STATUTORY RAPE CRISIS

The Statutory Rape Crisis: A judgment too far or a judgment that could have gone further?

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A INTRODUCTION

> Several people are being deprived of their liberty right now on the basis of this Section 1(1) which, according to the Supreme Court, is not a law. How can this be?[1]

Thus wrote a perplexed Vincent Browne in the aftermath of the statutory rape crisis which befell our 'impeccably constitutional Republic' in the summer of 2006. The writer continued

> There is something very serious here, if my contention is correct. It would mean that the Supreme Court was playing around with the law to fit the circumstances. And one of the safeguards we supposedly have of our liberties is that the Supreme Court will always stand by the law, at all times, irrespective of how unpopular or difficult.[2]

Section 1(1) of the Criminal Law (Amendment) Act, 1935 ("1935 Act") created the offence of unlawful carnal knowledge of a girl under the age of 15, otherwise known as the offence of statutory rape. The offence was silent on the question of *mens rea* – the mental element of a crime – and when charged under s.1(1) the applicant in *CC v. Ireland*[3] ("*CC*") sought to put forward a defence of reasonable mistake as to age. The Supreme Court in its judgment of 12th July, 2005 held by a majority that the offence was intended to be one of strict liability and therefore precluded the applicant from pleading any such defence. The applicant thus proceeded to challenge the constitutionality of allowing such a stigmatic offence to be one of strict liability. On the 23rd of May, 2006 the Supreme Court held s.1(1) to be unconstitutional. To deny an accused the opportunity of a defence of reasonable mistake as to the age of the girl with whom he was charged of having carnal knowledge, the Court said, constituted a failure by the State in its laws to respect, defend and vindicate the rights to liberty and to good name of the person.

The *CC* case provoked widespread consternation[4] when it became known that persons previously convicted under s.1(1) were preparing to challenge the continuation of their detention hoping to 'piggyback' on that declaration. The first such challenge was brought on 26th May in a *habeas corpus* application by a man to become known as Mr A. Laffoy J in the High Court ordered the release of Mr A four days later.[5] Fortunately, the story does

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[1] The Sunday Business Post, 16th July, 2006.
[2] ibid.
[3] [2005] IESC 48 and [2006] IESC 33.
[4] Hardiman J was later to criticise the "rather breathless, and intentionally alarmist" coverage of the case: *A v. Governor of Arbour Hill Prison* [2006] IESC 45, p. 36 of the printed judgment.
[5] *A v. Governor of Arbour Hill Prison* [2006] IEHC 169.

not stop there for the State immediately appealed to the Supreme Court and successfully obtained an order for the re-arrest of Mr A on 2nd June. The court reserved judgment later to be delivered on 10th July. This extraordinary episode had all the hallmarks of a Supreme Court "turning its own logic inside out"[6] in order to dispel public alarm; of a court 'playing with the law' to fit the circumstances. Vincent Browne suggested that the Supreme Court Justices "had to bend their minds to find a rationale for ordering the re–imprisonment of somebody for a crime that does not exist."[7] Thus, in the language of judicial activism, some suggest that the Supreme Court judgment was 'a judgment too far.'

B THE INTERPRETATION OF SECTION 1(1)

The foundations of this crisis were laid bare in the Supreme Court's judgment from July of 2005 on the interpretation of s. 1(1).[8] The majority found it "compellingly clear that the Oireachtas, as a matter of deliberate policy, deprived accused persons of the defence."[9] But could the Court not have gone the other way and simply have implied a reasonable mistake defence from the section? This approach has quite a bit of appeal for it would have meant that the case could proceed without calling into question the constitutionality of the statutory rape legislation and so Mr A would not have been released and there would have been no crisis. Thus, the question arises: could these judgments have gone further? On this point one should bear in mind that when the Supreme Court was later to strike down the legislation, Hardiman J, who delivered the judgment of the Court, was of the view that such a decision "cannot reasonably be regarded as surprising."[10] So it is interesting that Geoghegan J in his 2005 judgment suggested that "a constitutional requirement of an element of *mens rea* in serious offences seems to be hinted at,"[11] as is Fennelly J's acknowledgement that "it may be appropriate to give further consideration to the question of constitutionality."[12] Both Justices, therefore, were open to the idea of a constitutional challenge. One wonders whether either of the learned judges appreciated that a ruling of unconstitutionality could render previous convictions under the legislation unlawful. Another matter entirely is the influence that this potential consequence should have on a judge's decision.

The majority decision rests essentially on the legislative history of these particular sexual offences. The 1935 Act amended and carried over the statutory rape offences which were previously covered by the Criminal Law Act, 1885 ("1885 Act"). Of great significance was the fact that under the 1885 legislation the 'older girl offence' (unlawful carnal knowledge of a girl aged between 15 and 17) contained an express requirement of knowledge of age. But when this offence was transposed into the 1935 Act this *mens rea*

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[6] John Waters, The Irish Times, 12th June, 2006.
[7] Vincent Browne, The Irish Times, 7th June, 2006.
[8] [2005] IESC 48. Three judgments were delivered, Denham and Geoghegan JJ for the majority with whom Hardiman and McCracken JJ concurred, Fennelly J in dissent.
[9] ibid., p. 9 of Fennelly J's judgment.
[10] [2006] IESC 33.
[11] [2005] IESC 48.
[12] ibid.

requirement was dropped. Similarly, the 1885 Act proscribed unlawful carnal knowledge of a mentally impaired girl with an essential element of the offence being knowledge of such impairment. This *mens rea* requirement was retained in the new Act. However, a *mens rea* requirement was absent from the 'younger girl offence' – unlawful carnal knowledge of a girl under the age of 15, the offence with which *CC* was charged – in both the 1885 and the 1935 Acts. What Geoghegan J took from this was that:

> The Oireachtas … when enacting the 1935 Act was clearly intending to revise the offences under the 1885 Act … [T]he proviso permitting the defence of mistake of age in the case of the 'older girl offence' was not inserted into the 1935 Act and by necessary implication this must have been deliberate … To hold otherwise would be an unjustifiable distortion of what was clearly the intention of the Oireachtas of Saorstát Éireann.[13]

Fennelly J went further in saying:

> A contrary view would make nonsense of the legislation and would, furthermore, run counter to the commonly accepted interpretation of the section which has prevailed for the seventy years since its enactment.[14]

Denham J, however, found this approach unconvincing:

> I am not satisfied that it is correct to put great weight on construing the Act of 1935 by comparison with that of 1885… The absence [of a mistaken belief defence] in the 1935 Act does not make compellingly clear the intent of parliament.[15]

Thus support was found in the Supreme Court for two conclusions which were poles apart on a question as important as whether a defendant had a crucial defence open to him or not. It is argued here that Denham J was acutely aware of the potential consequences of this decision and thus, the motivating factor behind the judge's decision was to avert a constitutional crisis. Hogan & Whyte – the authors of the authoritative text on the Irish Constitution (Kelly) – suggest that

> the courts have shown no consistency with regard to any particular approach [to constitutional interpretation] and this gives rise to the suspicion that individual judges are willing to rely on any such approach as will offer adventitious support for a conclusion which they have already reached.[16]

The striking disparity in the judgments on the interpretation of s. 1(1) arouses this suspicion of a judge searching out 'adventitious support' that will justify the decision. Prof Gwynn Morgan has noted that "the judges have been fairly careful to arrange their judgments so as to accord with the outlook of society."[17] Indeed, Denham J's judgment on the statutory interpretation issue might seem to be an excellent example of this alignment with the 'outlook of

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[13] ibid, Emphasis added.
[14] ibid.
[15] ibid. para. 45.
[16] Hogan & Whyte, J.M. Kelly: The Irish Constitution, Butterworths, (4th ed, 2001), p. 3.
[17] Gwynn Morgan, A Judgment Too Far? Judicial Activism and the Constitution (CUP, 2001), p. 104.

society.' The learned judge felt that such a defence ought to be implied from the section. She said that the "test to be applied in construing the legislation is whether the defence of mistake is a necessary implication"[18] and she was satisfied that it was. As Denham J eloquently put it:

> [T]he presumption that *mens rea* is required for the commission of an offence is well established in this jurisdiction. It is a silken thread in the fabric of the legal system ensuring a just process. It is part of the protective cloak of Article 38.1 of the Constitution of Ireland, of the due process of law.[19]

Why then were the other judges of the Court reluctant to endorse Denham J's approach and hold that such a defence was open to the applicant? Could those judgments have gone further? The answer must surely be: not without going too far. To quote again the *doyen* on these matters, Gwynn Morgan, "the issue of deciding at what point a law goes beyond the Constitution leaves a great deal of authority to the senior judiciary and [it is suggested] that this authority has been used in a very activist way."[20]

When we talk of judicial activism in this context, often what it entails is the blurring of the line between the judicial and the legislative functions. However desirable it may have been to imply the defence in order to avert a constitutional crisis, one can only stress the imperative that the courts respect the idea of the separation of powers. The judiciary's credibility rests on its deferential treatment of the law, which entails a considerable degree of coherent and consistent application. This is why our constitutional framework establishes the Oireachtas as the sole and exclusive law-maker under Art 15.2.1. Public confidence in the court system would be sure to wane were it not seen to be adhering to some standard of governing principles. For this reason, it is submitted, the Supreme Court majority were loath to interpret the section in a way which amounted to, in the words of Geoghegan J, an "unjustifiable distortion" of the framers' intention.

It is suggested that Denham J's judgment on the interpretation of s. 1(1) trespassed too far into the realm of legislating. In light of the section's legislative history, it is submitted that any reasonable interpretation ought to have led one to the conclusion that the Oireachtas did not intend any mistaken belief defence to lie. The argument being made here is that the judge made the positive choice to depart from the status quo (which required her to acknowledge that the Oireachtas intended the offence to be one of strict liability); in other words, that Denham J engaged in adventurous interpretation to create what she felt was desirable social policy, when the axiom is that "judges should be governed by the law, rather than by what, based on their individual viewpoints, they consider moral or appropriate."[21] It is submitted that Denham J's colleagues anticipated that for them to imply a defence into s. 1(1) would inevitably draw criticism as an exercise of judicial activism and so they cautiously circumnavigated these perilous shores. Thus,

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[18] [2005] IESC 48 at para. 39.
[19] [2005] IESC 48, para. 33.
[20] Gwynn Morgan, op. cit. note 17 at p. 92.
[21] ibid., p. 108.

the majority appreciated that they couldn't have gone any further without going too far.

C PUBLIC SENTIMENT

Thus, the applicant proceeded to challenge the constitutionality of the offence being one of strict liability and the Supreme Court in May 2006 came to the rather unexceptional conclusion that the section was so repugnant. Giving the judgment of the Court, Hardiman J stated:

> I cannot regard a provision which criminalises and exposes to a maximum sentence of life imprisonment a person without mental guilt as respecting the liberty or the dignity of the individual or as meeting the obligation imposed on the State by Art 40.3.1.[22]

And he concluded: "A finding to [this] effect cannot reasonably be regarded as surprising."[23] But, for some reason, the decision was a total surprise and as soon as the possibility of previously–convicted sex offenders walking free was mentioned, it ignited a media and public frenzy.

Fears of the sky-falling-in scenario were realised when the High Court ordered the release of a convicted s. 1(1) offender, Mr A, allowing him to take advantage of the Supreme Court's ruling in *CC* on the section's unconstitutionality. As an editorial in the Sunday Business Post put it:

> Quite understandably, the public had little patience with the complex legal argument that lead to the release of Mr A … When men convicted of such heinous crimes walk free, then clearly something serious has gone wrong.[24]

As reasonable as this may seem, it is asking a Court to discard legal nuance in favour of what is widely perceived to be the right result. But a fundamental legal maxim is that "public sentiment is an elusive and subjective consideration and a Court should not rest its decision upon such a basis"[25] — something that Laffoy J, admirably, was keen to avoid. A judge following precedent "sacrifices his own view of what is just or desirable and instead honours his judicial oath of office to uphold the Constitution and the laws."[26] Laffoy J sacrificed her own view of what was just and desirable, and indeed what she thought the community regarded as the right result, and upheld the law as she interpreted it.

D RETROSPECTIVITY

Unfortunately, though, it was the judge's interpretation of the law that was the 'something serious that had gone wrong'. The issue before the learned High Court judge concerned the retrospective effects that flow from a pronouncement of the unconstitutionality of a pre-1937 statute. Laffoy J relied on an *obiter dictum* of Henchy J in the Supreme Court case of *Murphy v.*

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[22] [2006] IESC 33.
[23] ibid.
[24] Sunday Business Post, 4th June, 2006.
[25] Gwynn Morgan, op. cit, note 17 at p.27.
[26] ibid., p. 19.

Attorney General[27] ("*Murphy*") which suggested that she equate the ruling to "a judicial death certificate, with the date of death stated as to the date when the Constitution came into operation."[28] Thus, what Laffoy J applied was a form of absolute retrospectivity in that everything done under an invalid law then becomes itself invalid. If one can put aside for the moment the repellent and egregious character of the individual set to gain from the operation of a rule of absolute retrospectivity, it must be conceded that there is a rather appealing and convincing logic here. This logic is articulated by Laffoy J as follows: "the offence with which the applicant was charged did not exist in law when it was purported to charge him with it, nor at the respective dates of his purported conviction and sentencing."[29] This is the result one might expect when the statute's death certificate is dated 1937. But the gaping hole in Laffoy J's approach becomes apparent on a consideration of what follows Henchy J's rather striking and memorable reference to a 'judicial death certificate.' He went on to say:

> [A] declaration … that a law has lost validity in 1937 on constitutional grounds does not necessarily carry with it the corollary that what has been done after 1937 in pursuance of that statutory provision will equally be condemned for lack of validity.[30]

What Henchy J's caveat takes into account is that though a law be struck down as unconstitutional, the reality of the situation requires actions done in good faith under it to continue to be valid; in Griffin J's illustrative phrase, "the egg cannot be unscrambled."[31]

Indeed, had Laffoy J leafed through the standard literature on the subject, it is difficult to comprehend how she wasn't persuaded to hold otherwise. For example, in Kelly, Hogan & Whyte speak of exceptions to the 'primary rule of redress'; that:

> whether a pre- or post-Constitution statute was struck down, it does not follow that the legal order could or should undertake to repair all or any of the loss, or amend the grievance which has been caused by the operation of what now turned out to be an illegal measure.[32]

Or perhaps one might have referred to the report of the Constitution Review Group: "The courts appear to recognise that, notwithstanding the invalidity *ab initio*, the clock either cannot or should not be turned back … [T]he courts have taken a pragmatic approach."[33] Had one perused Casey's discussion of 'the effect of a ruling of invalidity'[34] one would have come across the concept of the 'statutory undead'[35] or the 'zombie Act'[36] and seen that the Supreme Court in past cases had employed devices such as laches and waiver

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[27] [1982] IR 241.
[28] ibid p. 307.
[29] [2006] IEHC 169.
[30] supra note 27 at p. 307.
[31] ibid., p. 331.
[32] *op. cit.* note 16., at p. 901.
[33] Report of the Constitution Review Group (Government Publications Office, 1996), p. 167.
[34] Casey, Constitutional Law in Ireland (Roundhall, 2000), pp. 370-374.
[35] ibid, at p.371.
[36] ibid.

to avoid the unwelcome consequences when in extremely similar predicaments.

But, therein essentially lies the crucial point: this issue was far from novel. The question of the retrospective effects which flow from a statute's unconstitutionality had arisen in *Murphy,* wherein the Supreme Court, having found a piece of tax legislation to be invalid, restricted the applicants' redress to the time from which they first challenged the statute. Similarly, an attempt was made to piggyback the case of *de Búrca v. Attorney General*[37] which held that all-male juries empanelled under the Juries Act, 1927 was an invidious discrimination not authorised by Art 40.1 (which allows enactments to have due regard to differences of capacity and social function) and so was repugnant to the Constitution. However, the prosecutor in *The State (Byrne) v. Frawley*,[38] whose jury had been empanelled before the *de Búrca* decision, was unsuccessful in having his conviction quashed because as he had not objected to the constitution of his jury at trial or on appeal and so was deemed to have waived his right to trial before a lawful jury. And if further precedent was required for one to appreciate what one might have thought to be the rather bleak prospects of the *A*[39] case, one should be referred to *McDonnell v. Ireland*.[40] Having being convicted of membership of the IRA in 1974, McDonnell's position in the civil service was forfeit under s. 34 of the Offences Against the State Act, 1939. But then in 1991, this s. 34 was found to be unconstitutional in *Cox v. Ireland*[41] whereupon McDonnell contended that his dismissal was now unlawful, entitling him to damages. Not surprisingly, the Supreme Court dismissed the appeal. The Court was of the view that since the applicant had exhausted all of his actual and potential remedies, his dismissal must be deemed valid and lawful notwithstanding a later finding of unconstitutionality. In each of these very different factual circumstances, the windfall bonus sought was either denied or curtailed.

E A SEEMING ABSURDITY OR OVERWHELMING LOGIC?

One could be forgiven for thinking that the Supreme Court was eager to prevent a legal concept as nuanced as retrospectivity becoming a "tool of chaos."[42] Vincent Browne wrote of the "seeming absurdity" at which the Supreme Court arrived. He said that "this absurd court ruling defies logic;" that "[i]n justifying what seems on the face of it to be an absurdity, the Supreme Court must address issues to do with its own credibility."[43] In an obvious response to the criticisms of the *A* case that were levelled by Browne, the Minister for Justice wrote an article in the Irish Times asserting that the State's plea (and so presumably the Supreme Court judgments as well) had "overwhelming logic." He wrote:

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[37] [1972] IR 36.
[38] [1978] IR 326.
[39] [2006] IESC 45.
[40] [1998] 1 IR 134.
[41] ibid p.142.
[42] A phrase used by Denham J in her judgment in the *A* case, [2006] IESC 45.
[43] The Irish Times 5th July, 2006.

> Anyone who now reads the five Supreme Court judgments will see that the view taken by the State was not simply correct; it had overwhelming logic, it had ample international precedent, and it had deep foundations in Irish constitutional jurisprudence, in justice, and in common sense.[44]

McDowell's response, while being nothing short of characteristic for our Justice Minister, is also, I would suggest, overwhelmingly correct. The 'logic' Browne speaks of is that followed by the High Court in *A* and essentially encapsulates the concept of absolute retrospectivity. But, however desirable it may be, the law need not be logical. Achieving consistency alone in the law might seem to be a trying task in itself. T this writer, the consistent line of precedent – *Murphy*, *Frawley* and *McDonnell* – affords ample legitimacy to the Court's decision in *A*. Thus, the argument that the continuing detention of a person convicted on foot of a law which is deemed no longer to exist is unlawful is untenable with the logic formerly employed by the courts. The courts have in a line of cases drawn a distinction between the declaration of a statute void *ab initio* and its retrospective effects. Despite its 'dubious' logic, the fact remains that this has been the logic consistently applied by the Court in these circumstances. As articulated by O'Flaherty J in *McDonnell*, "[t]he consequences of striking down legislation can only crystallise in respect of the immediate litigation which gave rise to the declaration of invalidity."[45] Quoting O'Higgins CJ in *Murphy*, O'Flaherty J warned that a rule of absolute retrospectivity "would provide ... the very antithesis of a true social order – an uneasy existence fraught with legal and constitutional uncertainty."[46]

F CONCLUSION

Neville Cox wrote of the *AG v X* case:[47]

> The net result reached by the Supreme Court ... was undoubtedly what was desired by a good deal of public opinion. Moreover, in moral terms it may well be the "right" result. Nonetheless in legal terms ... the "right" result was reached by an inappropriate judicial intervention in an area of extreme moral controversy, which struck at the very heart of democratic government ... Abortion politics aside, this is a dangerous approach to constitutional law and one which sets a precedent with breathtaking potential.[48]

Vincent Browne has been raising these exact concerns with the *A* case, and with good reason. Far too many people have unquestioningly accepted the Supreme Court's decision because it achieved the 'right' result: Mr. A was returned to Arbour Hill Prison. For most, as long as the right result is reached, how the Court justifies arriving there is irrelevant. The point being made by this writer is that a proper judicial process is more important than the 'right' net result, a point perhaps better articulated by Prof Fennell as follows: "[T]he relegation of procedure to a place of relative unimportance, is not only

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[44] The Irish Times, 15th July, 2006.
[45] [1998] 1 IR 134, p. 144.
[46] ibid., p. 142.
[47] *Attorney General v. X* [1992] 1 IR 1.
[48] Cox 'Judicial Activism, Constitutional Interpretation and the Problem of Abortion' in O'Dell (ed.), Leading Cases of the Twentieth Century, (Roundhall, 2000) p. 237 at 254.

significant, but potentially worrisome … How we deal with our violators has always been the hallmark of liberal societies."[49]

Cases of such significance as those in question here ought to be the subject of more searching scrutiny. But it is of particular importance that the foundations on which these decisions are constructed are exposed to thorough and critical questioning. In this regard, Vincent Browne's contribution to the coverage of the statutory rape crisis was a healthy dose of constructive criticism. More opinion of this nature is to be welcomed.

[49] Fennell, Crime and Crisis in Ireland: Justice by Illusion (CUP, 1993), pp. 3-4.