have been aware. In *Chard v Wallis*[23],

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22 [2002] 1 AC 462 at 467-469 [4]-[10].

23 (1988) 12 NSWLR 453.

the accused was charged with a contravention of s 78Q(2) of the Crimes Act. That was one of a series of homosexual offences, the relevant age of consent being 18 years. Although the Crimes Act said nothing on the matter, Roden J, applying the general principle earlier mentioned, held that a mistaken but reasonable belief that the male in question was above the age of 18 years was a ground of exculpation. In the Court of Criminal Appeal in the present case, Howie J indicated some doubt about the correctness of that decision. Nevertheless it has stood since 1988, and there was nothing said in Parliament when the current legislation was enacted to acknowledge a legislative intention to reverse it. In its application to homosexual acts, that decision had a consequence that was in some respects similar to, and in other respects different from, the statutory provision for a defence in the case of a charge of carnal knowledge of a female.

The New South Wales legislation before 2003

19 This appeal is concerned with the effect of certain amendments, in 2003, to a number of provisions of the Crimes Act dealing with sexual offences. Those provisions had been the subject of much legislative attention, and alteration, over the years. For purposes directly relevant to the kind of offence of which the appellant was convicted, it is sufficient to note that the Crimes Act, as it stood in 2002, as well as making it an offence to have sexual intercourse with another person without that other person's consent knowing of such absence of consent (s 61I), provided for various offences of carnal knowledge which could be committed in different circumstances. Sexual intercourse with a person under the age of 10 years was one offence (s 66A). Sexual intercourse with a person between the ages of 10 and 16 years was a different offence (s 66C). Section 77 provided:

> "**Consent no defence in certain cases**
>
> (1) Except as provided by subsection (2), the consent of the child or other person to whom the charge relates shall be no defence to a charge under section 61E(1A), (2) or (2A), 61M(2), 61N(1) or 61O(1) or (2), 66A, 66B, 66C, 66D, 66EA, 66F, 67, 68, 71, 72, 72A, 73, 74 or 76A or, if the child to whom the charge relates was under the age of 16 years at the time the offence is alleged to have been committed, to a charge under section 61E(1), 61L, 61M(1) or 76.
>
> (2) It shall be a sufficient defence to a charge which renders a person liable to be found guilty of an offence under section 61E(1A), (2) or (2A), 61N(1), 61O(1) or (2), 66C, 66D, 71, 72 or 76A or, if the

child to whom the charge relates was under the age of 16 years at the time the offence is alleged to have been committed, to a charge under section 61E(1), 61L, 61M(1) or 76 if the person charged and the child to whom the charge relates are not both male and it is made to appear to the court or to the jury before whom the charge is brought that:

(a) the child to whom the charge relates was of or above the age of 14 years at the time the offence is alleged to have been committed,

(b) the child to whom the charge relates consented to the commission of the offence, and

(c) the person so charged had, at the time the offence is alleged to have been committed, reasonable cause to believe, and did in fact believe, that the child to whom the charge relates was of or above the age of 16 years."

20 In the result, sexual intercourse with a child under the age of 10 years was an offence for which the necessary mental element, or intention, was uncomplicated. It was necessary for the prosecution to prove an intentional act of sexual intercourse with a certain person, and to prove that the person was under the age of 10 years. Those were the elements of the offence, proof of which established guilt. For an offence against s 66C (sexual intercourse with a person between the ages of 10 and 16), considered in the light of s 77(2), the position was more complicated. It depended upon whether the conduct was homosexual or heterosexual, whether the alleged victim was 14 years of age or older, and whether the alleged victim consented. If the necessary conditions in those respects were fulfilled, then honest and reasonable mistake as to age, if made to appear, was a defence.

21 Sub-section (2) of s 77, although in a broad sense it dealt with the topic of honest and reasonable mistake, was an elaborate provision, reflecting a number of legislative concerns and, perhaps, compromises. It did not apply where both parties to the conduct in question were male. It placed the onus on the accused relying on the defence it provided. It dealt, not only with both objective and subjective matters as to age (actual age and reasonable and honest belief about age), but also with the matter of consent. In the latter respect, as the opening words of sub-s (1) indicated, it qualified sub-s (1). Although absence of consent was not an element of the offence created by s 66C, the presence of consent was an aspect of the defence provided by s 77(2), or, to put it another way, it was a condition of the (limited) availability of a defence of honest and reasonable mistake as to age.

The 2003 amendments

22 The *Crimes Amendment (Sexual Offences) Act* 2003 (NSW) made substantial amendments to the sexual offences provisions of the Crimes Act. Of direct relevance to the present case are the amendments made to ss 66C and 77. Of indirect, but substantial, relevance are other amendments designed to give effect to one of the purposes stated in the long title to the Act, "to provide for the equal treatment of sexual offences against males and females". In that respect, it established what the Attorney-General described as "an equal age of consent". The Attorney-General said[24]:

> "Equalising the age of consent to 16 is just one of the many objectives of the bill …
>
> The safeguards now include the removal of the express defence [to a charge] of carnal knowledge based on reasonable mistake of age".

23 In an earlier speech in Parliament on the same Bill, the Attorney-General said[25]:

> "The bill eliminates the defence currently available to consensual sexual activity with young people aged between 14 and 16 years, formerly known as carnal knowledge.
>
> The bill removes the express statutory defence presently provided in section 77(2)(c) of the Crimes Act that the person charged had reasonable cause to believe, and did in fact believe, that the child was of or above the age of 16 years. As a consequence, it will no longer be possible to argue that a uniform age of consent of 16 years creates an effective age of consent of 14 years."

24 What the Attorney-General did not say was that the "express defence" in s 77(2) was a statutory narrowing of a wider potential ground of exculpation that, according to established principle, would at least arguably have been available

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24 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 May 2003 at 898-899.

25 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 May 2003 at 376.

otherwise and that, in 1988, had been held to be available in the case of certain homosexual offences.

25 The 2003 legislation amended s 66C to make it, as it were, gender neutral, but otherwise retained, in terms of offences, and penalties, the distinction between offences against children under 10, children between 10 and 14, and children between 14 and 16. It also amended s 77 by deleting s 77(2), and the opening words of s 77(1).

26 Section 66C, following amendment, and so far as is presently relevant, dealt, in sub-s (1), with sexual intercourse with a person aged between 10 and 14, in sub-s (2) with sexual intercourse with a person aged between 10 and 14 in (defined) circumstances of aggravation and, in sub-s (3), with sexual intercourse with a person aged between 14 and 16. We are presently concerned directly with s 66C(3), which provided that any person who has sexual intercourse with another person who is of or above the age of 14 years and under the age of 16 years is liable to imprisonment for 10 years.

27 The question arises: what does the law now provide if a person charged with an offence against s 66C(3) honestly believed, on reasonable grounds, that the complainant was aged 16 years or over? It has already been noted with reference to what was said by Dixon J in *Proudman v Dayman*[26] that the potential ground of exculpation requires an honest and reasonable belief in a state of affairs which, had it existed, would be such that the accused's conduct was innocent, in the sense earlier explained. It would therefore not assist an accused to believe that a child was aged between 10 and 14, or between 14 and 16; for if the child were of that age, it would merely take the case out of one prohibition into another. The act of consensual sexual intercourse is not of itself an offence. The offence consists in a particular accompanying state of affairs or circumstance (relevantly, age). An honest mistake about the extent to which a child is under-age would merely be a mistake about the kind of offence that is being committed. That would be legally irrelevant to guilt, although it could possibly have some consequence for sentencing purposes. Furthermore, the belief, to be exculpatory, must be reasonable. The greater the gap between the child's true age and the age of 16 years, the less likely it may be, in practice, that such a belief was reasonable.

28 The Attorney-General's speech in Parliament reveals a concern about an argument that, in the case of homosexual intercourse, to reduce the "age of

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26 (1941) 67 CLR 536 at 541.

consent" from 18 years to 16 years was, in practice, to reduce it to 14 years. The problem, however, was more complex than that.

29 In the Court of Criminal Appeal, Howie J said:

> "It has to be said at the outset that I find it remarkable that a section [s 77(2)] that had existed from time immemorial should be repealed without a clear and uncompromising statement being made, either by the draftsperson or by the Minister responsible for the repeal, as to its intended effect. On the face of it a defence to a number of serious criminal offences, carrying substantial sentences of imprisonment as the maximum penalties, was being repealed and yet nothing is expressly stated to indicate any clear understanding by Parliament of the consequence of that repeal. And this in an area of the criminal law which is of continuing concern to the community and, hence, the Parliament. There is probably no part of the *Crimes Act* that has been subject to more change in recent years than the provisions dealing with sexual assaults against children, much of those changes intended to increase penalties for the offences and to make it easier for children to give evidence and, thereby, easier to secure convictions."

30 Those sentiments are understandable, although it needs to be remembered that a court, knowing nothing of the political considerations at work, may not be well placed to draw inferences from silence, even on a topic that seems to demand attention[27]. In politics, compromise is sometimes achieved by reticence. This may create a problem for courts that have to deal with the outcome of the compromise, but that is the way of the democratic process. In the equalisation undertaken in 2003, the New South Wales Parliament regarded the "express defence" in s 77(2) as no longer appropriate. It was a defence that, in its terms, differentiated between homosexual and heterosexual activity, so it at least had to be changed if there were to be the desired equalisation. It could not have been left as it was. Yet the problem to which that provision was addressed did not disappear; and the long-standing and well-understood principle which provided an alternative response to the same problem remained potentially applicable in the absence of "the clearest and most indisputable evidence [concerning] the meaning of the Act."[28]

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27 See *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459; [1995] HCA 24; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168-169; [1996] HCA 40.

28 *R v Tolson* (1889) 23 QBD 168 at 182.

31 One of the reasons why, for more than a century, in most common law jurisdictions, including the Australian colonies and, later, States, the problem of mistake in connection with age-related sexual offences was dealt with by a separate and more specific legislative provision was that Parliament was thereby enabled to deal with issues such as onus of proof, consent, and mistake about age in a manner tailored to the particular kind of offence in question. One practical matter, discussed by Howie J in the Court of Criminal Appeal, is exemplified by this case. As often happens, the appellant was charged with sexual intercourse with the complainant, knowing she was not consenting. He was acquitted of that charge. The offence of which he was convicted (sexual intercourse with a person over 14 and under 16, contrary to s 66C(3)) was left to the jury as an alternative verdict. In such a case, where the complainant alleges she was not consenting, the prosecution sets out in support of its primary charge (in the language of former times, rape) to establish absence of consent. For the alternative charge (in the language of former times, carnal knowledge), it did not need to prove lack of consent. By the time the jury came to consider the s 66C issue, the matter of consent had been dealt with. Absence of consent was not an element of the s 66C(3) offence, and s 77(1) declared that presence of consent was no answer. The supposed mistake was about age, not consent. The defence previously provided by s 77(2) made the existence of consent, like the fact of an age in excess of 14 years, a condition of the availability of a defence based on a mistake as to age. The potential *Proudman v Dayman* ground of exculpation was not so conditioned.

32 When, in the context of equalisation of laws relating to heterosexual and homosexual activity, in 2003, the New South Wales Parliament repealed s 77(2), and thereby abandoned the special defence that previously applied to heterosexual acts with under-age persons, it necessarily raised the problem of the possible application, to the now equalised, age-related, offences, of the *Proudman v Dayman* ground of exculpation, that is to say, honest and reasonable mistake of fact. Such mistakes were still going to happen. The question that Parliament left for the courts to decide was whether they were to be treated as irrelevant, or whether they would constitute, in accordance with the long-established principle referred to at the commencement of these reasons, a potential answer to a charge.

33 Howie J said:

> "The immediate reaction to the Crown submission is surprise, if not shock, at the suggestion that the *Crimes Act* can have what are in effect absolute liability offences carrying substantial gaol penalties. Of course that was always so with a child under 14 but there can be no denying that as the

> child becomes older the likelihood of an innocent mistake becomes more likely. I also accept that it is notoriously difficult to tell the age of [a] person with such accuracy as an absolute offence would require, and it is not uncommon for children approaching the age of 16 to disguise or lie about their age in order to be treated more favourably as an adult."

34 He could have added that sexual activity with persons under 16 may be engaged in, not by adult sexual predators, but by other persons who themselves are adolescents. (This is not to overlook the possibility that some adolescents are capable of predatory behaviour.) Nevertheless, Howie J, and Hodgson JA and Price J who agreed with him, felt compelled to conclude that there was a legislative intent that, following the repeal of s 77(2), honest and reasonable mistake would be irrelevant to a charge of an offence against s 66C(3). We accept that, in the face of the legislative silence earlier referred to by Howie J, there are powerful arguments in support of that conclusion. There is, however, what appears to us to be a compelling argument to the contrary. It is that foreshadowed by Cave J in *R v Tolson*, and it concerns the relationship between the courts and Parliament.

35 The common law principle in question reflects fundamental values as to criminal responsibility. The courts should expect that, if Parliament intends to abrogate that principle, it will make its intention plain by express language or necessary implication. We would, therefore, construe the legislation in the light of the principle of criminal responsibility stated at the outset of these reasons. An honest and reasonable belief that the other party to sexual activity is above the age of 16 years is an answer to a charge of a contravention of s 66C(3). The evidential burden of establishing such a belief is in the first place upon an accused. If that evidential burden is satisfied, then ultimately it is for the prosecution to prove beyond reasonable doubt that the accused did not honestly believe, on reasonable grounds, that the other party was above the age of 16 years. The outcome of the present appeal turns upon what is involved in the concept of evidential burden in the context of the particular offence, and the particular ground of exculpation.

The present case

36 The facts, and the course of proceedings, appear from the reasons of Hayne J. We agree with Hayne J that the circumstance that, in answer to a police question in the course of an interview, the appellant said that the complainant was 16 and that she had told him that was her age did not, in the light of the course of evidence, and absence of evidence, at trial, discharge the evidentiary burden involved in reliance on honest and reasonable mistake of fact as a ground of exculpation. This was a point that was left unresolved by the Court of

Criminal Appeal. However, it arises once it is decided that what Howie J called "the common law defence" is left open by the statute.

37 In *Jiminez v The Queen*[29], the plurality reasons for judgment examined in some detail the circumstantial evidence in the case which suggested that the driver of a motor car honestly believed on reasonable grounds that it was safe for him to drive. The material referred to was such as to enable a tribunal of fact not only to decide whether such a belief might have been honestly held, but also to evaluate its reasonableness. The reasons did not merely rely on the driver's claim that he had no warning of the onset of sleep. They tested that claim against the facts and circumstances proved in evidence, and the inferences available from the evidence, and concluded that, in the light of the whole of the evidence, there was a serious issue to be decided.

38 Here, the fact that the defence case at trial (unsupported by sworn evidence of the appellant) was that no intercourse occurred did not of itself make the point unavailable, especially where, according to the defence case, the only reason no intercourse occurred was that the appellant's plans in that regard were interrupted. There was, however, nothing to support the honesty and reasonableness of a suggested belief in the truth of his out-of-court assertion that the complainant had told him what would have been a lie about her age. The complainant (who was in fact 15) gave evidence that she was in year 9 at school. The appellant, aged 17, was in year 11. In his record of interview the appellant, when asked by the police how old the complainant was, said "16". When asked how he knew that, he said that the complainant had told him. He also said the complainant was, he thought, in year 10. It was not suggested to the complainant in cross-examination that she had lied to the appellant about her age or, for that matter, that she had discussed it with him.

39 Honesty and reasonableness are essential features of the mistaken belief relied upon as a ground of exculpation. The belief of the appellant was a matter peculiarly within his own knowledge, but he gave no sworn testimony about it. The reasonableness of his belief was based on an out-of-court assertion as to what the complainant allegedly said, but this was not put to her in cross-examination. A tentative out-of-court suggestion by the appellant as to the complainant's class at school, which would have been consistent with his case, was shown by the evidence to be wrong. The evidential burden was not satisfied.

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29 (1992) 173 CLR 572 at 583-584.

Gleeson CJ
Gummow J
Crennan J
Kiefel J

Conclusion

40 The appeal should be dismissed.

41 KIRBY J. This appeal, from orders of the Court of Criminal Appeal of New South Wales, arises following the conviction of the appellant, CTM, of an offence against s 66C(3) of the *Crimes Act* 1900 (NSW) ("the Act").

42 The majority of this Court, whilst upholding the appellant's complaints of legal error, affirm his conviction for a suggested absence of miscarriage of justice. In my view, if a trial judge misdirects a jury on the legal ingredients of an offence, as well as on the onus and standard of proof to be applied, that constitutes a miscarriage of justice[30]. Certainly it does so in this case. Conviction of a sexual crime is a very serious outcome for the appellant. He is entitled to a retrial.

The decisional history

43 *Trial of the accused*: The appellant was tried before Garling DCJ and a jury in the District Court of New South Wales upon an indictment containing two counts. The counts alleged offences against s 61J of the Act (sexual intercourse without consent in circumstances of aggravation) and, in the alternative, s 66C(4) (sexual intercourse with a person aged between 14 and 16 years in circumstances of aggravation). The jury found the appellant not guilty of those offences and upon them he was discharged.

44 The jury went on to find the appellant guilty of a statutory alternative to the s 66C(4) offence, being an offence against s 66C(3) of the Act[31]. This involved a non-aggravated form of the offence of having sexual intercourse with a person between the ages of 14 and 16. The complainant was a female friend of the appellant. She was 15 years of age at the time of the alleged offence. The appellant was then 17 years of age.

45 Inherent in the jury's verdict on the s 66C(3) offence was a conclusion that the appellant and the complainant had engaged in consensual sexual intercourse. The appellant's conduct was not unlawful for want of consent, or aggravated because the complainant had been under the influence of alcohol[32], as had been alleged in respect of the offences charged in the indictment. It was unlawful because the complainant was below the age at which the law says a person may consent to sexual intercourse.

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30 See *Conway v The Queen* (2002) 209 CLR 203 at 241 [103]; [2002] HCA 2; *Darkan v The Queen* (2006) 227 CLR 373 at 413-415 [139]-[142]; [2006] HCA 34.

31 See the Act, s 66E(1A).

32 The Act, s 66C(5)(g).

46 In the Court of Criminal Appeal, the appellant argued that the jury's verdict was unreasonable. That Court rejected this argument[33]. It has not been maintained in this Court.

47 *Sentencing the prisoner*: In sentencing the appellant, the trial judge found no difficulty in reconciling the verdicts returned by the jury. The trial judge described the facts as he took them to be established:

> "The facts which the jury obviously accepted are that on 24 October 2004 [the complainant], a person of 15 years of age, who knew the prisoner quite well, had rung him and contacted him and had gone to the premises where he and some other boys lived. She was considerably affected by alcohol. During the course of that evening he and [the complainant] had sexual intercourse, and she was under the age of 16, namely 15, and they have obviously accepted that he knew [that fact], and they are the brief facts upon which I sentence him. He knew her, he had been friendly with her over a significant period of time. He was a young lad … 17 years of age at the time, [and] the difference in their age is minimal, but the fact is it is an offence and he has been found guilty of it.
>
> … [H]e denied having sexual intercourse, however, the jury was satisfied beyond reasonable doubt to the contrary. There is little else I can say about it. It is one of these very difficult sentences because what you are doing, in effect, is sentencing a person where two people of a similar age agreed obviously to have sexual intercourse, but she is of such an age that Parliament has deemed that it is an offence."

48 In the result, the trial judge sentenced the appellant to a term of eighteen months imprisonment with a non-parole period of nine months. He suspended the custodial sentence on the basis that "special circumstances" warranted that course. In the Court of Criminal Appeal, it was accepted by the prosecution that the sentence imposed had failed to take into account the *Children (Criminal Proceedings) Act* 1987 (NSW). Provisions of that Act applied to the appellant because, for its purposes, he was himself a child[34]. Thus, although the Court of Criminal Appeal dismissed the appellant's appeal against conviction, it upheld his application for leave to appeal against sentence. It quashed the sentence and ordered that the matter be remitted to the District Court for the resentencing of the appellant according to law[35].

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33 *CTM v The Queen* (2007) 171 A Crim R 371 at 373 [1], 381-385 [48]-[64], 405 [157].

34 (2007) 171 A Crim R 371 at 405 [153].

35 (2007) 171 A Crim R 371 at 405 [156].

49 *Court of Criminal Appeal*: The principal focus of the appellant's conviction appeal in the Court of Criminal Appeal was whether a "common law defence" of honest and reasonable mistake of fact applied to a charge based on s 66C(3) of the Act, such as would exculpate the appellant if he had held a belief, at the time of the sexual intercourse, that the complainant was over the age of 16 years.

50 By reference to decisions of this Court[36] and other courts[37], to English authority[38], and to the legislative history of the relevant provisions of the Act[39] (with particular reference to the repeal of s 77(2) of the Act and to extrinsic material explaining the purpose of that repeal[40]), the Court of Criminal Appeal unanimously concluded that the "common law defence" was not "activated" in respect of s 66C of the Act.

51 There was thus no need for the Court of Criminal Appeal to "go on to determine whether there was evidence to support the common law defence in the present case"[41]. Whilst the trial judge had given certain directions on the assumption that the "defence" applied, he had not been obliged by law to do so.

52 Despite this, the Court of Criminal Appeal noted an alternative submission advanced for the prosecution to the effect that, even if the "defence" had applied to s 66C(3) of the Act, it amounted, in the present case, to a "contingent defence", and could not be maintained. The prosecution argued that, because the appellant's case at trial had been that he did not have intercourse with the complainant at all, he could not also assert the inconsistent proposition that "if he did, he was mistaken as to her age and the fact that she was not consenting"[42].

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36 eg *Proudman v Dayman* (1941) 67 CLR 536; [1941] HCA 28; *He Kaw Teh v The Queen* (1985) 157 CLR 523; [1985] HCA 43; *Jiminez v The Queen* (1992) 173 CLR 572; [1992] HCA 14.

37 eg *Chard v Wallis* (1988) 12 NSWLR 453.

38 eg *R v Prince* (1875) LR 2 CCR 154; *Maughan* (1934) 24 Cr App R 130; *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428; *R v K* [2002] 1 AC 462.

39 See (2007) 171 A Crim R 371 at 391-397 [91]-[113].

40 See (2007) 171 A Crim R 371 at 397 [114]-[116]; see also at 373-374 [2]-[7] per Hodgson JA.

41 (2007) 171 A Crim R 371 at 405 [151].

42 (2007) 171 A Crim R 371 at 404 [149].

The Court of Criminal Appeal rejected this argument as incompatible with the decision of this Court in *Pemble v The Queen*[43].

53 *Appeal and contentions in this Court*: In this Court, the appellant argues that the Court of Criminal Appeal erred in finding that the "defence" of "honest and reasonable mistake" as to the age of the complainant was not available in respect of s 66(3) of the Act.

54 By a notice of contention, the respondent has submitted that the Court of Criminal Appeal erred in holding that *Pemble* has the effect that the "common law defence of honest and reasonable mistake applies even though the defence relied upon was not that the appellant, at the time of having intercourse, mistakenly believed that the complainant was over 16, but a denial that intercourse occurred at all". The respondent reiterated its argument that any defence of honest and reasonable mistake as to age "does not apply in a case such as the present where the accused denies committing the act to which the mistaken belief relates".

55 The respondent further contends that the Court of Criminal Appeal erred in holding that the onus of disproving honest and reasonable mistake, where applicable, lies on the prosecution. The respondent argues that "[i]f this Court were to decide that the common law defence was available in this case … the trial judge's direction placing the onus of establishing the defence on the accused on the balance of probabilities was correct".

The issues

56 Four issues therefore arise for decision by this Court:

(1) *The honest and reasonable mistake issue*: Does s 66C(3) of the Act create an offence of "absolute liability", such that the suggestion of "honest and reasonable mistake of fact" on the part of the accused as to the age of the complainant is legally immaterial?

(2) *The trial judge's direction issue*: If the first issue is answered in favour of the appellant, was the trial judge correct to direct the jury that an honest and reasonable mistake of fact as to the age of the complainant was a "defence", the onus of establishing which, on the balance of probabilities, was on the accused?

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43 (1971) 124 CLR 107; [1971] HCA 20 cited (2007) 171 A Crim R 371 at 404-405 [149].

(3) *The inconsistent propositions issue*: If both of the foregoing issues are decided in favour of the appellant, was he incapable in law of placing reliance on honest and reasonable mistake as to the age of the complainant because he conducted his case at trial on the basis of a denial that sexual intercourse had taken place at all? and

(4) *The Pemble issue and the proviso*: If all three of the foregoing issues are decided in favour of the appellant, should his appeal to this Court nonetheless be rejected on the basis that: (a) he did not at trial raise a live issue about his belief concerning the complainant's age; (b) the decision of this Court in *Pemble*[44] did not oblige the trial judge to direct the jury upon that issue; and (c) as a result, no miscarriage of justice occurred such as to warrant disturbing the appellant's conviction, despite a demonstrated error of law in the trial[45]?

Honest and reasonable mistake of fact and the offence

57 *A finely balanced question*: I can abbreviate what I would otherwise have written on this issue because I agree with much of what appears in the reasons of Gleeson CJ, Gummow, Crennan and Kiefel JJ ("the joint reasons"), and in the reasons of Hayne J.

58 At the outset, I acknowledge, alike with the joint reasons, that in the face of the silence of s 66C(3) of the Act with respect to honest and reasonable mistake, and given the legislative history, "there are powerful arguments in support of [the] conclusion" stated by Howie J for the Court of Criminal Appeal[46].

59 Years ago, sitting in that same Court in the case of *Jiminez*, I applied what I took to be the holdings of this Court, and concluded that the statutory offence of culpable driving, by its language and purpose, involved only objective considerations, viz "the actual behaviour of the driver", and did "not require any given state of mind as an essential element of the offence"[47].

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44 See eg (1971) 124 CLR 107 at 118.

45 See *Criminal Appeal Act* 1912 (NSW), s 6(1).

46 Joint reasons at [34].

47 (1991) 53 A Crim R 56 at 63 citing *R v Coventry* (1938) 59 CLR 633 at 637, 638; [1938] HCA 31; *McBride v The Queen* (1966) 115 CLR 44 at 50, 54; [1966] HCA 22.

60 In a unanimous decision, this Court reversed the conclusion that I (along with Lee CJ at CL) had reached[48]. I accept that the reasons of this Court, and not my own earlier opinion, correctly state the approach to be taken on the meaning and content of criminal offences such as those in question there and here.

61 *The governing principles*: I agree with the following conclusions stated by my colleagues:

(1) The starting point for resolving the first issue is an appreciation that what is involved is a question of statutory construction[49];

(2) The general principles of criminal responsibility necessarily inform the construction of criminal statutes[50];

(3) Although "honest and reasonable mistake" is sometimes described (as it was in this Court in *Jiminez*[51]) as a "common law defence", it is more accurate to characterise it as a circumstance or consideration that may deprive the facts of an ingredient essential to the offence[52];

(4) There is a strong presumption that the statutory definition of a crime contains an express or implied proposition as to the state of mind required on the part of the accused[53]. Although Parliament may, by clear provision, render criminal offences carrying serious penal consequences "absolute", courts are entitled to, and do, expect that Parliament will make any such purpose completely clear. Essentially, this is because of the seriousness with which courts view the imposition of criminal punishment (commonly involving loss of liberty and reputation) and the assumption that, absent clear provision, Parliament has meant the usual presumption to apply[54]; and

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48 *Jiminez* (1992) 173 CLR 572.

49 Joint reasons at [5]; reasons of Hayne J at [138]; see also reasons of Heydon J at [200].

50 Joint reasons at [5]; reasons of Hayne J at [146].

51 (1992) 173 CLR 572 at 581-582.

52 Joint reasons at [6]; reasons of Hayne J at [138]; see also reasons of Heydon J at [200].

53 Reasons of Hayne J at [159] citing *R v Tolson* (1889) 23 QBD 168 at 187 per Stephen J.

54 See joint reasons at [7].

(5) Although there are considerations in the present case that support the Court of Criminal Appeal's construction of s 66C(3) of the Act, the better view is that the "*necessary* implication"[55] required to sustain the reading of the statute for which the respondent contends is missing in this case[56]. At best, for the respondent, the Act might be said to be unclear, particularly if the Second Reading Speech is given weight. At worst, s 66C(3) of the Act simply creates a new offence, carrying heavy penalties, in a general criminal statute, that is to be construed so as to give effect to the normal presumption.

62 When one reaches this view, the application of the normal presumption in the circumstances of the present case is at once rational and understandable.

63 *Other factors favouring appellant's case*: Conviction of an offence against s 66C(3) of the Act carries a maximum penalty of ten years imprisonment. It thus has serious penal consequences. This is an important consideration, repeatedly recognised by this Court, favouring the application of the normal presumption[57].

64 Apart from the custodial and reputational consequences of conviction of such a serious offence, an offender against s 66C(3) of the Act becomes a "registrable person" under s 3A of the *Child Protection (Offenders Registration) Act* 2000 (NSW). Such a person is required to comply with a reporting regime, involving the provision of specified personal information to the Commissioner of Police[58], ordinarily for a period of 15 years[59]. Such information is recorded in the Child Protection Register[60]. I agree with Hayne J that the existence of a general

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55 *B* [2000] 2 AC 428 at 481 per Lord Hutton (Lords Mackay of Clashfern and Steyn agreeing) (emphasis in original); see also at 464 per Lord Nicholls of Birkenhead (Lord Irvine of Lairg LC agreeing) (describing the test as being whether the creation of absolute liability is "compellingly clear"). See Simester and Sullivan, *Criminal Law: Theory and Doctrine*, 3rd ed (2007) at 169-170.

56 Joint reasons at [35].

57 See eg *He Kaw Teh* (1985) 157 CLR 523 at 530 per Gibbs CJ (Mason J agreeing), 567 per Brennan J, 595 per Dawson J.

58 See *Child Protection (Offenders Registration) Act* 2000 (NSW), Pt 3.

59 Where the offender was a child at the time of the offence, as the appellant was, the length of the reporting period is reduced: see *Child Protection (Offenders Registration) Act* 2000 (NSW), s 14B.

60 *Child Protection (Offenders Registration) Act* 2000 (NSW), s 19.

prosecutorial and sentencing discretion does not diminish the gravity of the consequences that can follow from being convicted of such an offence[61].

65 In the Court of Criminal Appeal, Howie J acknowledged the difficulties involved in viewing s 66C(3) of the Act as a provision creating "an absolute offence" when the experience of courts suggested that the "likelihood of an innocent mistake" with respect to age increases "as [a] child becomes older"[62]. He was correct to do so.

66 *Conclusion: the Court of Criminal Appeal erred*: On the point of difference between the construction of the Act favoured in the joint reasons and by Hayne J, and that favoured by Heydon J, I prefer the former approach. It is more faithful to the presumption, often affirmed by this Court, that serious criminal offences are to be read as subject to a "defence" of honest and reasonable mistake about facts essential to conviction. We should not waver from the Court's previous insistence upon that principle. In this respect I join with the majority. The Court of Criminal Appeal erred in accepting the contrary argument maintained by the respondent. Prima facie, this conclusion entitles the appellant to relief from this Court.

The trial judge's directions were erroneous

67 *A lively controversy*: This is not one of those cases in which the issue before this Court was first conceived at appellate level. As the record of the trial demonstrates, there had, for some time, been debate in the District Court of New South Wales about the relevance of "honest and reasonable mistake of fact" to offences such as that established under s 66C(3) of the Act. Some judges had concluded that the "common law defence" was not available. Others had reached the opposite conclusion[63].

68 *The ERISP interview*: In the present trial, the conflicting decisions were drawn to the notice of the trial judge. The issue had become relevant because the appellant had made statements to police (out of court and not on oath) about his

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61 Reasons of Hayne J at [173].

62 (2007) 171 A Crim R 371 at 402 [137].

63 The attention of this Court was drawn to the reasons of Goldring DCJ in *R v Al-Abodi* (2005) 2 DCLR (NSW) 351 and of Knox DCJ in *R v Douglass* unreported, District Court of New South Wales, 10 August 2005 which substantially reached the conclusion now endorsed by this Court on the first issue. The reasons of Nicholson DCJ in *R v Yeo* unreported, District Court of New South Wales, 26 July 2005 reached a contrary conclusion.

belief as to the age of the complainant. These formed part of an electronic recording of interview ("ERISP"), which was in evidence. The following is the relevant passage from the interview:

> "Q53: How long have you known [the complainant] for?
>
> A: I think it was the start of the year, I started to go to … and then that's when I met [the complainant].
>
> Q54: Do you know how old [the complainant] is?
>
> A: 16.
>
> Q55: How do you know that?
>
> A: Well that's how, that's how old she's told me.
>
> Q56: When did she tell you that?
>
> A: Like when I first met her. I just assume that she's 16 ever since.
>
> Q57: Does [the complainant] go to school?
>
> A: She didn't for a while but she does now at the moment as far as I know, she's back at school.
>
> Q58: O.K. Do you know what year she's in?
>
> A: Year 10 I think."

69 In light of this evidence and of the submission for the appellant that the "common law defence" of honest and reasonable mistake was available, the trial judge was required to rule on whether he would, as requested:

> "remove from the jury's consideration that portion of the charge, which is the aggravating portion, that the complainant was under the age of 16 years, namely 15 years of age, on the basis that there should be available to him a defence that he was not aware that she was under the age of 16 years".

70 *Trial judge's ruling*: The trial judge declined to do so. However, he proceeded to what he described as "[t]he more difficult problem" arising in relation to the second count of the indictment (and the alternative third charge pursuant to s 66C(3)). He asked himself:

> "[I]s there a defence available that … the accused reasonably believed that [the complainant] was over the age of 16 years or indeed 16 years of age?"

71 The trial judge noted the conflicting decisions within the District Court. In brief terms he reviewed the relevant arguments. He then concluded:

> "[I]t seems to me that if it is a defence, that is, if the onus of proof is upon the accused, then you are not reducing an age of consent of 16 years to 14 years because it all depends upon the accused being able to satisfy, on the balance, a jury of his belief and the reasons for it. …
>
> But, secondly, having read those other judgments, I have concluded that the common law defence is still available. … I intend to allow counsel for … the accused to argue that defence [in respect of the charge under s 66C]."

72 Inherent in the foregoing ruling was a conclusion that the ERISP evidence afforded an evidentiary foundation for the proposition that the appellant believed, mistakenly, that the complainant was in fact 16 years of age at the time of the alleged offence. If it had been otherwise, it might have been expected that the trial judge would have said as much, and refused to waste time on an irrelevant and hypothetical issue.

73 *Submission of trial counsel*: Before the trial judge instructed the jury on the applicable law, the appellant's counsel informed him that "for pretty obvious forensic reasons" he would not be addressing the jury "on the common law defence available" in respect of the charge under s 66C. Nevertheless, counsel made it clear that he was not abandoning that "defence". The following exchange took place:

> "[COUNSEL]: … The only evidence is that he thought she was 16 so I mean if they apply what they've got before them to the facts—
>
> HIS HONOUR: So you probably won't touch on it but you still want me to.
>
> [COUNSEL]: Absolutely your Honour. Your Honour's obliged to give them the law and all the available defences. I mean I can't say … he didn't touch her but if he did she's the right age. … But I don't want your Honour to think that I'm abandoning that because in my view … the evidence is that there's a complete defence to it."

74 *Trial judge's directions to the jury*: In due course, the trial judge charged the jury on the relevance of the appellant's belief as to the age of the complainant:

> "There is, in this case, a defence. The defence is one in which the onus of proof switches slightly. Only in this one small area. The defence is one of having an honest belief that she was not under the age of 16 years. The Crown must prove its case beyond reasonable doubt but where there is a defence such as this the onus switches. There is no onus of proof of any

> matter on an accused person except where such a defence as this … [is] raised. The accused needs only to establish what the accused relies on in this regard to a lower standard of proof than beyond reasonable doubt. The accused is required to prove the accused's case in this regard only on the balance of probabilities. That is to say the accused needs only to show that it is more likely than not that what the accused asserts is so."

75 Later in his directions, the judge read the jury questions 54 to 58[64] and the appellant's answers to them. He noted that question 54 was "perhaps an important one". However, he gave no further indication to the jury of the consequence of a conclusion, reached on the basis of the recorded interview, that the appellant honestly and reasonably believed the complainant to be 16 years of age or older.

76 Once it was concluded, correctly, that the offence against s 66C(3) of the Act was not an "absolute" one, requiring no more than proof that sexual intercourse had taken place with a person in fact under the age of 16 years, it was essential that the jury be given accurate instructions upon that basis. However, perhaps because of the previous state of the law (where mistake as to the age of a complainant comprised a statutory defence[65]), possibly misled by the use of the expression "common law defence", the trial judge told the jury that it was for the appellant to establish the foundation for the "defence".

77 *Misdirection on burden and standard of proof*: During submissions, the trial judge's notice was drawn to a conclusion of Goldring DCJ in a decision which, in large part, the trial judge followed. In that decision, at the end of his ruling, Goldring DCJ had said[66]:

> "At this stage I propose to direct the jury, in accordance with *Chard v Wallis*[67], that when they come to consider the statutory alternative, that it is incumbent on the Crown, if the defence raises that the accused had an honest and reasonable belief, to negative that."

78 The present trial judge could not be persuaded to follow the same course. It was the correct course, consistent with the authority of this Court[68]. At

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64 See above these reasons at [68].

65 The Act, s 77(2) (repealed). See joint reasons at [19].

66 *Al-Abodi* (2005) 2 DCLR (NSW) 351 at 355-356 [21].

67 (1988) 12 NSWLR 453.

68 *He Kaw Teh* (1985) 157 CLR 523.

common law, an accused was not obliged to establish an honest and reasonable mistake of fact as to the age of the complainant as a "defence" to a charge such as that based on s 66C(3) of the Act. All the accused had to do was "raise" a suggestion of honest and reasonable belief on his part and identify some supporting evidence which it was open to the jury to accept. Once the suggestion was raised, it was for the prosecution to exclude it.

79 *Conclusion: error at trial*: I therefore agree with the joint reasons and with Hayne J on the second issue[69]. The trial judge erred both in assigning the burden of proof to the appellant and in defining the applicable standard of proof. On the face of things, this deprived the appellant of a trial according to law in respect of a matter which his counsel had identified in his submissions at trial. This therefore affords a further ground for providing relief to the appellant.

Honest mistake of fact was available at the trial

80 *The inconsistent propositions issue*: In this Court, as in the Court of Criminal Appeal, the respondent submitted, in effect, that it was impermissible for the appellant's counsel to request a judicial direction premised on a hypothesis inconsistent with the manner in which he had conducted his case at the trial. The prosecution argued that no directions were required concerning the appellant's belief as to the complainant's age, given that the sole defence postulated on his behalf was that no sexual intercourse had taken place between him and the complainant at all. As the trial judge acknowledged in his remarks on sentencing, the jury's verdict on the s 66C(3) offence represented a rejection of that claim.

81 Both the trial judge and Howie J in the Court of Criminal Appeal, each very experienced in the conduct of criminal trials, recognised correctly that it is not at all unusual for accused persons to propound arguments that are difficult or impossible to reconcile. The trial judge acknowledged this by accepting without demur the submission that he was obliged to instruct the jury on the "defence" of honest and reasonable mistake as to the age of the complainant, even though this was obviously inconsistent with the defence that counsel had indicated he planned to advocate.

82 Howie J, for the Court of Criminal Appeal, rejected the respondent's submission on this point in a short passage upon which I cannot improve[70]:

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69 See joint reasons at [35]; reasons of Hayne J at [189].

70 (2007) 171 A Crim R 371 at 404-405 [149] citing *Pemble* (1971) 124 CLR 107.

> "The Crown's contention is that the appellant could not assert that he did not have intercourse with the complainant yet also assert that, if he did, he was mistaken as to her age and the fact that she was not consenting. The Crown submitted that a 'contingent defence' would be 'offensive to basic principle'. That submission must be rejected. It would be no more offensive than a judge being required to leave the issue of self defence to the jury even though the accused was raising an alibi for the time of the offence".

83 In light of the record, it cannot be doubted that the appellant's counsel made a proper request for an appropriate direction. Repeatedly, he emphasised that, despite the way in which he would be putting the matter to the jury, he was not waiving the alternative case that he asserted arose from the evidence[71]. He made clear his submission that the trial judge was obliged to give directions in fulfilment of his own responsibility "to secure for the accused a fair trial according to law … [on] any matters on which the jury, upon the evidence, could find for the accused"[72].

84 *The Pemble requirement*: There was nothing odd, or even particularly surprising, in counsel for the appellant pressing the hypothesis that no sexual intercourse at all had taken place, whilst the judge reminded the jury that, if they were to reject that hypothesis, it would not be the end of their consideration of the matter. It does not impose too onerous a burden to require a trial judge to instruct the jury that, in such circumstances, they should proceed to consider whether, at the relevant time, the accused held an honest and reasonable, but mistaken, belief as to the age of the complainant. That course simply "covers all the bases" that logically arise. If necessary and appropriate, the judge could inform the jury that he or she was instructing them in that way because he or she was obliged by law to explain to them all of the legal principles necessary to ensure a fair and accurate trial of the accused. If the jury were told that this course sometimes becomes necessary because counsel may overlook a legal defence or because counsel might elect not to argue a point, they would understand. The judge's duty transcends that of counsel. The judge represents the whole community and the law. And that is what *Pemble* holds.

85 *Conclusion: entitlement to a direction*: The trial judge was therefore right to accept an obligation to direct the jury on the relevance of honest and reasonable mistake of fact as to the complainant's age (although, for the reasons explained above, the directions which he gave were incorrect and incomplete). I agree with the joint reasons, and with Hayne J, that no inconsistency was

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71 See eg above these reasons at [73].

72 *Pemble* (1971) 124 CLR 107 at 117-118.

involved in doing so[73]. The Court of Criminal Appeal was correct to so conclude. On this issue too, the appellant is entitled to succeed.

The inapplicability of the proviso in this case

86 *Point reached in the analysis*: The appellant is thus successful on the three issues debated below, both at the trial and in the Court of Criminal Appeal. The appellant's submission that the trial judge, in explaining the ingredients of the alleged offence under s 66(3), was required to instruct the jury to consider the suggestion, arising on the evidence, of honest and reasonable mistake as to age on the appellant's part, was correct. The contentions of the respondent to the contrary or, alternatively, to the effect that the directions given by the trial judge on this point were accurate, or that the appellant is unable to place reliance on an argument inconsistent with the presentation of his case at trial, are all rejected.

87 On the face of things, the fact that a verdict and conviction have followed a direction that was erroneous as to the components of the relevant offence, and as to the onus and standard of proof of a so-called "defence" to it, would appear to necessitate a retrial. The postulate of a legally accurate trial, in the sense of one in which the components of each offence alleged are correctly explained and understood, lies deep in our tradition of criminal justice. Its importance is compounded where, as here, significant custodial and other punishments are involved.

88 *A new point in this Court*: Not for the first time, the point that defeats the appellant in this Court is one that was accepted neither at first instance, nor in the intermediate court. Whilst I acknowledge the duty of this Court, where error on the part of an intermediate court has been shown, to give effect to its own conclusions in disposing of a case, prudence, and a proper discharge of this Court's constitutional functions as a final court of appeal, suggest that the closest attention should be paid to the opinions of decision-makers below on the now determinative point.

89 One may comb the transcript of the trial as closely as one wishes, but one will not find a suggestion on the part of the prosecutor that, even if the circumstance of honest and reasonable mistake of fact as to the complainant's age was relevant to the alleged offence under s 66C(3) of the Act, either: (1) the issue had not been properly raised or adequately reserved; or (2) there was insufficient evidence to afford (if accepted) a factual foundation for such mistake to be propounded.

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73 Joint reasons at [38]; reasons of Hayne J at [191].

90 The exchange extracted above[74] makes it abundantly clear that counsel for the appellant placed explicit reliance on honest and reasonable mistake of fact. He did not waive it by the manner in which he addressed the jury. On the contrary, he submitted that, in accordance with *Pemble*, the trial judge had his own legal duty to instruct the jury on the point.

91 There can be no suggestion that the trial judge did not accept that the ERISP evidence provided a foundation in fact for this "defence". Further, it is clear that the trial judge accepted, in accordance with *Pemble*, that he was obliged to give directions to the jury on what followed if they were to accept that evidence.

92 Likewise, there was no indication on the part of the Court of Criminal Appeal that the appellant had no basis for reliance on honest and reasonable mistake of fact. It is true that, in light of their conclusion on the applicable law, the judges of that Court were not required to decide "whether there was evidence to support the common law defence in the present case"[75]. However, everything that was said by Howie J, giving the principal reasons of the Court, suggests rejection of the narrow view, now favoured in this Court, that the ERISP evidence is insufficient to raise an issue as to the appellant's belief about the complainant's age. Thus, Howie J said[76]:

> "It cannot be doubted that, even if an accused does not give evidence, a fact can be proved in the Crown case. For example, in the appellant's trial the assertion that he believed the complainant was over the age of 16 years arose in the record of interview tendered by the Crown. But it could arise in other ways, for example by a witness giving evidence of what the appellant had been told about the complainant's age or what he had said about it at some relevant point of time. It is not unusual for a jury to infer a state of mind of an accused, such as a belief that an object was stolen on a charge of receiving, notwithstanding that there was no direct evidence of that belief and, even if the accused was denying being in possession of the object. It seems to me that whether there is evidence to raise the defence will depend upon the facts of the particular case. Generally a judge must leave a defence to the jury if there is evidence upon which a jury could reasonably find the defence established. That is so for other 'defences' where the ultimate onus is upon the Crown. It

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74 See above these reasons at [73].

75 (2007) 171 A Crim R 371 at 405 [151].

76 (2007) 171 A Crim R 371 at 405 [150].

arises in cases of self-defence and provocation and would arise in respect of a common law defence."

93 If the reference to honest and reasonable mistake of fact as to the age of a complainant as a "common law defence" (a common enough description) is deleted from the foregoing passage, the remaining exposition is entirely orthodox. I would endorse it.

94 *Evidence is for the jury to evaluate*: The question of whether there was evidence sufficient to permit a finding of honest and reasonable mistake of fact as to the complainant's age must be answered in the affirmative. True, the appellant did not himself give sworn evidence. The most direct testimony that could have been provided was therefore not adduced. But, as Howie J pointed out, the situation this created was hardly unique. There remained the next best source of the appellant's version, being the ERISP evidence recorded when the appellant's mind was focussed properly and clearly upon the issues now accepted to be of legal significance. The prosecution tendered that evidence in its case.

95 The ERISP evidence was before the jury. According to the record, it was also available during the jury's private deliberations. It was therefore for the jury to decide whether to accept or reject the relevant statements of the appellant, having regard to their content, his demeanour and other evidence. The jury might have considered that the statements were more believable because of their contemporaneity with the alleged offence, and because the appellant did not disclaim an intention to have sexual intercourse with the complainant. On the contrary, he described his purpose and conduct as consistent with that object until his friends entered the bedroom and insisted on being observers.

96 It was at all times for the jury to decide what they would make of the appellant's statement that the complainant had told him, when he met her, that she was 16 years of age. Certainly, his belief (inaccurate as it turned out) that she was in Year 10 at school would, if accepted, have been consistent with his stated belief about her age. In such circumstances, to say that there was *no* evidence of honest and reasonable mistake upon which the jury could have acted ignores the clear statements made in the recorded interview.

97 The jury might have rejected the appellant's evidence as, by inference, they did in part, albeit without the benefit of correct instructions on the governing law. But it cannot be said that there was *no* such evidence upon which the jury could have acted. Just as juries may act upon the evidence of recorded police interviews where such evidence tends to establish the accused's *guilt* of the crime charged, so the jury may act on such evidence where it tends to *exculpate* the accused.

98 The trial judge accepted that relevant evidence as to the appellant's belief about the age of the complainant existed and was before the jury. The prosecutor

at the trial did not deny it. The Court of Criminal Appeal did not dispute it. Nor should this Court.

99 *Rejecting the majority's disposition*: There are three basic reasons of legal principle for my divergence from the joint reasons, and from Hayne J, on the disposition of this appeal, despite otherwise agreeing in their analysis of the applicable law:

- First, I consider that their disposition is disharmonious with the proper approach to honest and reasonable mistake explained in unchallenged decisions of this Court;

- Secondly, I regard it as inconsistent with the explanations by this Court of the duty of the trial judge to direct the jury on all possible grounds of exculpation or defence enlivened by the evidence[77]; and

- Thirdly, I regard it as inconsistent with the language and purpose of the "proviso" and with this Court's explanations about its application.

100 I will deal with each of these points in turn.

The prosecution must dispel honest and reasonable mistake

101 *Distinguishing statute and common law*: Where (as is the case in most Australian jurisdictions[78] and as was formerly the case in New South Wales[79]) a defence of honest and reasonable mistake as to the age of a complainant exists under statute, the enacted provision must be given effect, including in so far as it deals with the applicable burden and standard of proof. However, where, as here, what is in issue is not a statutory prescription, but a common law principle as to the constituent elements of the crime itself, different rules apply.

102 These rules are a consequence of the fundamental principle that the prosecution must prove beyond reasonable doubt *all* of the elements of an offence, whether express or implied. Thus, in *Proudman v Dayman*[80], Dixon J explained:

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77 *Pemble* (1971) 124 CLR 107.

78 *Crimes Act* 1958 (Vic), s 45(4); *Criminal Law Consolidation Act* 1935 (SA), s 49(4); *Criminal Code* (Q), s 215(5); *Criminal Code* (Tas), s 124(2); *Criminal Code* (NT), s 127(4); *Crimes Act* 1900 (ACT), s 55(3).

79 The Act, s 77(2) (repealed).

80 (1941) 67 CLR 536 at 541.

> "The burden of establishing honest and reasonable mistake is in the first place upon the defendant and he must make it appear that he had reasonable grounds for believing in the existence of a state of facts, which, if true, would take his act outside the operation of the enactment and that on those grounds he did so believe. The burden possibly may not finally rest upon him of satisfying the tribunal in case of doubt."

103 In *He Kaw Teh v The Queen*[81], this Court was required to resolve certain questions arising under the common law of Australia. In his reasons, Gibbs CJ identified these questions as including[82]:

> "whether the absence of an honest and reasonable belief in the existence of facts which would have made the act innocent is a form of mens rea or whether, on the other hand, an honest and reasonable mistake affords the accused a defence only when he is charged with an offence of which mens rea is not an element. A second question is whether the accused bears the onus of proving on the balance of probabilities that he acted under an honest and reasonable mistake of fact or whether it is enough if the evidence raises a reasonable doubt."

104 The majority in *He Kaw Teh* decided that the presumption that the establishment of *mens rea* is a prerequisite to conviction for a grave criminal offence was not displaced by the statutory provision in issue in that case. In consequence, Gibbs CJ (Mason J agreeing) held that the prosecution bore the onus of proving that the accused knew of the facts that rendered his conduct criminal[83]. By reference to a great deal of historical and decisional material, Brennan J came to a similar conclusion[84]. To like effect were the reasons of Dawson J[85]:

> "There is … no justification since *Woolmington v Director of Public Prosecutions*[86] for regarding the defence of honest and reasonable mistake as placing any special onus upon an accused who relies upon it.

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81 (1985) 157 CLR 523.

82 (1985) 157 CLR 523 at 533.

83 (1985) 157 CLR 523 at 545, 546.

84 (1985) 157 CLR 523 at 582.

85 (1985) 157 CLR 523 at 592-593 (emphasis added).

86 [1935] AC 462.

> No doubt the burden of providing the necessary foundation in evidence will in most cases fall upon the accused. But it is not inconceivable that during the case for the prosecution sufficient evidence may be elicited by way of cross-examination or otherwise to establish honest and reasonable mistake or to cast sufficient doubt upon the prosecution case to entitle the accused to an acquittal. The governing principle must be that which applies generally in the criminal law. There is no onus upon the accused to prove honest and reasonable mistake upon the balance of probabilities. The prosecution must prove his guilt and the accused is not bound to establish his innocence. *It is sufficient for him to raise a doubt about his guilt and this may be done, if the offence is not one of absolute liability, by raising the question of honest and reasonable mistake. If the prosecution at the end of the case has failed to dispel the doubt then the accused must be acquitted*."

105 *Raising a doubt based on evidence*: In my opinion, this passage from the reasons of Dawson J expresses the common law rule applicable in Australia. The consequence for the present appeal is clear. If an offence is not, by clear statutory provision, rendered one of absolute liability, it is open to an accused to raise a doubt about guilt on the basis of an honest and reasonable mistake about an essential component of the offence. This the present appellant did by the ERISP evidence and by an explicit submission to the trial judge. He was not then obliged to give or adduce further or different evidence to establish his innocence on this basis.

106 In an accusatorial trial, as conducted in Australia, the accused is entitled to put the prosecution to the proof. He or she is entitled to rely, in exculpation, upon evidence that has been adduced in the prosecution case. Inherent in the view that an accused must give or elicit evidence in order to "enliven the issue" of honest and reasonable mistake of fact[87] is an erroneous idea that the accused is precluded from relying on evidence favouring him or her adduced in the prosecution case, and could thus be forced to give or adduce exculpatory evidence for him or herself. This does not reflect what the judges of this Court said in *He Kaw Teh*, and other relevant cases. More importantly, it is inconsistent with the basic principles of accusatorial procedure.

107 Obviously, in declining to give, or call, evidence about the suggested existence of an honest and reasonable mistake of fact, an accused may put him or herself at a serious forensic disadvantage. But if, in a jury trial, there is *some* evidence, within the prosecution case or otherwise, to raise "the question of honest and reasonable mistake", and thus "raise a doubt about [the accused's]

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87 Reasons of Hayne J at [194]; cf joint reasons at [36].

guilt"[88], the judge must direct the jury on the point. The judge must call attention to the relevant evidence and then leave it to the jury, as the constitutional tribunal of fact, to decide whether the prosecution has dispelled any doubt that the accused has raised. If it has not, the accused must be acquitted, and the judge must so direct the jury.

108 *The necessity to "enliven the issue"*: By enlarging the obligation upon the accused to give, or adduce, evidence so as to "enliven the issue", the majority in this Court have departed from the Court's previous statements about the respective roles of the prosecutor and the accused. More fundamentally, they have increased the burden on the accused at the trial in a manner inconsistent with its accusatorial character and with the "golden thread" of which Viscount Sankey LC spoke in *Woolmington*[89].

109 The particular suggestion that the appellant failed to "enliven the issue" because his counsel omitted to question the complainant about her age[90] illustrates this basic point. The appellant's counsel was perfectly entitled to present his case in terms of a denial that sexual intercourse took place at all, a course chosen no doubt on instructions and understandable for forensic reasons. He was not obliged to take a different course in order to "enliven an issue" of honest and reasonable mistake. The "issue" had an independent foundation in the evidence on the record. That foundation was adequate to allow counsel to "rais[e] the question"[91].

110 *Conclusion: directions erroneous*: It follows that, in accordance with *He Kaw Teh*, there was a sufficient suggestion of honest and reasonable mistake at the appellant's trial to require the trial judge to direct the jury on the point. Directions were indeed given upon this premise. But they were incorrect. I would not qualify the reasoning in *He Kaw Teh*. In this appeal, that reasoning should simply be applied.

111 Apart from any requirements of *Pemble*, an issue of honest and reasonable mistake of fact is sufficiently "enlivened" in a trial if there is some evidence before the jury to support it, and the accused has raised it for direction by the trial judge. Both of those preconditions were satisfied in the appellant's trial.

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88 *He Kaw Teh* (1985) 157 CLR 523 at 593 per Dawson J.

89 [1935] AC 462 at 481.

90 Joint reasons at [38]-[39]; reasons of Hayne J at [194].

91 *He Kaw Teh* (1985) 157 CLR 523 at 593; cf reasons of Hayne J at [179].

The judge's directions on grounds of exculpation and defences

112 *Rule in Pemble*: There is an additional consideration that reinforces the foregoing approach in the present appeal. It arises from the decision of this Court in *Pemble*. That decision acknowledges that an accused is entitled to have a defence put forward by counsel in the manner judged most likely to secure an acquittal. Often, for forensic reasons, this will involve a single or simple theory of the evidence. However, the decision also recognises that this does not relieve the trial judge of the obligation to explain to the jury any other bases upon which, in law, the accused may be entitled to acquittal *upon the evidence adduced.*

113 This recognition of the forensic privileges of defence counsel, and the distinct functions of judges, in criminal trials (as distinct from civil trials[92]) is altogether incompatible with requiring an accused to raise, at trial, all potential lines of defence so as to render them "live" or thereafter to lose the benefit of recourse to them. As the Court of Criminal Appeal pointed out, that has not hitherto been regarded as the obligation of defence counsel in this country. Quite the contrary. *Pemble* recognises the need for a protective rule precisely because the primary, or only, case advanced by an accused may be inconsistent with another basis for exculpation supported by evidence, upon which counsel may be silent. With respect, the suggestion that to "enliven the issue" of honest and reasonable mistake, an accused is bound to cross-examine a witness in a manner inconsistent with his or her chosen strategy at trial, cuts across the rule explained by this Court in *Pemble*.

114 *History and purpose of Pemble*: The holding of this Court in *Pemble* does not stand alone. It can be traced at least to the opinion of the English Court of Criminal Appeal in 1915 in *R v Hopper*[93]. There, Lord Reading CJ said[94]:

> "Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence even although counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence – we say no more than that – upon which a question ought

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92 *Pemble* (1971) 124 CLR 107 at 117.

93 [1915] 2 KB 431.

94 [1915] 2 KB 431 at 435.

> to have been left to the jury as to the crime being manslaughter only, we think that [the] verdict of murder cannot stand."

115 The approach in *Hopper* was endorsed by the House of Lords in *Mancini v Director of Public Prosecutions*[95]. The influence of *Hopper* and *Mancini* was expressly acknowledged by Barwick CJ in *Pemble*[96]. The authorities establish a practical rule and one that acknowledges and accommodates the often difficult forensic choices that defence counsel face in conducting a criminal trial, especially before a jury. A new rule, in effect obliging an accused's counsel to embark on a particular line of cross-examination in order to "enliven an issue" which in evidence the accused elects not to pursue[97], is fundamentally incompatible with the reasoning behind *Hopper, Mancini* and *Pemble*.

116 In the present case, the rule in *Pemble* not only applied, but it was explicitly drawn to the notice of the trial judge and emphatic reliance was placed upon it. Moreover, the trial judge attempted to observe it; but he erred in doing so.

117 Difficult questions may sometimes arise when *Pemble* is considered. As Menzies J remarked in *Pemble* itself, it is usually undesirable for a trial judge in instructing a jury to go beyond what it is necessary for them to know[98]. However, what is necessary is not determined exclusively by reference to the issues presented by trial counsel. It is determined by reference to the evidence that is received in the trial, and to any legal principles which that evidence enlivens.

118 *Obliging accused to "enliven issues"?* Because the evidence as to the appellant's belief about the complainant's age was before the jury, it was for the jury to decide what, if any, weight they would give to it. It is not for judges, least of all judges in this Court and for the first time in the entire proceedings, to substitute their own opinions about such evidence for that of the jury. A correct

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95 [1942] AC 1 at 7-8.

96 (1971) 124 CLR 107 at 117.

97 cf reasons of Hayne J at [194].

98 (1971) 124 CLR 107 at 128. See also *Alford v Magee* (1952) 85 CLR 437 at 466; [1952] HCA 3; cf *De Gruchy v The Queen* (2002) 211 CLR 85 at 96 [44]; [2002] HCA 33; *Murray v The Queen* (2002) 211 CLR 193 at 219 [78(4)]; [2002] HCA 26.

application of the *Pemble* rule, which has never been doubted and has frequently been confirmed by this Court[99], denies that approach.

119 Until now, the rule in *Pemble* has been engaged where a fair reading of the evidence presents an issue that needs to be considered by the jury in reaching their verdict and deciding any basis on which the accused may be entitled to acquittal[100]. The danger involved in the approach now adopted by the majority is that, by requiring an accused to "enliven the issue" sufficiently at trial, the need for the rule in *Pemble*, and the occasions for its exercise, will be inappropriately circumscribed. No one in this appeal argued for that course. I would not adopt it.

The "proviso" does not apply

120 *The suggested absence of miscarriage*: The ultimate basis of the majority's decision to refuse relief to the appellant, notwithstanding the identification of legal errors in his trial, is that such errors "occasioned no substantial miscarriage of justice"[101].

121 This is the language of the "proviso" contained in s 6(1) of the *Criminal Appeal Act* 1912 (NSW). That provision permits an appellate court, whilst finding (relevantly) "the wrong decision of any question of law" or "on any other ground … a miscarriage of justice", to nonetheless dismiss the appeal, because of the absence of the actual occurrence of a "substantial" miscarriage.

122 In *Pemble*, Windeyer J observed, correctly, that sometimes "justice may miscarry simply because a trial was not in all respects correctly conducted"[102]. Another way of expressing the same idea is that "some errors or miscarriages of justice occurring in the course of a criminal trial may amount to such a serious breach of the presuppositions of the trial as to deny the application of the common form criminal appeal provision with its proviso"[103].

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99 See eg *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 161-162, 169; [1986] HCA 76; *Pantorno v The Queen* (1989) 166 CLR 466 at 473; [1989] HCA 18; *BRS v The Queen* (1997) 191 CLR 275 at 330; [1997] HCA 47; *Gipp v The Queen* (1998) 194 CLR 106 at 124 [53]; [1998] HCA 21.

100 cf *Kwaku Mensah v The King* [1946] AC 83; *Bullard v The Queen* [1957] AC 635.

101 Reasons of Hayne J at [195]; joint reasons agreeing at [36].

102 (1971) 124 CLR 107 at 138.

103 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [46]; [2005] HCA 81.

123 *Limitations of appellate review*: It is now clearly established that, where the "proviso" is available[104], it is for the appellate court itself to review the entire record of the trial, making due allowance for its own limitations, in order to decide whether, to the requisite standard, the accused was proved to be guilty of the offence on which the jury returned their verdict of guilty.

124 In my view, it is impossible to reach an affirmative conclusion that no substantial miscarriage of justice has occurred in the appellant's case. The evidence was ambivalent. Given the respective ages of the appellant and the complainant; the fact of their past relationship; and the circumstances prevailing at the time that sexual intercourse was said to have occurred, it is far from impossible to postulate a conclusion that if (as the jury found) the appellant had sexual intercourse with the complainant, he honestly and reasonably believed her to be over the age of 16 years. Certainly, the prosecution had done little to dispel that suggestion.

125 *Legal principle and the proviso*: Because of the trial judge's errors, the appellant is primarily entitled to have his appeal allowed and a new trial ordered. He certainly suffered a miscarriage of justice to the extent that his trial did not conform to law. The legal questions in issue concerned the judge's explanation to the jury of: (1) the legal ingredients of the relevant offence; (2) the assignment of the burden of proof of the material facts; and (3) the identification of the standard of proof to be applied. What could be more fundamental in a criminal trial than these three matters?

126 There was a time, not so long ago, when it was possible to say that applications of the "proviso" were becoming less common because of the properly rigorous standards which this Court and intermediate courts in Australia were demanding in the conduct of criminal trials[105]. The same cannot now be said.

127 *Recent authority on the proviso*: In a recent decision concerning the application of the "proviso", *AK v Western Australia*[106], it was acknowledged by Gleeson CJ and Kiefel J that "the proviso cannot be applied where the error at trial denies or substantially frustrates the capacity of an appellate court to decide

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104 This was not and is not universal: see eg *Pemble* (1971) 124 CLR 107 at 125; cf *Conway* (2002) 209 CLR 203 at 207 [4], 228 [68].

105 See *Whittaker* (1993) 68 A Crim R 476 at 484 cited *Gilbert v The Queen* (2000) 201 CLR 414 at 438 [86]; [2000] HCA 15.

106 (2008) 82 ALJR 534; 243 ALR 409; [2008] HCA 8.

whether a conviction is just"[107]. Here, this Court has no way of knowing whether the jury accepted or rejected the appellant's statement about his mistake as to the complainant's age because the trial judge's directions did not call the jury's attention to the correct considerations. How could this Court possibly decide the point never having seen the witnesses, or heard the ERISP evidence?

128 Similarly, Gummow and Hayne JJ noted in *AK* that there exists a "class of … circumstances", albeit difficult to describe in the abstract, in which "radical" error at trial renders the application of the proviso all but impossible[108]. The failure on the part of the trial judge to explain to the jury the legal ingredients of an offence, and to assign correctly the burden and standard of proof in respect of them, seem to me to be "radical" errors, inconsistent with the requirements of the law. It cannot matter that the law in question is common law and not, as in *AK*[109], expressed in a statute. It is still the law.

129 It was also acknowledged in *AK* that one of the "two principal safeguards for the accused in a criminal trial" is "the criminal burden and standard of proof"[110]. If this is the case, then surely it must be a grave (or "radical") error for the trial judge to misdirect the jury on each of these considerations, as occurred in the appellant's trial. If this Court is itself to deny relief to an otherwise successful appellant by its own application of the "proviso", it must, in my respectful opinion, be consistent in doing so.

130 *The proviso and practicalities*: There is one further consideration which this Court should keep in mind in a case such as the present. Discordancy of opinion at trial level, such as existed in respect of the question in this appeal[111], creates uncertainty, expense and the potential for injustice. Only a fraction of such questions are ever examined by the intermediate courts. Still fewer are the cases in which special leave to appeal to this Court is sought. Tiny indeed are the number of cases decided by this Court.

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107 (2008) 82 ALJR 534 at 540 [23]; 243 ALR 409 at 415-416; cf *Nudd v The Queen* (2006) 80 ALJR 614 at 618 [7]; 225 ALR 161 at 164; [2006] HCA 9.

108 (2008) 82 ALJR 534 at 545 [54]; 243 ALR 409 at 422 referring to *Wilde v The Queen* (1988) 164 CLR 365 at 373; [1988] HCA 6.

109 See (2008) 82 ALJR 534 at 545 [55]; 243 ALR 409 at 422-423; cf *Gassy v The Queen* [2008] HCA 18 at [33]-[34].

110 (2008) 82 ALJR 534 at 558 [102] per Heydon J; 243 ALR 409 at 440.

111 See above these reasons at [67], fn 63.

131 An appellant has no special interest, as such, in resolving contested questions of criminal law, such as were at issue in this appeal. If it is thought that an appellant may succeed in substance but will generally fail on the "proviso", an important practical incentive for the bringing of criminal appeals is diminished, if not lost entirely. Yet, when legally justified, the prosecution of such appeals is essential to the proper administration of criminal justice in Australia.

132 *Conclusion: order retrial*: This is why, in a case such as the present, this Court, having found legal errors concerning jury instructions about the definition of the offence and the onus and standard of proof, should return the matter for retrial according to law. The case is legally important enough for that course to be taken. The conviction and sentence are very significant for the appellant. At the very least, the appellant has suffered a serious legal and procedural miscarriage. If this Court refuses a retrial, all of the learned disquisitions in the opinions of the Justices in this case represent little more than *obiter dicta*: an elaborate coda to yet another decision that is actually based on the proviso.

Orders

133 The appeal should be allowed. The judgment of the Court of Criminal Appeal of New South Wales should be set aside. In place of that judgment, this Court should order that the appeal to that Court be allowed; the conviction and sentence of the appellant be quashed; and a new trial ordered.

134 HAYNE J. Section 66C(3) of the *Crimes Act* 1900 (NSW) provides that "[a]ny person who has sexual intercourse with another person who is of or above the age of 14 years and under the age of 16 years is liable to imprisonment for 10 years". What, if any, mental element must be proved to establish commission of that offence? Is a mistaken belief about the age of the other person relevant?

135 To prove commission of an offence against s 66C(3) the prosecution need not establish that the accused knew or believed that the other person was under the age of 16 years. If, however, there is a sufficient foundation in the evidence led at trial for there to be an issue about whether the accused mistakenly believed that the other person was not under the age of 16 years, the prosecution must prove beyond reasonable doubt that the accused did *not* honestly and reasonably hold that belief.

136 In this matter, no issue of mistaken belief about age was sufficiently raised by the appellant at his trial. The directions given at the appellant's trial about mistake as to age, though wrong, occasioned no substantial miscarriage of justice. His appeal to this Court should be dismissed.

137 It is convenient to deal first with the relevant question of statutory construction, then with some matters of history, including legislative history, and the relevance of that history to the question of mistake as to age, and only then with the course of the appellant's trial, his appeal to the Court of Criminal Appeal of New South Wales, and his appeal to this Court.

A question of statutory construction

138 The issue that arises in this matter is an issue about the proper construction of s 66C(3) of the *Crimes Act* and the state of mind of the accused that the prosecution must prove in order to attach criminal responsibility to proscribed conduct. It is not a question about the availability of any "common law defence" to the offence created by that sub-section. Properly identifying the nature of the issue, as one about statutory construction and criminal responsibility, is critical to its proper resolution. In particular, recognising that the issue is not one of defence, excuse or justification bears directly upon what is the mental state of the accused that the prosecution must prove, which party bears the onus of proof, and what standard of proof must be applied in deciding the relevant issue.

139 More than a century ago, Griffith CJ said, in *Hardgrave v The King*[112]:

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112 (1906) 4 CLR 232 at 237; [1906] HCA 47.

> "The general rule is that a person is not criminally responsible for an act which is done independently of the exercise of his will or by accident. It is also a general rule that a person who does an act under a reasonable misapprehension of fact is not criminally responsible for it even if the facts which he believed did not exist."

Questions about an act done independently of the exercise of will, or by accident, may be put aside from consideration in this matter. But what about mistake? What of the case where a person accused of having sexual intercourse with another person, of or above the age of 14 years and under the age of 16 years, mistakenly believed that that other person was not under the age of 16 years?

140 Section 66C(3) contains no words suggesting that proof of the offence requires proof that the accused knew or believed that the other person was under the age of 16 years. The appellant in the present matter rightly disclaimed any argument that proof that the accused knew or believed the other person to be under the relevant age was a necessary step in establishing commission of the offence. It by no means follows, however, that mistake about the age of the other person is irrelevant to the criminal responsibility of a person who has intercourse with another person under the age of 16 years. Mistake about the age of the other person would be irrelevant only if there were "a rigid adherence to the inflexible English principle of literal interpretation of statutory enactments"[113] that once held sway. That is, questions of mistake about age would be irrelevant only if the absence of explicit reference to mistake, in the relevant statutory provision, were seen as determinative. It is not.

141 By the late 19th century the English courts had recognised[114] not only that statutory silence about mistake was not conclusive of the question about its relevance to a criminal prosecution, but also "that a *contrary* presumption was applicable alike to offences created by statute and to crimes existing at common law"[115] (emphasis added). It was to this presumption that Griffith CJ had adverted, in *Hardgrave*[116], when he spoke of "a general rule that a person who does an act under a reasonable misapprehension of fact is not criminally responsible for it even if the facts which he believed did not exist".

142 In *Thomas v The King*, Dixon J accepted[117] that:

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113 *Thomas v The King* (1937) 59 CLR 279 at 302 per Dixon J; [1937] HCA 83.

114 *R v Tolson* (1889) 23 QBD 168.

115 *Thomas* (1937) 59 CLR 279 at 304 per Dixon J.

116 (1906) 4 CLR 232 at 237.

117 (1937) 59 CLR 279 at 305.

> "[I]n the application of the principle of interpretation to modern statutes, particularly those dealing with police and social and industrial regulation, a marked tendency has been exhibited to hold that the prima facie rule has been wholly or partly rebutted by indications appearing from the subject matter or character of the legislation."

But as Dixon J went on to emphasise[118], "the general rule has not been and could not be impaired in its application to the general criminal law". To exclude from consideration a mistaken belief of the accused, held on reasonable grounds, in facts which, if true, would make the accused's conduct innocent was condemned by Dixon J in *Thomas*. Excluding consideration of such a mistake, where the accused was charged with a statutory offence forming part of the general criminal law, was described by Dixon J as "fundamentally inconsistent with established principle and a reversion to the objective standards of early law"[119], as "excluding from inquiry the most fundamental element in a rational and humane criminal code"[120] and as "not only ... contrary to principle but ... discreditable to our system of criminal law"[121].

143 In *Thomas*, the question was identified as being whether a mistake of the kind described ("an honest and reasonable belief in the existence of circumstances which, if true, would make innocent the act for which [the accused] is charged"[122]) was a defence to a charge of bigamy. That identification of the issue reflected the procedure that had been followed in the courts below. At the trial of Mr Thomas for the offence of bigamy, contrary to s 61 of the *Crimes Act* 1928 (Vic), the trial judge stated a case for the opinion of the Full Court of the Supreme Court of Victoria. The question reserved for the opinion of the Full Court was whether it was "a good defence to the charge of bigamy ... that the accused bona fide and on reasonable grounds believed" that a divorce granted to the person with whom he first went through a ceremony of marriage had not been made absolute (with the result that his first "marriage" was void and the second "marriage" the subject of the charge was not bigamous). This being the question reserved, there was no occasion for this Court to consider questions of onus or standard of proof.

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118 (1937) 59 CLR 279 at 305.

119 (1937) 59 CLR 279 at 308.

120 (1937) 59 CLR 279 at 309.

121 (1937) 59 CLR 279 at 311.

122 (1937) 59 CLR 279 at 304.

144 *Thomas* was decided in 1937, after *Woolmington v The Director of Public Prosecutions*[123] had held that, in a trial for murder, the prosecution must disprove accident beyond reasonable doubt if that issue was raised. And in *R v Mullen*[124], decided in 1938, the High Court considered and applied *Woolmington* to the offence of wilful murder under the *Criminal Code* (Q), holding that, if "accident" was raised, it was for the prosecution to prove that the killing was not accidental[125]. It may be assumed that considerations of the kind that had been decided in *Woolmington*, and were soon to be considered in *Mullen*, led Dixon J, in *Thomas*, to frame his analysis of the issues tendered for consideration by the Court in that case by reference to notions of "criminal responsibility", rather than the availability of a "defence".

145 Subsequently, in the well-known case of *Proudman v Dayman*[126], consideration was given to the significance to be attached to honest and reasonable mistake of fact in relation to summary offences created by statute. *Proudman* concerned a charge of permitting an unlicensed person to drive a motor vehicle on a road. This Court held that proof that the defendant knew that the driver was unlicensed was not necessary. Dixon J considered[127] that "[a]s a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence". But this was identified as a general rule and Dixon J went on to point out[128]:

> "[t]he strength of the presumption that the rule applies to a statutory offence newly created varies with the nature of the offence and the scope of the statute. *If the purpose of the statute is to add a new crime to the general criminal law, it is natural to suppose that it is to be read subject to the general principles according to which that law is administered.* But other considerations arise where in matters of police, of health, of safety or the like the legislature adopts penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced. In such cases there is less ground, either in

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123 [1935] AC 462.

124 (1938) 59 CLR 124; [1938] HCA 12.

125 *Murray v The Queen* (2002) 211 CLR 193; [2002] HCA 26; *Stevens v The Queen* (2005) 227 CLR 319; [2005] HCA 65.

126 (1941) 67 CLR 536; [1941] HCA 28.

127 (1941) 67 CLR 536 at 540.

128 (1941) 67 CLR 536 at 540.

> reason or in actual probability, for presuming an intention that the general rule should apply making honest and reasonable mistake a ground of exoneration, and the presumption is but a weak one." (emphasis added)

146 Where, as here, the legislature creates a statutory offence that forms part of the general criminal law, full force must be given to the need to read that provision "subject to the general principles according to which [the criminal law] is administered"[129]. That is, a person is not to be exposed to liability to imprisonment (in this case for up to 10 years) if that person reasonably and honestly believes in a state of facts that would make his or her conduct innocent, unless the legislature makes it abundantly plain that such a mistake of fact is irrelevant to the determination of criminal responsibility.

147 No doubt, as Dixon J pointed out in *Proudman*[130]:

> "The burden of establishing honest and reasonable mistake is in the first place upon the defendant and he must make it appear that he had reasonable grounds for believing in the existence of a state of facts, which, if true, would take his act outside the operation of the enactment and that on those grounds he did so believe."

But as Dixon J suggested in *Proudman*[131], and this Court has later held in *He Kaw Teh v The Queen*[132], the burden of proof of satisfying the tribunal about the asserted mistake of fact does not finally rest upon the accused. If the issue is raised, it is for the prosecution to prove beyond reasonable doubt that the accused did not honestly believe, on reasonable grounds, in the existence of circumstances which, if true, would make innocent the act for which the accused is charged.

148 To read a statute which creates a statutory offence that forms part of the general criminal law as subject to the general principles according to which the criminal law is administered does no more than reflect the fact that "[s]ociety and the law have moved away from the primitive response of punishment for the *actus reus* alone"[133]. It avoids what has been called "the public scandal of

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129 (1941) 67 CLR 536 at 540.

130 (1941) 67 CLR 536 at 541.

131 (1941) 67 CLR 536 at 541.

132 (1985) 157 CLR 523; [1985] HCA 43.

133 *Leary v The Queen* [1978] 1 SCR 29 at 43 per Dickson J, cited by Stephen J in *R v O'Connor* (1980) 146 CLR 64 at 96; [1980] HCA 17. See also *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 565 per Brennan J.

convicting on a serious charge persons who are in no way blameworthy"[134]. And "[i]t is now firmly established that mens rea is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject-matter, it is excluded expressly or by necessary implication"[135].

149 Particular application of these general principles is sometimes attended by difficulties about terminology. So, for example, the exact meaning or content of expressions like mens rea and actus reus, or "general" and "specific" intent, is not always easily identified. And there is no little danger in first seeking to identify a class of offences as ones of "strict liability" and then asking whether the offence under consideration is within or without that class. These difficulties reinforce the need to approach the question as one of construction of the particular statutory provision.

150 In some statutes the language used to describe the offence will readily yield the conclusion that a specific state of mind must be established. *He Kaw Teh* was such a case. There the relevant statute prohibited "possession" of certain substances. As Brennan J pointed out[136], "[h]aving something in possession is not easily seen as an act or omission; it is more easily seen as a state of affairs ... but it is a state of affairs that exists because of what the person who has possession does in relation to the thing possessed". But like the offence of bigamy considered in *Thomas*, the offence now under consideration contains no language that suggests a specific state of mind must be established to prove commission of the offence. The offence now under consideration is identified by reference only to specified conduct (having sexual intercourse) and the objectively ascertainable fact of the age of the "other person". It is this second, factual, element that must yield to the general principles about mistake that have earlier been described, unless the contrary legislative intent is plainly shown.

151 In that regard, much emphasis was given in argument to the legislative history that lies behind the enactment of what now is s 66C(3) of the *Crimes Act*. In particular, the respondent submitted that consideration of the history of the provision demonstrates that an accused's mistake as to the age of the other person with whom the intercourse occurred is irrelevant. It is necessary, then, to say something about that history. In the course of dealing with the legislative history, and in order to put that history into its proper context, it will be

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134 *Sweet v Parsley* [1970] AC 132 at 150 per Lord Reid, cited by Brennan J in *He Kaw Teh* (1985) 157 CLR 523 at 565.

135 *He Kaw Teh* (1985) 157 CLR 523 at 566 per Brennan J.

136 (1985) 157 CLR 523 at 564.

convenient to notice some aspects of two 19th century English decisions – *R v Prince*[137] and *R v Tolson*[138].

Legislative history

152 Statutory provisions making it a crime to have carnal knowledge of a young female have long been part of the criminal law. The origins of the offence of carnal knowledge, and some associated sexual offences, are sometimes traced to ss 50 and 51 of the *Offences against the Person Act* 1861 (UK) (24 & 25 Vict c 100). It may be noted, however, that similar offences were to be found in s 17 of the *Offences against the Person Act* 1828 (UK) (9 Geo IV c 31). Both the 1828 and the 1861 Acts made it a felony to have carnal knowledge of a girl aged less than 10 years and a misdemeanour to have carnal knowledge of a girl above the age of 10 years and under the age of 12 years.

153 By s 24 of the *Australian Courts Act* 1828 (Imp) the *Offences against the Person Act* 1828 applied in New South Wales. In 1883, the New South Wales Parliament enacted the *Criminal Law Amendment Act* 1883 (NSW). Section 42 of that Act made it an offence to have carnal knowledge of a girl above the age of 10 years and under the age of 14 years.

154 None of these early provisions about the offence of carnal knowledge (in the *Offences against the Person Act* 1828, the *Offences against the Person Act* 1861 or the *Criminal Law Amendment Act* 1883) said anything about mistakes as to the age of the girl concerned.

155 In *Prince*[139], decided in 1875, 15 of the 16 judges in the Court for Crown Cases Reserved held that a bona fide belief on reasonable grounds that the girl concerned was over the age of 16 years was no defence to a charge of unlawfully taking an unmarried girl under the age of 16 out of the possession and against the will of her father. A critical step in the reasoning of several of the judges in that case was that mistake as to age would afford no answer to a charge of carnal knowledge.

156 Ten years after *Prince* was decided, s 5 of the *Criminal Law Amendment Act* 1885 (UK) made it an offence to have unlawful carnal knowledge of any girl being of or above the age of 13 years and under the age of 16 years. But it was expressly provided by the 1885 Act that it should be "a sufficient defence to any

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137 (1875) LR 2 CCR 154.

138 (1889) 23 QBD 168.

139 (1875) LR 2 CCR 154.

charge ... if it shall be made to appear to the court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of 16 years". It is to be observed that this provision for a defence to the charge was introduced in connection with the extension of the range of conduct rendered criminal and provided a defence in respect of only that extended range of criminal conduct. It is further to be observed that the provision about a defence of mistake about age was made before the decision in *Tolson*[140].

157 Like *Prince*, *Tolson* was a Crown case reserved for the consideration of all the judges. The prisoner had been convicted of bigamy, having gone through a ceremony of marriage with another man at the time when, in fact, her husband was alive. At her trial, the jury had found that at the time of the second marriage she believed, in good faith and on reasonable grounds, that her first husband was dead. By majority, the Court held that the conviction should be quashed.

158 Little is to be gained from a detailed analysis of whether, and how, the decisions in *Tolson* and *Prince* may be reconciled. What is presently important is that, in *Tolson*, that considerable criminal lawyer, Sir James Fitzjames Stephen, then a judge of the Queen's Bench Division, made some important points about criminal responsibility that are of enduring relevance. He deprecated reference to the Latin maxim *non est reus, nisi mens sit rea* (and its variants). The phrase, though "in common use", was described[141] as "most unfortunate, and not only likely to mislead, but actually misleading". It was identified as misleading because[142] "[i]t naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a 'mens rea', or 'guilty mind', which is always expressly or by implication involved in every definition" whereas "[t]his is obviously not the case, for the mental elements of different crimes differ widely".

159 Sir James Stephen stated the relevant principles in terms that repay close attention. For present purposes, what is important is his identification of the general presumption that a statutory definition of crime must be read as qualified in such a way that there is no criminal responsibility in an accused who acts under honest and reasonable mistake of fact which, if true, would make the conduct innocent. It is as well, however, to identify the steps that preceded that conclusion. First, "[t]he full definition of every crime contains expressly *or by*

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140 (1889) 23 QBD 168.

141 (1889) 23 QBD 168 at 185.

142 (1889) 23 QBD 168 at 185.

implication a proposition as to a state of mind"[143] (emphasis added). Next, while legislation may mark the mental element of a crime by use of a word like "maliciously", "fraudulently", "negligently" or "knowingly", some of the mental elements of crime are usually left unexpressed. They include what Sir James Stephen described[144] as "competent age, sanity, and some degree of freedom from some kinds of coercion". He continued[145]:

> "With regard to knowledge of fact, the law, perhaps, is not quite so clear, but it may, I think, be maintained that *in every case knowledge of fact is to some extent an element of criminality* as much as competent age and sanity." (emphasis added)

And it was on this footing that he propounded[146] "*as a general rule* that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence" (emphasis added).

160 The decision in *Prince* was said, by the majority in *Tolson*, not to deny the general presumption of which Sir James Stephen wrote, but to depend upon the particular construction given to the relevant provision. And while it may be doubted that *Prince* can so easily be accommodated with the principles described by Sir James Stephen in *Tolson*, it is not useful to explore that particular question any further. This Court's decision in *Thomas* resolved any such doubts for Australia by adopting the principles described by Sir James Stephen.

161 It may be noted, however, that any doubts about the application of what was decided in *Prince* to the offence of carnal knowledge were resolved in Britain by the legislature at Westminster expressly stating its intention in the *Criminal Law Amendment Act* 1885 about the relevance of mistake as to age.

162 In New South Wales, the *Crimes (Girls' Protection) Act* 1910 (NSW) ("the 1910 Act") extended what the long title to that Act referred to as "the protection given to girls under the ages of fourteen and sixteen years respectively by certain provisions of the criminal law relating to offences against the person". By the 1910 Act, several provisions of the *Crimes Act* 1900 were amended to increase the age of girls against whom offences might be committed from 14 to 16 years. And s 2 of the 1910 Act further provided that, if the girl in question

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143 (1889) 23 QBD 168 at 187.

144 (1889) 23 QBD 168 at 187.

145 (1889) 23 QBD 168 at 187.

146 (1889) 23 QBD 168 at 188.

was over the age of 14 years, it was a defence to several charges, including a charge of carnal knowledge, "if it shall be made to appear to the court or jury before whom the charge is brought that the girl was at the time of the alleged offence a common prostitute, or an associate of common prostitutes, or that the person so charged had reasonable cause to believe that she was of or above the age of sixteen years". In 1911, the 1910 Act was amended by making plain that the defence to offences (including the offence of carnal knowledge) that the person charged had reasonable cause to believe that the girl was of or above the age of 16 years could be engaged only where the girl in question had "consented to the commission of the alleged offence"[147].

163 The provisions of the *Crimes Act* 1900 dealing with sexual offences against young girls were repealed and re-enacted by the *Crimes (Amendment) Act* 1924 (NSW). Section 71 of the *Crimes Act*, as re-enacted by the 1924 amending Act, provided that:

> "Whosoever unlawfully and carnally knows any girl of or above the age of ten years, and under the age of sixteen years, shall be liable to penal servitude for ten years."

Section 77 provided that the consent of the subject of the offence should be no defence to certain charges but that:

> "[I]t shall be a sufficient defence to any charge which renders a person liable to be found guilty of an offence under [s 71 or s 72] of this Act ... if it be made to appear to the court or jury before whom the charge is brought –
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> (a) that the girl was over the age of fourteen years at the time of the alleged offence; and
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> (b) that she consented to the commission of the offence; and
>
> (c) either –
>
> (i) that she was at the said time a common prostitute or an associate of common prostitutes; or
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> (ii) that the person so charged had at the said time reasonable cause to believe, and did in fact believe, that she was of or above the age of sixteen years."

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147 *Crimes (Girls' Protection) Amendment Act* 1911 (NSW), s 2(b).

164 The provisions of s 71 (making it an offence to have carnal knowledge of a girl aged of or above 10 years and under 16 years) and s 77 (providing for a defence if the accused reasonably believed the girl to have been of or above the age of 16 years) remained in force, substantially unaltered, for many years. Although the *Crimes (Sexual Assault) Amendment Act* 1981 (NSW) abolished the common law offences of rape and attempted rape, and created new offences of sexual assault, the provisions of the *Crimes Act* relating to carnal knowledge remained substantially unchanged.

165 In 1985, s 71 of the *Crimes Act* was repealed[148] and a new provision (s 66C) was made about what until then had been the offence of carnal knowledge. No longer was the offence confined to offences against girls. Section 66C now provided that any person who has sexual intercourse with *another person* who is of or above the age of 10 years, and under the age of 16 years, was liable to penal servitude for eight years. By the same 1985 Act, s 77 was repealed and re-enacted. For present purposes, it is important to notice that although s 77 continued to provide for a defence of mistake, if the child to whom the offence related was over the age of 14 years but under 16 years, the defence was available[149] only "if the person charged and the child to whom the charge relates are not both male".

166 In 2003, substantial amendments were made to the provisions of the *Crimes Act* dealing with sexual offences. The *Crimes Amendment (Sexual Offences) Act* 2003 (NSW) ("the 2003 Act") repealed the then provisions of s 66C and re-enacted the provision in terms that created four offences bearing different levels of maximum imprisonment. Section 66C(1) provided that a person having sexual intercourse with another person of or above the age of 10 years and under the age of 14 years was liable to imprisonment for 16 years. A person having intercourse with such a person "in circumstances of aggravation" was liable to imprisonment for 20 years (s 66C(2)). A person who has sexual intercourse with another person who is of or above the age of 14 years and under the age of 16 years was liable to imprisonment for 10 years (s 66C(3)) but if guilty of that offence in circumstances of aggravation, was liable to imprisonment for 12 years (s 66C(4)).

167 It is evident from the text of the 2003 Act and from the Second Reading Speech relating to the Bill for that Act that at least one of its purposes was, as the Minister said[150], "to provide for the equal treatment of sexual offences

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148 *Crimes (Child Assault) Amendment Act* 1985 (NSW), Sched 2, item 10.

149 s 77(2)(c).

150 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 May 2003 at 374.

irrespective of whether the victim or the perpetrator is male or female". The Minister said[151] that the *Crimes Act*, as it then stood, was discriminatory in a number of ways including "in that it provides different ages of consent for heterosexual and homosexual intercourse". The Bill for the 2003 Act was said[152] to remove this discrimination and ensure equal treatment before the law. The Minister went on to say[153]: "The bill rationalises the age of consent in New South Wales to 16 years of age for all persons irrespective of gender or sexual orientation. The lower age limit is absolute – no specific statutory defence is provided for." This last reference reflected the repeal effected by the 2003 Act of what was then s 77(2) of the *Crimes Act* – the provision dealing with mistake about age. But it is important also to recall that, as s 77(2) stood immediately before the 2003 Act came into effect, it provided for a defence only "if the person charged and the child to whom the charge relates are not both male". And the repeal of s 77(2) by the 2003 Act was, therefore, consistent with the overall purpose of the 2003 Act being to eliminate discrimination between heterosexual and homosexual conduct.

168 Neither the repeal of the provision for a defence of mistake about age, nor what was said in the course of the Second Reading Speech, provides a sufficient basis for concluding that the newly enacted provisions of s 66C(3) created an offence in which a mistake about the age of the person in respect of whom the offence is committed is irrelevant to criminal responsibility. It is important to recall that s 66C(3) may be engaged in a variety of circumstances. In some circumstances description of the conduct as predatory or exploitative will be more apposite than in other circumstances. But it is also important to recognise that s 66C(3) will be engaged in cases in which there is no allegation that the intercourse is not consensual and in cases where there is no circumstance of aggravation.

169 If the conduct is not consensual, an offence under s 61I will have been committed. Section 61I provides that "[a]ny person who has sexual intercourse with another person without the consent of the other person and who knows that

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151 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 May 2003 at 374.

152 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 May 2003 at 374.

153 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 May 2003 at 374.

the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years"[154].

170 If the intercourse is accompanied by the malicious infliction of actual bodily harm, or a threat to do so, the offence is the aggravated offence proscribed by s 66C(4). Likewise, if the alleged offender is in the company of another person or persons, if the alleged victim is under the authority of the alleged offender, if the alleged victim has a serious physical or intellectual disability or if the alleged offender took advantage of the alleged victim being under the influence of alcohol or a drug in order to commit the offence, it is the aggravated offence under s 66C(4) that is committed, not simply the offence under s 66C(3). Cases of these kinds are, therefore, to be put aside from consideration. They are cases in which more serious offences than the offence now under consideration are committed.

171 Once that step is taken it is more clearly apparent, first, that s 66C(3) deals with consensual sexual conduct, and secondly, that the conduct may take place between persons who are of generally the same age or between persons whose ages are so different as to found the description of the conduct as "predatory" or "exploitative".

172 And it is because the circumstances attending the conduct proscribed do not invariably warrant description as predatory or exploitative that it is not to be supposed that the presumption about the relevance of mistake of fact is excluded. Neither the bare fact of repeal of s 77(2), nor what the Minister said in his Second Reading Speech, suffices to establish that the legislative intention was that regardless of mistake as to age, the act of consensual intercourse with a person aged under 16 years, without more, warrants punishment by up to 10 years' imprisonment.

173 It is no answer to the presumption to say, as was urged on behalf of the respondent in the present matter, that prosecutorial and sentencing discretions could accommodate the fact of mistake as to age. Those discretions provide no answer because the relevant question is one of criminal responsibility. A person should not be held criminally responsible for conduct which would be innocent if the facts were as that person reasonably believed them to be.

174 Three further aspects of the matter merit some further separate examination. First, a deal of reference was made in argument to whether a person should be held criminally responsible under s 66C(1) for having sexual

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154 Content was given to the expression "consent" by s 61R. But see now *Crimes Amendment (Consent – Sexual Assault Offences) Act* 2007 (NSW) inserting s 61HA in the *Crimes Act*.

intercourse with another person who is of or above the age of 10 years and under the age of 14 years if the person accused held an honest and reasonable belief that the child was of or above the age of 14 years (but under 16 years). The fact that the accused may have reasonably believed that the child was 14 years or above (but under 16 years) would not affect that person's criminal responsibility. It would not affect that person's criminal responsibility under s 66C(1) because the belief, if true, would not make the accused person's conduct innocent. If the accused's belief about the age of the child were true, the accused would nonetheless have committed the offence under s 66C(3), of having intercourse with a person of or above the age of 14 years and under the age of 16 years. The point to be made is well illustrated by the colourful example given by Fullagar J in *Bergin v Stack*[155]. A person charged with the offence of burglary (breaking and entering a dwelling-house with intent to commit a felony between the hours of 9.00 pm and 6.00 am) who proved positively that he or she honestly, and on reasonable grounds, believed that the breaking and entering occurred before 9.00 pm would not be entitled to an acquittal on that ground. Even if the belief had been well founded, the conduct was not innocent, an offence had been committed.

175 The second matter concerns consent. Absence of consent to the intercourse is not an element of the offence created by s 66C(3). If a question about mistake as to age arises at the trial of a charge under s 66C(3) that does not then enliven any issue about consent. To the extent to which the reasons of the Court of Criminal Appeal in the present matter[156] may be understood as suggesting that it does, that suggestion is wrong. Of course the act of intercourse would not be innocent if the "other person" did not consent to it. But because the absence of consent is not an element of the offence, raising an issue about mistake as to age does not call for the prosecution to prove or the jury to consider any question about consent.

176 The third point to make concerns whether it suffices for the prosecution to demonstrate beyond reasonable doubt that any belief entertained by the accused was not founded on *reasonable* grounds. It may be accepted that the common law of Australia and the common law of England diverged about whether a mistake of fact must be based on reasonable grounds if it is to be relevant to questions of criminal responsibility when the House of Lords decided *R v Morgan*[157]. It is to be noted, however, that in *Morgan* the House of Lords

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155 (1953) 88 CLR 248 at 262-263; [1953] HCA 53.

156 *CTM v The Queen* (2007) 171 A Crim R 371 at 400 [126]-[127] per Howie J.

157 [1976] AC 182.

distinguished *Tolson*; the House did not overrule the decision. As Lord Cross of Chelsea said[158] in *Morgan*:

> "I can see no objection to the inclusion of the element of reasonableness in what I may call a '*Tolson*' case. If the words defining an offence provide either expressly or impliedly that a man is not to be guilty of it if he believes something to be true, then he cannot be found guilty if the jury think that he may have believed it to be true, however inadequate were his reasons for doing so. But, if the definition of the offence is on the face of it 'absolute' and the defendant is seeking to escape his prima facie liability by a defence of mistaken belief, I can see no hardship to him in requiring the mistake – if it is to afford him a defence – to be based on reasonable grounds."

177 It is unnecessary to explore here whether the distinction drawn in *Morgan* is well based. That is, it is unnecessary to examine whether it is important that the subject of the mistake in question in *Morgan* was the consent of the victim of the alleged assault. Professor Rupert Cross has argued[159] that "it is a contradiction in terms to say that someone who believes, however unreasonably, that the woman consents either knows that she does not do so or disregards the question of consent". But, whatever force that particular argument may have[160], neither party in the present matter suggested that, if mistake is relevant to criminal responsibility, this Court should now reconsider the long-established Australian common law that the mistake must be founded on reasonable grounds. That approach was reaffirmed in *He Kaw Teh* and neither party to the present appeal sought any reconsideration of that decision or the earlier decisions reflected in it.

178 It is, therefore, not profitable to examine how what was said by the House of Lords in *Morgan* was subsequently understood and applied by the Privy Council in *Beckford v The Queen*[161]. It suffices to notice that in both *B (A Minor) v Director of Public Prosecutions*[162] and *R v K*[163] the House of Lords accepted the force of the presumption of statutory construction that absence of mistake of fact

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158 [1976] AC 182 at 202-203.

159 Cross, "Centenary Reflections on Prince's Case", (1975) 91 *Law Quarterly Review* 540 at 547.

160 Simester, "Mistakes in Defence", (1992) 12 *Oxford Journal of Legal Studies* 295.

161 [1988] AC 130.

162 [2000] 2 AC 428.

163 [2002] 1 AC 462.

about age must be proved by the prosecution in prosecuting a statutory offence like the offence under consideration in the present matter.

Raising the issue

179 Questions of mistake need be considered at a criminal trial only if the issue is alive. As Dawson J pointed out in *He Kaw Teh*[164]:

> "[T]he burden of providing the necessary foundation in evidence will in most cases fall upon the accused. But it is not inconceivable that during the case for the prosecution sufficient evidence may be elicited by way of cross-examination or otherwise to establish honest and reasonable mistake or to cast sufficient doubt upon the prosecution case to entitle the accused to an acquittal. The governing principle must be that which applies generally in the criminal law. There is no onus upon the accused to prove honest and reasonable mistake upon the balance of probabilities. The prosecution must prove his guilt and the accused is not bound to establish his innocence. It is sufficient for him to raise a doubt about his guilt and this may be done, if the offence is not one of absolute liability, by raising the question of honest and reasonable mistake. If the prosecution at the end of the case has failed to dispel the doubt then the accused must be acquitted."

As these reasons will later show, no question of mistake was sufficiently raised at the trial of the appellant to require consideration of that issue by the jury. To explain why that is so, it is necessary to say something further about the course of the trial of the appellant.

The appellant's trial

180 The appellant was charged in the District Court of New South Wales with one count of sexual intercourse without consent, contrary to s 61J(1) of the *Crimes Act*, and, as an alternative count, one count of sexual intercourse with a person aged between 14 and 16 years in circumstances of aggravation, contrary to s 66C(4). The circumstance of aggravation relied upon by the prosecution in relation to the charge under s 66C(4) was that the appellant had taken advantage of the complainant being under the influence of alcohol in order to commit the offence. The complainant was aged 15 years at the time of the alleged offence.

181 Although the indictment charged only the two offences (as alternative charges), if the jury was not satisfied that either of those charges was made out, a further alternative had to be considered – the offence of having sexual intercourse

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164 (1985) 157 CLR 523 at 592-593.

with another person who is of or above the age of 14 years and under the age of 16 years, contrary to s 66C(3). Section 66E(1A) of the *Crimes Act* provides that where a jury is not satisfied that an accused is guilty of an offence under s 66C(4) but is satisfied that the accused is guilty of an offence contrary to s 66C(3), the jury may find the accused not guilty of the aggravated form of the offence but guilty of the offence under s 66C(3).

182 The prosecution case was that the appellant had had non-consensual sexual intercourse with the complainant. She gave evidence that she was drunk, had fallen asleep, and that she awoke to find the appellant having intercourse with her.

183 The appellant did not give evidence at his trial. Evidence was led of what he had said to interviewing police officers in his recorded interview. In that interview the appellant denied having intercourse with the complainant, acknowledged that he had wanted to do so, but said that he had left the bedroom in which the complainant was present, before any intercourse took place, because his friends had entered the room and had then refused to leave. The appellant said in the interview that he knew the complainant was 16 years old because she had told him this some months earlier. There was no evidence led at the trial to confirm or contradict what the appellant said in his interview with police about having known that the complainant was aged 16 years or about how he came to know this.

184 Before final addresses to the jury had been completed, trial counsel for the appellant asked the trial judge (Garling DCJ) to instruct the jury about mistake as to the complainant's age. Trial counsel for the appellant submitted that the appellant was in a difficult position, because he was denying sexual intercourse had taken place while at the same time asserting that he had a defence of honest and reasonable mistake of fact about the complainant's age. Trial counsel asked for the defence of mistake to be elucidated to the jury even though he would not address the jury about the issue.

185 The trial judge accepted that the question of mistake should be left to the jury. In his ruling on the topic, the trial judge indicated, in effect, that he proposed to instruct the jury that it would be for the prosecution to prove, beyond reasonable doubt, that the appellant did not have a reasonable and honest mistake about the complainant's age. In his directions to the jury, however, the trial judge gave directions which reflected the position that had obtained when s 77(2) of the *Crimes Act* provided for a defence of mistake as to the complainant's age. In particular, the trial judge directed the jury that it was for the appellant to prove, on the balance of probabilities, that he held such an honest and reasonable mistake. No objection to the direction was made at trial but in his subsequent appeal to the Court of Criminal Appeal and his appeal to this Court, the appellant submitted that the direction about onus and standard of proof was wrong.

186 The jury returned verdicts of not guilty to the count of sexual intercourse without consent, and to the alternative count of sexual intercourse with a person between the ages of 14 and 16 years in circumstances of aggravation, but returned a verdict of guilty to the statutory alternative count of an offence under s 66C(3).

Appeal to the Court of Criminal Appeal

187 The appellant appealed against his conviction to the Court of Criminal Appeal of the Supreme Court of New South Wales. That Court (Hodgson JA, Howie and Price JJ) dismissed[165] the appellant's appeal against conviction. The Court held that "the history and context of the legislation provides a clear and unambiguous inference that Parliament intended that there be no defence available to the newly created offences by way of mistake of age"[166].

188 The analysis made by the Court of Criminal Appeal of the relevant statutory provisions was framed in terms of whether there is a defence of mistake about age available to a charge brought under s 66C(3). For the reasons given earlier, that approach to the matter is flawed. The relevant question is not whether there is a defence or excuse available in answer to what otherwise is the imposition of criminal responsibility. The relevant question is, as Sir James Stephen identified in *Tolson*[167]: what knowledge of fact is an element of the criminality for which the legislature has provided. And as Dixon J pointed out in *Thomas*, the presumption that the legislature does not intend to attach criminal responsibility for conduct performed by a person under a mistake of fact reasonably and honestly held, is a presumption not lightly or easily denied.

189 For the reasons given earlier, mistake of fact about the age of the person concerned is relevant to criminal responsibility for the offence created by s 66C(3). And as is also explained earlier, if the issue is raised at trial, it is for the prosecution to prove, beyond reasonable doubt, that the accused did not honestly and reasonably believe the other person to be aged more than 16 years. The directions given by the trial judge on this subject were, therefore, wrong.

The appeal to this Court

190 The major premise of the appellant's argument in this Court thus being established, attention must turn to the minor premise: should the issue of mistake

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165 (2007) 171 A Crim R 371.

166 (2007) 171 A Crim R 371 at 404 [147] per Howie J.

167 (1889) 23 QBD 168 at 187.

have been left to the jury? What was the evidence that enlivened an issue of mistake at trial?

191 The validity of what has been described as the minor premise of the appellant's argument was put in issue by the respondent's notice of contention. That notice was cast in terms suggesting that no issue about mistake could arise where "the defence relied upon was not that the appellant, at the time of having intercourse, mistakenly believed that the complainant was over 16, but a denial that intercourse occurred at all". This contention may well reflect a serious forensic difficulty facing an accused who seeks to urge alternative answers to a charge of the kind now in question. It may be accepted that it is not always easy to argue that intercourse did not occur but that, if it did, the accused was mistaken about the age of the other person. But whatever may be the forensic difficulties in such an argument it was not shown that there was any legal reason why an accused could not assert both arguments. The proposition advanced by the respondent in the notice of contention is too broad and should not be accepted.

192 Nonetheless, it is important to recognise, as the respondent accepted, that, in instructing the jury in a criminal trial, the trial judge must give such instructions as are necessary to ensure a fair trial of the accused. That is why, in *Pemble v The Queen*[168], this Court held that, whatever course counsel for an accused may take, the trial judge "must be astute to secure for the accused a fair trial according to law"[169] and to that end must "put to the jury with adequate assistance *any* matters on which the jury, upon the evidence, could find for the accused"[170] (emphasis added).

193 Trial counsel for the appellant had invoked this principle in asking the trial judge to direct the jury about mistake. In this Court the respondent contended that the principle was not engaged. The respondent's contention made in the notice of contention by reference to *Pemble* has been rejected, but there remains for consideration whether the principle in *Pemble* was properly engaged at trial. That turns on whether an issue about mistake was raised at trial.

194 Without more, the fact that the appellant was proved to have made an out-of-court assertion about his belief as to the complainant's age was not sufficient to raise an issue at his trial about mistake. In his interview with police, the appellant had said that he believed the complainant was aged 16 years

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168 (1971) 124 CLR 107; [1971] HCA 20.

169 (1971) 124 CLR 107 at 117 per Barwick CJ.

170 (1971) 124 CLR 107 at 118 per Barwick CJ.

because she had told him this. No question about this alleged conversation or about any communication she may have had with the appellant about her age was directed to the complainant in the course of her evidence. Not having raised the matter with the complainant in the course of her evidence, it was not then open to the appellant, relying only on what he had told police, to say that there was a live issue at the trial about his belief about the complainant's age. To enliven the issue it was essential that the complainant be asked whether there had been a conversation of the kind described by the appellant to police. But not having raised the matter with her, it was not open to the appellant to say that the evidence elicited in the course of the prosecution's case sufficed to enliven the issue.

195 It follows that although the directions which the trial judge gave the jury about the question of mistake were wrong, the error occasioned no substantial miscarriage of justice. It occasioned no such miscarriage of justice because the misdirection concerned matters which it was neither necessary nor appropriate for the jury to consider at the appellant's trial.

196 It also follows that the appeal to this Court should be dismissed.

197 HEYDON J. The circumstances behind this appeal are set out in the reasons for judgment of Hayne J.

The *Proudman v Dayman* principle

198 The appellant was convicted of contravening s 66C(3) of the *Crimes Act* 1900 (NSW) as it stood at the date of the alleged offence, 24 October 2004. If the words of that section were considered by themselves, there would be much to be said for the view that they do not exclude the "defence" in *Proudman v Dayman*[171], and that the Court of Criminal Appeal erred in concluding that that "defence" could not apply in this case. However, they must be considered not only by themselves, but also in the context of the provisions of the *Crimes Act* as they stood at the date of the alleged offence, and in the light of the legislation in its earlier forms. The key question is whether on that approach to the construction of s 66C(3) the Court of Criminal Appeal's conclusion is correct.

199 What is often called the "defence" in *Proudman v Dayman* may be put thus. Legislation will be construed so as not to render criminally liable an accused person provided that, first, the accused person satisfies an evidential burden of establishing an honest belief on reasonable grounds in the existence of a state of factual affairs which, had it existed, would have made the acts alleged by the prosecution non-criminal, and, secondly, the prosecution fails to discharge a legal burden of establishing beyond reasonable doubt that the accused did not have that honest belief on reasonable grounds[172]. Below this will be called "the *Proudman v Dayman* principle".

200 Two points may be briefly amplified. First, the *Proudman v Dayman* principle does not operate as an absolute rule of substantive law. Rather it is a presumption[173] or a "prima facie rule"[174] or a "general rule"[175] or a rule of construction. Its effect can be negated by appropriate legislative language to the contrary. Secondly, the *Proudman v Dayman* principle is not a true "defence" at all. Subject to the accused's discharge of the evidential burden, where legislation has not excluded the principle, there is a legal burden of proof on the prosecution, not the accused.

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171 (1941) 67 CLR 536 at 539; [1941] HCA 28.

172 In this appeal the prosecution argued strenuously that the legal burden lay on the accused, but the submission cannot stand with the modern authorities, particularly *He Kaw Teh v The Queen* (1985) 157 CLR 523; [1985] HCA 43.

173 *Thomas v The King* (1937) 59 CLR 279 at 304 per Dixon J; [1937] HCA 83.

174 *Thomas v The King* (1937) 59 CLR 279 at 305 per Dixon J.

175 *Hardgrave v The King* (1906) 4 CLR 232 at 237 per Griffith CJ; [1906] HCA 47.

201 There are authorities[176] that hold that there must be "express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity". There must be[177]:

> "some manifestation or indication that the legislature has not only *directed its attention* to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also *determined* upon abrogation or curtailment of them. The courts should not impute to the legislature an *intention* to interfere with fundamental rights. Such an *intention* must be clearly manifested by unmistakable and unambiguous language." (emphasis added)

202 The *Proudman v Dayman* principle is sometimes seen as a "fundamental right" to which these statements apply. Assuming that to be correct[178], three points should be made.

203 First, the emphasised parts of the passages quoted reveal that they are couched in terms of a search for subjective legislative intention, as are other passages on which those passages rely or to which they have led. So read, they are not convincing if the correct common law rule of construction is one which calls for an inquiry not into what the legislature meant, but what the legislation

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176 *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ; [1994] HCA 15, applied, for example, in *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 494 [37]; [2003] HCA 2; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19]; [2004] HCA 37; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [20]-[21]; [2004] HCA 40.

177 *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ.

178 It does not appear, for example, in a list of 21 "fundamental rights" to which *Coco v The Queen* applies which was compiled by Chief Justice Spigelman in his first lecture in the 2008 McPherson Lectures on "Statutory Interpretation and Human Rights", delivered on 10 March 2008 (at 21-24, especially the text at notes 33-51).

means[179], and limits its search for legislative intention to "the intention expressed by the words used"[180].

204 Secondly, the requirement for "express" language leaves out of account the possibility of construing legislation so as to exclude the *Proudman v Dayman* principle by reason of "a necessary implication"[181]. An implied provision can be as important, even crucial, as an express one, whether the court is considering a contract or a statute.

205 Thirdly, the requirement for "express" or "unmistakable and unambiguous language"[182] is not to be read as excluding recourse to conventional methods of statutory construction. One of these is legislative history, for an inquiry into legislative history can reveal a necessary implication. Mason J said: "Resort to the history of a statute all too rarely illuminates the meaning of its current provisions."[183] The truth of that statement, whether it is viewed as empirical or normative, may be accepted, but it does concede that, however regrettable it may be that those construing legislation should have to engage in archaeological excavations of its origins, sometimes the history of a statute illuminates its present meaning[184].

The legislative background to the 2003 amendments

206 Section 66C(3) of the *Crimes Act*, in its form at the date of the alleged offence, was introduced by the *Crimes Amendment (Sexual Offences) Act* 2003. What was the legislative background to its introduction and to the simultaneous repeal of s 77(2)?

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179 Holmes, "The Theory of Legal Interpretation", (1899) 12 *Harvard Law Review* 417 at 419.

180 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304 per Gibbs CJ; [1981] HCA 26, quoting *River Wear Commissioners v Adamson* (1877) 2 App Cas 743 at 763.

181 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11] and 563 [43]; [2002] HCA 49; see also *Coco v The Queen* (1994) 179 CLR 427 at 438.

182 *Coco v The Queen* (1994) 179 CLR 427 at 437.

183 *Beckwith v The Queen* (1976) 135 CLR 569 at 578; [1976] HCA 55.

184 As Mason J himself proceeded to demonstrate in *Beckwith v The Queen* itself: (1976) 135 CLR 569 at 578-582.

207 *The original provisions.* The *Crimes Act* as enacted in 1900 provided in s 67: "Whosoever carnally knows any girl under the age of ten years shall be liable to suffer death." And s 71 provided: "Whosoever unlawfully and carnally knows any girl of or above the age of ten years, and under the age of fourteen years, shall be liable to penal servitude for ten years."

208 *The 1910 and 1911 amendments.* In 1910, the age range of 10 to 13 years in s 71 was changed to 10 to 15 years by the *Crimes (Girls' Protection) Act* 1910, s 2. Section 2 also created the first precursor to s 77(2). It provided a defence to the offence of carnal knowledge of a girl aged 10 to 15 years (s 71) where the girl was over 14, "if it shall be made to appear ... that the [accused] had reasonable cause to believe that she was of or above the age of sixteen years". In 1911, s 2 of the *Crimes (Girls' Protection) Amendment Act* amended s 2 of the *Crimes (Girls' Protection) Act* 1910 so as to make it a condition of the defence based on the accused's having reasonable cause to believe that the girl was of or over 16 that she consented.

209 After the creation of this new defence, whatever the earlier position was, there was no room for construing ss 67 and 71 by recourse to the *Proudman v Dayman* principle. The new defence was a true defence: the accused had to satisfy the legal onus of proving on the balance of probabilities the conditions set out. These requirements were harder for the accused to satisfy than the conditions applying if the *Proudman v Dayman* principle applied. The express enactment of a true defence with these hard requirements excluded the possibility of construing ss 67 and 71 conformably to the *Proudman v Dayman* principle. It would have been absurd if an accused person who failed to satisfy the legal burden of proving the conditions stipulated on the balance of probabilities in order to obtain the benefit of the expressly granted defence would be able nonetheless to escape conviction by satisfying an evidential burden of holding an honest and reasonable belief that the other participant was at least 16, and successfully contending that the prosecution had failed to satisfy a legal burden of excluding the existence of that honest and reasonable belief beyond reasonable doubt. The legislation prevented application of the *Proudman v Dayman* principle, because the enactment of the new defence (coupled with the failure of the legislation to make any other true defence of the kind available either to those charged with sexual intercourse with girls aged between 14 and 15 or to persons accused of offences against girls aged less than 14 under s 67 or s 71) excluded any other pathway to acquittal based on the beliefs of the accused about the age of the victim.

210 *The 1924 changes.* The *Crimes (Amendment) Act* 1924 made the following changes. Section 71 was repealed and a new s 71 enacted in the following terms: "Whosoever unlawfully and carnally knows any girl of or above the age of ten years, and under the age of sixteen years, shall be liable to penal servitude for ten years." A new s 77 was enacted. So far as relevant, its terms were:

> "The consent of the ... girl ... shall be no defence to any charge under [section] seventy-one ...
>
> Provided that it shall be a sufficient defence to any charge which renders a person liable to be found guilty of an offence under [section] seventy-one ... if it be made to appear to the court or jury before whom the charge is brought –
>
> (a) that the girl was over the age of fourteen years at the time of the alleged offence; and
>
> (b) that she consented to the commission of the offence; and
>
> (c) either –
>
> ...; or
>
> (ii) that the person so charged had at the said time reasonable cause to believe, and did in fact believe, that she was of or above the age of sixteen years."

Neither that change, nor any other change before 2003, made any difference to the non-availability of the *Proudman v Dayman* principle.

211 *The abolition of the death penalty in 1955.* The *Crimes (Amendment) Act* 1955, s 5(f), amended s 67 by substituting for the words "to suffer death" the words "to penal servitude for life".

212 *Changes in 1974 and 1981.* In 1974, the *Crimes and Other Acts (Amendment) Act* made two changes to s 77, neither relevant to the present case. In 1981, although various sexual offences provisions in the *Crimes Act* were changed by the *Crimes (Sexual Assault) Amendment Act* 1981, ss 67 and 71 were not changed, and s 77 was changed only in minor and immaterial respects.

213 *The 1984 changes.* The *Crimes (Amendment) Act* 1984 introduced various offences of homosexual intercourse. Section 78H corresponded with s 67 and s 78K with s 71 (save that the age range was 10 to 17 years – that is, the age of consent was 18, not 16).

214 *The 1985 changes.* The *Crimes (Child Assault) Amendment Act* 1985 repealed ss 67 and 71. Instead of s 67, a new s 66A provided: "Any person who has sexual intercourse with another person who is under the age of 10 years shall be liable to penal servitude for 20 years." And instead of s 71, a new s 66C(1) provided: "Any person who has sexual intercourse with another person who is of or above the age of 10 years, and under the age of 16 years, shall be liable to penal servitude for 8 years." Although the penalty for an offence against the

former s 67 was reduced from life imprisonment to 20 years in the new s 66A, a substantial difference was maintained between it and the penalty for an offence against the former s 71 and the new s 66C(1), even though the latter was reduced to 8 years. Further, while ss 67 and 71 rendered criminal only carnal knowledge of girls, ss 66A and 66C(1) rendered criminal sexual intercourse with "another person", whether male or female. Section 77 was also repealed and replaced. The new s 77(1) provided that "[e]xcept as provided by subsection (2)", consent was no defence to various charges including charges under s 66A or s 66C. The new s 77(2) relevantly provided:

> "It shall be a sufficient defence to a charge which renders a person liable to be found guilty of an offence under section ... 66C ... if the person charged and the child to whom the charge relates are not both male and it is made to appear to the court or to the jury before whom the charge is brought that –
>
> (a) the child to whom the charge relates was over the age of 14 years at the time the offence is alleged to have been committed;
>
> (b) the child to whom the charge relates consented to the commission of the offence; and
>
> (c) the person so charged had, at the time the offence is alleged to have been committed, reasonable cause to believe, and did in fact believe, that the child to whom the charge relates was of or above the age of 16 years."

That is, the conferral of that defence on persons alleged to have committed crimes against s 66C(1) did not extend to males who were alleged to have committed offences on males.

215 *The introduction of s 66F in 1987.* The *Crimes (Personal and Family Violence) Amendment Act* 1987, although it did not amend s 66A, s 66C(1) or s 77(2), did introduce a crime of having sexual intercourse with a person who had an intellectual disability. Section 66F(5) provided: "A person does not commit an offence under this section unless the person knows that the person concerned has an intellectual disability." That provision has survived the legislative amendments in 2003 which pose the construction issue before the Court.

216 *Changes in 1989, 1995, 1999 and 2002.* The *Crimes (Amendment) Act* 1989, the *Criminal Legislation Amendment Act* 1995 and the *Crimes Legislation Amendment Act* 1999 made immaterial amendments to s 77(2). The *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002, s 3 and Sched 2 item 2, amended s 66A by increasing the penalty for sexual intercourse with a child under 10 from 20 to 25 years.

The exclusion of the *Proudman v Dayman* principle before 2003

217 Thus from 1910 until just before the time when the *Crimes Amendment (Sexual Offences) Act* 2003 came into force the position was as follows. Sexual intercourse with a girl (from 1985, another person) under 10 was a crime punishable by death, then by life imprisonment, then by 20 years imprisonment, then by 25 years imprisonment. Sexual intercourse with a girl (from 1985, another person) of or over the age of 10 and under 16 was a crime punishable by 10 years penal servitude, then by 8 years imprisonment. To a charge of the latter offence under s 66C, s 77(2) afforded a defence of consent, provided other conditions were satisfied: from 1985 the other conditions were that the person accused and the other participant were not both male, the other participant was over 14, and the accused reasonably believed that the other participant was 16 years or older. That defence applied not only to s 66C charges, but also to certain charges under ss 61L, 61M(1), 61N(1), 61O(1) and (2) and 66D.

218 The legislation presented the following pattern. When some defence in the strict sense relating to a mental state was created, explicit provision was made for it: one example is the legislation in existence from 1910 that led to s 77(2) in the form it took just before its repeal, and another example is s 78C(1), which created a defence to charges of incest or attempted incest that the accused did not know that he or she was related to the other participant. When some specific mental state had to be proved by the prosecution beyond reasonable doubt, specific provision was made for it, as with s 66F(5). This is a pattern which points strongly towards reading the legislation creating offences of sexual intercourse below specified ages as excluding the *Proudman v Dayman* principle.

219 Plainly s 66F(2)(a), creating the offence of having sexual intercourse with another person who has an intellectual disability, could not have been given, and cannot now be given, a construction corresponding with the *Proudman v Dayman* principle in view of s 66F(5). That is because the specific creation of a duty – a rather heavy one – on the prosecution to prove beyond reasonable doubt that the accused knows of the other participant's intellectual disability as a necessary condition for conviction is inconsistent with recognition of a lesser duty on the prosecution to exclude the existence of an honest and reasonable belief by the accused that the other participant had no intellectual disability. While it is true that the offence created by s 66F(2)(a) is not related to the age of the person participating with the accused in the act charged, and while it is true that the offences created by ss 66A and 66C(1) were age-related in that way, many persons of intellectual disability share with many persons aged less than 16, and even more persons aged less than 10, what s 66F(3) describes as a "vulnerability to sexual exploitation".

220 Further, s 66C(1), which created the offence of having sexual intercourse with another person aged between 10 and 15, could not have been given a construction corresponding with the *Proudman v Dayman* principle, at least in

relation to persons accused of sexual intercourse with persons aged 14 or 15 who could satisfy the other conditions of s 77(2)[185]. It would have been incongruous, in view of the defence of consent available to such persons under s 77(2) (provided they could also prove that they had a reasonable cause to believe, and did believe, that the other participant was 16 or over), to construe s 66C(1) as creating an offence depending on the prosecution's capacity to exclude beyond a reasonable doubt the accused's honest and reasonable belief that the other participant was 16 or over. From the accused's point of view, s 77(2) afforded a path to acquittal, but a difficult one. The existence of that specific aspect of the legislative regime was not reconcilable with the existence of the easier path to acquittal which a *Proudman v Dayman* construction of s 66C(1) would have afforded, with a more favourable burden and standard of proof.

221 Section 66C(1) could not have been given a construction corresponding with the *Proudman v Dayman* principle in relation to accused persons who could not take advantage of the s 77(2) defence of consent in relation to sexual intercourse with persons aged 14 or 15 on the ground that both participants in the actus reus were male. To have read s 66C(1) in its application to male persons accused of sexual intercourse with males aged 14 or 15 as attracting the *Proudman v Dayman* principle, while also reading s 66C(1) in its application to male persons accused of sexual intercourse with females aged 14 or 15, or female persons accused of sexual intercourse with male or female persons aged 14 or 15, as not attracting that principle, would have been incongruous and artificial.

222 Moreover, s 66C(1) could not have been given a construction corresponding with the *Proudman v Dayman* principle in the case of accused persons charged with the offence of having sexual intercourse with another person aged between 10 and 15, being persons unable to take advantage of the s 77(2) defence because the other person was aged less than 14. Again it would be incongruous to have given s 66C(1) a construction corresponding with the *Proudman v Dayman* principle for one class of accused persons charged with a particular offence when it did not have that construction in its application to another class of persons charged with the same offence.

223 Finally, s 66A, creating the offence of having sexual intercourse with another person under the age of 10, was not to be construed as corresponding with the *Proudman v Dayman* principle. If the offence created by s 66C(1) was not to be so construed, but s 66A was to be so construed, the legislative regime would not have been a coherent one.

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185 If it matters, according to the Court of Criminal Appeal, the appellant conceded – it is not clear how extensive the concession was – in that Court that the *Proudman v Dayman* principle did not apply to the offence created by s 66C(1) while s 77(2) was in force: *CTM v The Queen* (2007) 171 A Crim R 371 at 385 [65].

The language of the 2003 amendments

224 What is there in the language of the 2003 amendments which suggests any change in that state of affairs? What is there to suggest that the *Proudman v Dayman* principle now applies to offences relating to sexual intercourse with persons below a certain age? The 2003 amendments involved repeal of homosexual offences and assimilation of them with other sexual offences, thus creating a uniform age of consent of 16. Apart from those amendments and apart from other amendments which were formal in character, the 2003 amendments reveal a trend towards extended criminal liability and heavier sanctions. Thus the conduct of an accused person who had sexual intercourse with another person under his or her special care when that other person was above the age of 17 and under the age of 18 was rendered criminal (s 73(2)). The incest provisions were extended to females, and to persons having sexual intercourse with grandparents, half-brothers and half-sisters (s 78A). The penalty for incest was increased from 7 years imprisonment to 8 (s 78A(1)).

225 Of central concern is the repeal of s 66C(1) and s 77(2). In place of s 66C(1), a "new" s 66C(1) and (3) provided:

> "(1) Any person who has sexual intercourse with another person who is of or above the age of 10 years and under the age of 14 years is liable to imprisonment for 16 years.
>
> ...
>
> (3) Any person who has sexual intercourse with another person who is of or above the age of 14 years and under the age of 16 years is liable to imprisonment for 10 years."

The repeal of s 77(2) was not accompanied by any replacement or derivative provision.

226 The "new" s 66C differed from the former s 66C(1) in several ways. First, leaving aside offences with aggravating features, dealt with in s 66C(2), (4) and (5), it replaced one offence (sexual intercourse with another person aged 10 to 15 years) with two offences (sexual intercourse with another person aged 10 to 13 years (s 66C(1)) and sexual intercourse with another person aged 14 to 15 years (s 66C(3))). Secondly, it increased penalties markedly: for the offence of sexual intercourse with another person aged 10 to 13 years, instead of 8 years imprisonment the punishment was 16 (s 66C(1)); for the offence of sexual intercourse with another person aged 14 to 15 years, instead of 8 years imprisonment the punishment became 10 (s 66C(3)). These increased penalties are consistent with the increase effected in 2002 in the penalty for the crime

created by s 66A of sexual intercourse with a person under 10 from 20 years imprisonment to 25[186].

227 Thus the offences created by s 66C(1) and (3) were "new" in form only: in truth the legislation simply preserved the pre-2003 position, while adopting a more discriminating (but more onerous) approach to penalty. Leaving aside s 77(2) and the *Proudman v Dayman* principle, that which would have been criminal before the 2003 amendments remained criminal after them, but attracted higher penalties.

228 Overall then, the 2003 amendments widened criminal liability (not least by repealing the s 77(2) defence) and increased the severity of criminal sanctions (apart from reductions flowing from the repeal of the provisions relating to homosexual offences).

Exclusion of the *Proudman v Dayman* principle: radical and obscure nature of suggested change

229 The appellant's case is that the inapplicability of the *Proudman v Dayman* principle before 2003 was reversed by the amendments made in 2003. If so, a very extensive and radical change to a long-standing position would have been effected, because the *Proudman v Dayman* principle had not existed for at least the previous 93 years in relation to age-related sexual crimes against females, and for the previous 18 years in relation to age-related sexual crimes where it was not the case that both participants were male. And the change would have extended to various other provisions to which s 77(2) provided a defence[187]. Yet the repeal of the defence conferred by s 77(2) does not suggest that that radical change was made. The repeal of s 77(2) suggests only that an onerous pathway to acquittal was removed. It does not suggest that an easier pathway to acquittal came into existence despite having not existed for a long time. Nothing else in the new statutory language supports the outcome advocated by the appellant.

230 But the change advocated by the appellant is not only radical: it is also obscure. If, in lieu of the inapplicability of the *Proudman v Dayman* principle relating to honest and reasonable belief to the former s 66C, that principle is to be applied to the new s 66C(1) and (3) in consequence of the repeal of s 77(2), a question arises: how far is that principle to be applicable?

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186 See [216] above.

187 See above at [217].

(a) Is it to be applicable only in the precise area to which s 77(2) applied – where the participants were not both male, and the participant other than the accused was 14 or more?

(b) Or is it to be applicable where the participants were male, and the participant other than the accused was 14 or more?

(c) Or is it also to be applicable where the participant other than the accused was less than 14?

(d) Or is it additionally to be applicable where the other participant was less than 10?

If all the questions are answered "Yes", the pre-2003 law will have been very extensively altered despite the want of any textual basis for reaching that conclusion, or, as will be seen below[188], without any evident consciousness on the part of the responsible Minister that the amendments led to this result or were intended to. If only one, two or three questions are answered "Yes", in the words of Hodgson JA, "there would be the anomalous situation that, in the absence of anything in the legislation as amended to suggest this result, [the] *Proudman v Dayman* [principle] would apply to some age-related sexual offences and not to others."[189] Similar questions, and similar difficulties, arise in relation to other provisions to which s 77(2) applied, such as s 61N(1) (act of indecency with a person under 16), s 61O(1) (act of indecency with a person under 16 in circumstances of aggravation), s 61O(2) (act of indecency with a person under 10) and s 61M (aggravated indecent assault of child under 16).

The relevance of s 66F

231 A further factor pointing against the correctness of the appellant's approach to the construction of s 66C(3) can be seen by comparing s 66C with s 66F. The conduct rendered criminal by s 66F(2) of having sexual intercourse with another person who has an intellectual disability, or is under the authority of the accused in connection with any facility or programme providing services to persons who have intellectual disabilities, may be identical with conduct rendered criminal by s 66C(1) and (3) in the circumstances of aggravation referred to in s 66C(5)(f), ie where "the alleged victim has a serious intellectual disability". On the appellant's argument, if the charge were brought under s 66C, the *Proudman v Dayman* principle would operate; but if the charge were brought under s 66F(2), the *Proudman v Dayman* principle would not operate because of

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188 At [233]-[236].

189 *CTM v The Queen* (2007) 171 A Crim R 371 at 374 [7].

s 66F(5). This would create an anomaly. If the appellant's argument were rejected, the anomaly would not exist.

The irrelevance of *Chard v Wallis*

232 The appellant relied on the decision of Roden J, sitting on appeal from the decision of a magistrate, in *Chard v Wallis*[190]. He held that the *Proudman v Dayman* principle applied to the offence created by s 78Q(2) of the *Crimes Act*. Counsel for the appellant described that provision as creating an offence of "gross indecency by a male upon a male aged under 18 years". In fact the relevant offence was procuring the commission of an act of gross indecency by a male person under the age of 18. That decision seems open to some of the criticisms made by the Court of Criminal Appeal[191]. But whether or not that is so, the construction of s 78Q(2) is of limited materiality to the construction of the post-2003 version of s 66C(3) in view of the fact that one of the 2003 amendments was the repeal of s 78Q(2)[192], which was not absorbed into any successor to the pre-2003 version of s 66C[193].

The Second Reading Speech

233 Earlier[194], it was suggested that under the applicable common law rules of statutory construction, the correct inquiry may not be into what the legislature "intended", "directed its attention to" or "determined", but into the meaning of the words it employed. In the present circumstances, however, statute permits and perhaps mandates attention to what was in the responsible Minister's mind in

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190 (1988) 12 NSWLR 453.

191 *CTM v The Queen* (2007) 171 A Crim R 371 at 396-397 [113] and 400-401 [129]-[130].

192 *Crimes Amendment (Sexual Offences) Act* 2003, s 3, Sched 1 item [18].

193 An offence of procurement has now been created by s 66EB introduced in 2007 by the *Crimes Amendment (Sexual Procurement or Grooming of Children) Act* 2007, s 3, Sched 1 item [1]. Section 66EB(7) creates a specific defence "if the accused reasonably believed that the other person was not a child": this points against reading the post-2003 version of s 66C as conforming to the *Proudman v Dayman* principle.

194 See [203].

relation to the 2003 amendments as reflected in his Second Reading Speech[195]. History teaches that recourse to extrinsic material of that kind tends to afford even less illumination than Mason J thought legislative history did. But in the present case the statements of the responsible Minister, the Attorney-General, do cast some illumination. Speaking of the reduction in the age of consent for males from 18 to 16, the age which had applied to females since 1910, he said[196]:

> "The bill rationalises the age of consent in New South Wales to 16 years of age for all persons irrespective of gender or sexual orientation. The lower age limit is absolute – no specific statutory defence is provided for."

He also said at the end of his speech that the Bill "establishes an absolute uniform minimum age of consent of 16 years. There are no statutory exceptions."[197] The "absoluteness" of a lower age limit suggests that not only are no specific

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195 The *Interpretation Act* 1987 (NSW), s 34(1)(b), provides:

> "(1) In the interpretation of a provision of an Act ..., if any material not forming part of the Act ... is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
>
> ...
>
> (b) to determine the meaning of the provision:
>
> (i) if the provision is ambiguous or obscure ..."

A difference of opinion as marked as that which exists between a unanimous Court of Criminal Appeal and six Justices in this Court suggests that the relevant provisions are "obscure". Section 34(2)(f) provides:

> "(2) Without limiting the effect of subsection (1), the material that may be considered in the interpretation of a provision of an Act ... includes:
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> ...
>
> (f) the speech made to a House of Parliament by a Minister ... on the occasion of the moving by that Minister ... of a motion that the Bill for the Act be read a second time in that House ..."

196 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 May 2003 at 374.

197 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 May 2003 at 377.

statutory defences or statutory exceptions provided for, but that no common law principle of construction having a similar effect, like the *Proudman v Dayman* principle, applies either. He, and the executive of which he was the spokesman, did not mean or intend by his invitation to the legislature to enact amendments excluding any avenue of acquittal by way of "specific statutory defence" to enable it to take the radical and novel step of creating another and easier avenue to acquittal[198]. The Minister also said[199]:

> "The bill now before the House has several crucial differences from the private member's bills previously introduced, as it contains important additional safeguards to protect our young people from sexual exploitation. These further safeguards include the removal of the defence to carnal knowledge based on reasonable mistake of age".

If repeal of s 77(2) was thought to be an "important" safeguard against the sexual exploitation of the young, it is unlikely that the Minister intended that the *Proudman v Dayman* principle, which creates an easier avenue for the accused to escape conviction by reason of claimed reasonable mistake of age, would operate. That is because if it did operate, it would not only nullify the assigned safeguard against sexual exploitation of the young, but also create a greater risk of that exploitation coming to pass.

234 The Minister also said[200]:

> "The bill eliminates the defence currently available to consensual sexual activity with young people aged between 14 and 16 years, formerly known as carnal knowledge.
>
> The bill removes the express statutory defence presently provided in section 77(2)(c) ... that the person charged had reasonable cause to believe, and did in fact believe, that the child was of or above the age of 16 years. As a consequence, it will no longer be possible to argue that a uniform age of consent of 16 years creates an effective age of consent of 14 years."

The last sentence indicates that the Minister's mind was concentrated not only on the repeal of the "express statutory defence" in s 77(2), but on the *Proudman v*

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198 See [229] above.

199 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 May 2003 at 374.

200 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 May 2003 at 376.

Dayman principle. That is because the effect of the *Proudman v Dayman* principle on s 66C(3), if it were not excluded by the legislation, would be to create an effective age of consent of 14 years in relation to the crime created by s 66C(3) in circumstances where the prosecution cannot negate, beyond reasonable doubt, an honest and reasonable belief on the part of the accused that the other participant was aged 16 or more.

235 It is significant that at no point did the Attorney-General make reference to any avenue being left open, after the repeal of s 77(2), to an accused to escape conviction by reason of a reasonable mistake as to age.

236 If the appellant's construction were correct, a revolution would have been effected by changing the long-established position, and replacing a narrow avenue to acquittal with a broader one[201]. Nothing in the legislative language suggests that this revolution took place. The remarks of the Attorney-General suggest that he and his colleagues were hostile to any such revolution, and intended that it should not take place.

A "Draconian" result

237 The appellant contended that the Court of Criminal Appeal's construction should be rejected because it was "Draconian". It would cause an accused person to be punished even though that accused person was not "morally blameworthy" by reason of an honest and reasonable belief that the person under 16 with whom sexual intercourse had taken place was 16 or over. It would mean that the accused could be convicted because the other participant had lied about his or her age. It is true that the consequences of a particular construction can be taken into account in assessing the likelihood of that construction being correct. But once the conclusion is reached that legislation bears a particular construction, even if a court thinks that legislation may be "uncommonly silly", "unwise, or even asinine"[202], that consideration cannot prevail over the legislative language.

Order

238 For the reasons given, the order of the Court of Criminal Appeal dismissing the appellant's appeal was correct. The appeal to this Court should be dismissed.

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201 See [229] above.

202 Cf, in another context, *Griswold v Connecticut* 381 US 479 at 527 (1965) per Stewart J; see also at 530-531, and see *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 305 and 310.