PARTIES:	DIRECTOR OF PUBLIC PROSECUTIONS
	v
	COLE, Joshua Glen
	AND
	LEGGETT, Jonathan Patrick
TITLE OF COURT:	COURT OF CRIMINAL APPEAL (NT)
JURISDICTION:	SPECIAL CASE STATED
FILE NO:	CA 6 OF 1994
DELIVERED:	16 DECEMBER 1994
HEARING DATE:	6 DECEMBER 1994
JUDGMENT OF:	MARTIN CJ., ANGEL AND PRIESTLEY JJ.

CATCHWORDS:

Criminal Law – Offences against the persons – Assaults – Sexual offences – Unlawful sexual intercourse or carnal knowledge – Proof, evidence and procedure – Burden of proof – Burden of proof on the accused to show on balance of probabilities reasonable grounds to believe complainant above age of 16

Criminal Code (NT), ss12, 31, 32, 129, 192 and s414(4)(c)

Simmons (1931) 23 Crim App R 25, referred to.
Harrison and Ward (1938) 26 Crim App R 166, referred to.
Dowling v Bowie (1952) 86 CLR 136, applied.

Criminal Law Amendment Act 1885 (UK), s5

R v Banks [1916] 2 KB 621, applied.
Simmons (1931) 23 Cr App R 25, applied.
R v Harrison (1938) 26 Cr App R 166, applied.

Sexual Offences Act 1956 (UK), ss6(3) and 47
Criminal Code (Qld), s213

R v Logan [1962] QWN 3, applied.

Criminal Code (WA), s187(2)

Thomason v Martin (1964) WAR 136, applied.

Crimes Act 1900 (NSW), ss66C, 71, 77(2)

Sparre v The King (1942) 66 CLR 149, applied.

Crimes (Sexual Offences) Act 1980 (VIC), s48

R v Douglas [1985] VR 721, applied.
Scanlon v Hutchison (1946) NZLR 735, distinguished.
R v Carr-Braint (1943) 2 KB 605, distinguished.
Brimblecombe v Duncan [1958] Qd R 8, referred to.
McPherson v Cairn [1977] WAR 51, referred to.

REPRESENTATION:

Counsel:

Applicant:	Rex Wild QC
1st & 2nd Respondents:	Kim Kilvington

Solicitors:

Applicant:	DPP
1st & 2nd Respondents:	Crown Law Office

Judgment category classification: A
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IN THE COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA

No CA 6 of 1994

IN THE MATTER of a reference under Section 414(2) of the Criminal Code

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS
Applicant

AND:

JOSHUA GLEN COLE
First Respondent

AND:

JONATHAN PATRICK LEGGETT
Second Respondent

CORAM: MARTIN CJ, ANGEL and PRIESTLEY JJ

REASONS FOR JUDGMENT

(Delivered 16 December 1994)

THE COURT:

The Director of Public Prosecutions, under s 414(2) of the Criminal Code, referred for the consideration and opinion of the Court, a point of law which arose in the trial of the respondents, Joshua Cole and Jonathan Leggett. Each of them was acquitted on 18 July 1994 of two charges of having unlawful carnal knowledge of a female under the age of 16 years contrary to s 129(1) of the Criminal Code. Each was also acquitted of two charges of aggravated carnal knowledge of a female, contrary to

s 192(1), s 192(2) and s 192(4) of the Criminal Code. The s 192 charges do not involve the point of law referred to the court.

That point was:

> "Whether the learned trial judge was correct in directing the jury that the Respondents having raised the defence set out in s 129(3) of the Criminal Code, the Crown was therefore required to prove beyond reasonable doubt that the Respondent did not believe on reasonable grounds that the female was of or above the age of 16 years?"

At the conclusion of argument the Court answered the question "No". These are the reasons for that opinion.

Section 414(5) of the Criminal Code provides that the opinion of the Court upon this reference is not to affect the respondents' acquittal in the trial. In the present proceedings Mr Kilvington of counsel was appointed by the Crown Law Officer pursuant to s 414(4)(c) to present such argument as might have been presented by the acquitted persons if they had appeared.

The events which gave rise to the charges occurred on 25 April 1993 at Darwin, when the complainant was fifteen years of age.

In the course of the trial both of the accused sought to rely upon s 129(3) as a defence to the charges of unlawful carnal knowledge under s 129(1). The two subsections are as follows:

> "(1) Any person who with respect to a female who is under the age of sixteen years -
> (a) has unlawful carnal knowledge of her; or
> (b) ...
> (3) It is a defence to a charge of a crime defined by this section to prove that the accused person believed, on reasonable

> grounds, that the female was of or above the age of sixteen years."

At the trial the submissions and argument as to the onus of proof under this section were brief. The main points appear to have been as follows.

Counsel for the Crown submitted that the onus is on an accused who relies upon s129(3) to prove, on the balance of probabilities, that he had reasonable grounds to believe that the complainant was of or above the age of sixteen years; as to s 31 of the Code, although it applies to the Criminal Code generally and requires the Crown to prove the mental element of crimes beyond reasonable doubt, s 129(3) is a statutory defence or "built-in" defence to the offence under s 129(1), and hence the onus of proof should be upon the defendant; the language of the provision supported this interpretation; to prove an offence under s 129 it was not necessary to prove beyond reasonable doubt that the accused knew the female was under sixteen years, only that she was in fact under sixteen; two English cases supported this view of the provisions, Simmons (1931) 23 Crim App R 25 and *Harrison and Ward* (1938) 26 Crim App R 166.

Counsel for the respondents submitted that once the respondents had raised the defence under 129(3) on the balance of probabilities, the onus was upon the Crown to negative that defence. Counsel for the second respondent argued that it is always incumbent upon the Crown to negative any defence beyond reasonable doubt. He referred to s 31 of the Criminal Code as giving rise to an added element of the defence which the Crown must negative, and said s 129(3) was merely stating one aspect

which the Crown must negative beyond reasonable doubt once raised. Counsel for the first respondent argued that s 32 of the Criminal Code should apply since the accused had made a mistake of fact as to the age of the complainant, and hence the Crown must negative the defence of mistaken belief of fact beyond reasonable doubt. Finally, counsel for the second respondent argued that s 129(4) specifically excluded the application of s 12 (which deals with abettors and accessories before the fact), and by implication, other sections of the Code must be intended to apply to s 129 and hence s 32 would apply.

Although the arguments touched upon the main points which were later argued in this court, the submissions in this court were much fuller. It seems from the transcript of the argument at the trial that the arguments were there put in circumstances of some pressure and haste and that Thomas J was obliged to decide the point at once.

She agreed with the submissions made on behalf of the respondents, saying,

> "I rule that if the accused prove on the balance of probabilities that the accused believed on reasonable grounds that the female was of or above the age of 16 years, then the onus falls upon the Crown to negative this defence."

This ruling adopted the language used by counsel for the respondents in their submissions and, as pointed out in this court by Mr Wild QC for the Director of Public Prosecutions, cannot reflect the intended meaning of the submission, because once an accused proved he believed on reasonable grounds the female was sixteen or more, his defence would be made out. A

more plausible meaning for the submission and the ruling appears in the directions actually given by her Honour at the trial. The first of these, which all followed the same pattern, was as follows:

> "It is a defence to this charge, under section 129 - and I will read to you the provision of section 129, which is section 129(3) which states: It is a defence to a charge of a crime defined by this section to prove that the accused person believed on reasonable grounds that the female was of or above the age of sixteen years - I just draw your attention to one aspect of the evidence on this because the accused, Jonathan Leggett, has raised this defence.
>
> In his record of interview he is asked these two questions" 'What age is Lynne?---I don't know, I honestly don't know'; question: 'Well, what age do you think she is?---16'. Now, the accused, Jonathan Leggett, having raised this defence, it is for the Crown to prove beyond reasonable doubt that the accused did not believe on reasonable grounds that the female was of or above the age of 16 years."

Whichever version of the ruling is taken however, it seems to us to be very difficult to support in view of the way in which s 129(3) is expressed. The subsection provides that it is a defence (to the charge) *to prove* that the accused person believed, on reasonable grounds, that the female was of or above the age of sixteen years. The reasonable reader, looking simply at these words would in our view take them as meaning that the onus of proving that the accused held the belief on reasonable grounds lay upon the accused. All the courts which have considered the matter in other jurisdictions have also taken that meaning from them.

Before turning to give instances of authorities from various jurisdictions, it seems appropriate to mention that the way in which statutory provisions structured as s 129(3) is structured should be interpreted has long been settled. Dixon CJ in *Dowling v Bowie* (1952) 86 CLR 136, described the approach as a "common law doctrine" to the effect

> "that where a statute having defined the grounds of some liability it imposes proceeds to introduce by some distinct provision a matter of exception or excuse, it lies upon the party seeking to avail himself of the exception or excuse to prove the facts which bring his case within it. The common law rule distinguishes between such a statutory provision and one where the definition of the grounds of liability contains within itself the statement of the exception or qualification, and in the latter case the law places upon the party asserting that the liability has been incurred the burden of negativing the existence of facts bringing the case within the exception or qualification. See *Barritt v Baker* (1948) VLR 491, at 495. The distinction has been criticised as unreal and illusory and as, at best, depending on nothing but the form in which legislation may be cast and not upon its substantial meaning or effect. The question, however, where in such cases the burden of proof lies may be determined in accordance with common law principle upon considerations of substance and not of form. A qualification or exception to a general principle of liability may express an exculpation excuse or justification or ground upon which the general rule of liability is based and depends on additional facts of a special kind. If that is the effect of the statutory provisions, considerations of substance may warrant the conclusion that the party relying on the qualification or exception must show that he comes within it. Cf *Pye v Metropolitan Coal Co Ltd* (1934) 50 CLR 614; *Darling Island Stevedoring & Lighterage Co Ltd v Jacobson* (1945) 70 CLR 635." (at 139-140)

Thus, if a statutory provision requires the conclusion spoken of by Dixon CJ in the last sentence of the cited passage,

the kind of onus which falls upon the Crown in cases where self defence or provocation become issues, is not applicable. The onus is not upon the Crown to establish beyond reasonable doubt the absence of the particular exculpatory matter, but upon the accused to show that the matter is, on all the material in evidence, established on the probabilities.

It seems that it was in England that the predecessor of s 129(3) was first enacted. In England and Australia until the 1880s there had been no statutory sanction against men having consensual intercourse with females above twelve years of age. Then, in New South Wales, the Criminal Law Amendment Act of 1883 made carnal knowledge of any girl of or above the age of ten and under fourteen liable to penal servitude for ten years. Two years later, in the United Kingdom, the Criminal Law Amendment Act 1885 (48 and 49 Vict c.69, s 5(1)) both made carnal knowledge of a girl of or above the age of thirteen and under sixteen a misdemeanour, and also, by a proviso to the subsection, stated that it should be a "sufficient defence" if it should "be made to appear" that the accused "had reasonable cause to believe that the girl was of or above the age of sixteen". A similar proviso was enacted in New South Wales in 1910 (Act No 2, 1910).

In England, the provisions introduced in 1885 were regularly held to put the onus of establishing the defence upon the accused: *R v Banks* [1916] 2 KB 621; *Simmons* (1931) 23 Cr App R 25; *R v Harrison* (1938) 26 Cr App R 166.

This approach was carried into the Sexual Offences Act 1956 (UK). Section 6(3) says,

> "(3) A man is not guilty of an offence under this section (ie intercourse with a girl under 16) because he has unlawful sexual intercourse with a girl under the age of sixteen, if he is under the age of twenty-four and has not previously been charged with a like offence, and he believes her to be of the age of sixteen or over and has a reasonable cause for the belief."

and s 47 says

> "Where in any of the foregoing sections the description of an offence is expressed to be subject to exceptions mentioned in the section, proof of the exception is to lie on the person relying on it."

In Queensland, s 213 of the Criminal Code, drafted by Sir Samuel Griffith, and enacted by the Criminal Code Act 1899, made it a misdemeanour to have unlawful carnal knowledge of a girl under fourteen and provided:

> "It is a defence to [a charge of that offence] to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of fourteen years."

In *R v Logan* [1962] QWN 3, Mack J held that this provision put the onus on the accused of proving belief on reasonable grounds.

Section 129(3) of the Northern Territory Criminal Code is obviously derived from the Queensland Code, (and see also the

detail given by Robin S Reagan in *New Essays on the Australian Criminal Codes* (1988) Ch VIII, at 113-114).

In Western Australia the same wording was adopted in s 187(2) of its Criminal Code, largely based on the Queensland Code, and enacted in 1902. In *Thomason v Martin* (1964) WAR 136 the Full Court of the Supreme Court of Western Australia held that under s 187(2), the defendant bore the onus of proof, Hale J saying that "This defence must be alleged and proved by the accused" (at 141).

The corresponding New South Wales provision of 1910 (which became a proviso to s 77 of the Crimes Act 1900) was considered by the High Court in *Sparre v The King* (1942) 66 CLR 149. This case concerned the application of s 71 of the Crimes Act 1900 (NSW) in its application to the Australian Capital Territory by virtue of s 6 of the Seat of Government Administration Act 1909-1933. Under s 71 (repealed in 1985 and since, in substance, appearing in s 66C) it was provided that

> "whosoever unlawfully and carnally knows a 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."

The proviso to s 77 (now appearing in s 77(2)) made it

> "a sufficient defence to any charge which renders a person liable to be found guilty of this offence where the girl in question was over the age of fourteen years if it shall be made to appear to the court or jury before whom the charge is brought that the person so charged had

> reasonable cause to believe that she was of or above the age of sixteen years."

The court found that the burden of proof under the proviso was on the accused. Starke J held

> "There is no doubt that the burden is upon the accused of proving that he had within the meaning of the proviso already mentioned reasonable cause to believe that the girl was of or above the age of sixteen years. Normally in criminal proceedings it is for the jury to determine all questions of fact, subject of course to the direction of the court whether in point of law there is any evidence of any particular fact fit for their consideration. The Act in the present case makes the fact mentioned in the section a sufficient defence if it shall appear to the court or jury." (at 153)

McTiernan J was of the same view (at 157), as was Williams J (at 160).

Sparre v The King was applied by the Full Court of the Supreme Court of Victoria in *R v Douglas* [1985] VR 721. This case concerned the burden of proof under s 48 of the Crimes (Sexual Offences) Act 1980, which says, so far as presently relevant:

> "(1) A person who takes part in an act of sexual penetration with a person who is of or above the age of ten years but under the age of sixteen years and to whom the first-mentioned person is not married is guilty of an indictable offence
> ...
> (4) The consent of a person with or upon whom an offence against this section is alleged to have been committed is no defence to a charge under this section unless at the time the offence is alleged to have been committed -

(a) the accused believed on reasonable grounds that the person was of or above the age of sixteen years; or
(b) the accused was not more than two years older than the person."

The court held that if the elements of the offence created by subs (1) are proved, then the accused must rely upon subs (4) to avoid conviction and show that he held the relevant belief on reasonable grounds. It was said that since the matter was peculiarly within the knowledge of the accused the criminal law reverses the burden of proof (at 724).

The foregoing authorities represent a uniform approach to the class of provisions of which s 129(3) is one. It was the apparent meaning of the words of the provision and the weight of these authorities that led us to say earlier that it would be very difficult to support the trial judge's ruling in question in this reference, and the directions based on it.

In seeking to support the ruling, Mr Kilvington drew the Court's attention to two matters. He pointed to a New Zealand case, *Scanlon v Hutchison* (1946) NZLR 735, in support of the proposition that the onus was on the Respondents to establish a reasonable probability of the existence of the belief, and that the onus then shifted back to the Crown to prove beyond reasonable doubt that no reasonable belief existed. Scanlon involved the application of s 165 of the Licensing Act 1908 (NZ) which made it an offence for an innkeeper to refuse, without valid reason, to supply a meal to a traveller. Blair J held (at 737) that following *R v Carr-Braint* (1943) 2 KB 605 there was an

onus on the innkeeper to set up a prima facie case of valid reason for refusal, but once having done that the onus then shifted to the Crown to prove beyond reasonable doubt that no valid reason existed. We do not think this decision should be treated as an authority on s 129(3). It is the decision of a single judge on a statutory provision (the precise terms of which do not appear from the report) dealing with a different subject matter from s 129. Further, we doubt that *R v Carr-Braint* supports the proposition Blair J deduced from it. The ultimate conclusion in R v Carr-Braint (at 612) was that where "some matter is presumed against an accused 'unless the contrary is proved'" the burden of proof upon the accused "may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish".

The other matter relied on by Mr Kilvington was that S 31 and/or s 32 of the Criminal Code operated to put the onus on the Crown of negativing the defence under s 129(3) beyond reasonable doubt.

Section 31(1) states:

> "A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct...."

Section 32 states:

> "A person who does, makes or causes an act, omission or event under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for it to any greater extent than if the real state of

> things had been such as he believed to exist."

There is some awkwardness in applying s 31(1) to a charge under s 129(1). Section 31(1) could only arguably need consideration where the accused had in fact carried out the act of having carnal knowledge of a female under sixteen. Section 31(1), the argument must be, will excuse him from criminal responsibility for that act "unless it was intended or foreseen by him as a possible consequence of his conduct". The word "it" must, we think, in the case being considered, refer to the act. It is difficult to see, even if the provision can have any application to cases in which the ingredients of s 129(1) are proved, that the provision has any common ground at all with what may be raised under s 129(3). So far as we can see, any issue which might arise under s 31(1) in a s 129(1) case would be different from any issue arising under s 129(3). We therefore do not think s 31(1) has any bearing on the construction of s 129(3).

As to sections such as s 32, there is authority that when an issue as to mistake arises the onus of proof will be on the Crown to exclude beyond reasonable doubt the operation of mistake: *Brimblecombe v Duncan*, *ex parte Duncan* [1958] Qd R 8, *McPherson v Cairn* [1977] WAR 51. However, the same authorities show that when there is a specific section such as s 129(3) and a general section such as s 32, both possibly applicable to the one situation, it is a matter of statutory construction whether the specific section is to operate notwithstanding the presence

of the general one. It seems to us that the language of s 129(3) quite clearly indicates that s 32 is not intended to diminish the meaning of s 129(3) which was well settled in other jurisdictions at the time when the Criminal Code was enacted in 1983. To the extent that s 31(1) may be relevant, the same applies to it. In the Western Australian case of *Thomason v Martin* earlier mentioned, the court reached its conclusion that the burden of proof was on the accused under s 187(2) of the Western Australian Code notwithstanding the presence in the Code of s 23 and s 24 which are similar to s 31 and s 32 of the Northern Territory Code.

In summary, both the language of s 129(3) and the authorities relating to similar provisions support the view that the burden of proof is on the accused. If all the elements of an offence under s 129(1) or s 129(2) are proved by the prosecution beyond reasonable doubt, and the accused fails to discharge the burden of proof under s 129(3), then the accused should be found guilty. The standard of proof resting on the accused is that upon a balance of probabilities – s 440(1) Criminal Code - which section is predicated upon proof by the accused of a defence.

For the foregoing reasons, it was our opinion that the question (set out at p 2 above) referring a point of law to the court pursuant to s 414 of the Criminal Code be answered "No".
