



5 April 2017

PRESS SUMMARY

AB (Appellant) v Her Majesty's Advocate (Respondent) (Scotland) [2017] UKSC 25 *On appeal from [2016] HCJAC*

JUSTICES: Lord Kerr, Lord Wilson, Lord Reed, Lord Hughes, Lord Hodge

BACKGROUND TO THE APPEAL

In 2009, when the appellant was aged 14, the police charged him with two charges of lewd and libidinous practices at common law and one contravention of section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995. One of the common law charges involved the allegation of showing online pornographic images to a young boy. The other common law charge and the statutory charge involved the allegation of exposing his penis to, and chasing after, three other children, who were girls aged 4, 12 and 13. The police reported the case to the Procurator Fiscal but a decision was made not to prosecute the appellant.

In July 2015, when the appellant was aged 19, he was charged with having sexual intercourse with a girl who was aged 14 years and 11 months, contrary to sections 28 and 30 of the Sexual Offences (Scotland) Act 2009 (“the 2009 Act”). The appellant did not deny that sexual intercourse had taken place, but sought to rely on the defence in section 39(1)(a) of the 2009 Act that at the time he reasonably believed that the girl was aged 16. However, section 39(2)(a)(i) of the 2009 Act provides that the reasonable belief defence is not available to an individual who has previously been charged by the police with a “relevant sexual offence”. The “relevant sexual offences” are set out in Schedule 1 to the 2009 Act and cover a wide range of sexual offences, both consensual and non-consensual, and include offences in which the age of the victim is not an essential component of the crime. The definition excludes consensual sexual activities between older children.

The offences with which the appellant had been charged in 2009 fell within the meaning of a “relevant sexual offence” and the appellant could not therefore plead the reasonable belief defence. He argued that section 39(2)(a)(i) was not compatible with his rights as set out in the European Convention on Human Rights and therefore, in accordance with section 29 of the Scotland Act 1998, was outside the competence of the Scottish Parliament and was not law. He argued that that the provision breached both the presumption of innocence in Article 6(2) and his Article 8 right to privacy, and was unjustifiably discriminatory for the purposes of Article 14 read with Article 8.

The Lord Advocate argued that any interference with the appellant’s Convention rights was justified in the interests of protecting older children from sexual exploitation. He argued that the prior charge acts as an official warning, alerting the person charged to the importance of a young person’s age in relation to sexual behaviour, and therefore justifies depriving that person, if later charged with a sexual offence against an older child set out in section 28 to 37 of the 2009 Act, of the reasonable belief defence.

JUDGMENT

The Supreme Court unanimously allows AB’s appeal and remits the proceedings to the High Court of Justiciary. Lord Hodge gives the lead judgment, with which the other Justices agree. Lord Reed gives a concurring judgment, with which Lord Kerr, Lord Wilson and Lord Hughes agree.

REASONS FOR THE JUDGMENT

Article 6

Section 39(2)(a)(i) is not within the ambit of Article 6. Section 39(2)(a)(i) did not create an irrebuttable presumption that the appellant did not have a reasonable belief as to the age of the girl with whom he had sexual intercourse, thereby overriding the presumption of innocence in Article 6(2). The provision created what amounts to a strict liability offence, by treating as irrelevant the accused person's knowledge of the victim's age. Such an offence does not violate Article 6(2), which is concerned with procedural guarantees and not with the substantive elements of a criminal offence [21].

Article 8

There was an interference with Article 8 which requires to be justified under Article 8(2) because the prosecutor relied on the earlier police charge in the criminal proceedings [23-24, 56-57].

Lord Hodge concludes that section 39(2)(a)(i) is incompatible with the appellant's Article 8 rights [47]. The exclusion of the reasonable belief defence in this case is a disproportionate interference with the appellant's Article 8 rights because the prior charges did not give the official warning or notice that consensual sexual activity with children between the ages of 13 and 16 is an offence [44]. Those prior charges were not charges of sexual activity with a child aged between 13 and 16 and therefore did not provide such a warning [29]. The list of "relevant sexual offences" includes charges in which the age of the victim is not an essential component, extends far beyond consensual sexual activity with an older child and excludes charges where the charged person was an older child at the time of the charge. This suggests that section 32(2)(a)(i) is likely in many other cases to give rise to infringements of article 8 because the prior charge does not objectively give the relevant warning [45, 47].

Lord Reed agrees that the interference with the Article 8 right is not proportionate where the necessary link between the prior charge and the supposed warning does not exist [66]. The difficulty arises from the width of the definition of "relevant sexual offences". Since such offences are not confined to sexual conduct which is illegal *because* it is with children, prior charges of such offences cannot be taken to have alerted the accused to the importance of making sure that a person is over 16 before engaging in sexual activities. Further, since the definition includes non-consensual offences, prior charges relating to those offences cannot be taken to have alerted the accused to the importance of age in the context of consensual sexual conduct [64]. The definition also excludes consensual sexual activities between older children, perhaps the clearest example of a situation where the charge alerts the person charged to the importance of the age of consent when engaging in consensual sexual behaviour [65].

Article 14

In light of the conclusions in relation to Article 8, it is unnecessary to discuss this challenge [46, 67].

Remedy

It is not possible to interpret section 39(2)(a)(i) narrowly to bring it within the competence of the Parliament [48, 66]. Section 39(2)(a)(i) is therefore not law [66] and proceedings are remitted to the High Court of Justiciary to exercise the power to suspend or vary the effect of this decision [49-50].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>