



Summary of Judicial Decision

**HKSAR v Choi Wai Lun (D)
FACC 11/2017; [2018] HKCFA 18**

Decision : **Appeal allowed and acquittal restored**
Date of Hearing : **23 April 2018**
Date of Judgment/Decision : **9 May 2018**

Background

1. In August 2014, D visited an adult website on which a girl had posted an advertisement, describing herself as aged 17 and offering sexual services at listed prices. They went to a guest house where they showered together and D ran his hands over her body. The girl then performed oral sex on him. The girl was actually aged 13. D was subsequently charged with indecent assault, because section 122(2) of the Crimes Ordinance, Cap. 200 (the Ordinance) provides that a person under the age of 16 cannot in law give any consent to an act of indecent assault.
2. D's defence was that he honestly and reasonably believed that the girl was aged 16 or above. D testified that the girl appeared to be relatively tall, with well-developed bodily features, and spoke in a mature manner. The girl also gave evidence that she would dress more maturely when meeting clients. The trial magistrate found that the defence was not rebutted by the prosecution and thus acquitted D.
3. The Secretary for Justice (SJ) appealed against the acquittal by way of case stated to the Court of First Instance (CFI). On 31 July 2017, the CFI allowed SJ's appeal, holding that indecent assault was an offence of absolute liability in relation to the victim's age. D's honest and reasonable belief as to the girl's age was thus no defence. D appealed to the Court of Final Appeal (CFA) against the CFI's decision.

Issues in dispute

4. The applicable mental element, if any, of indecent assault when the alleged victim is aged under 16. In particular, whether the offence is one of absolute liability.
5. Whether the defendant can legally put forward the defence that the alleged victim in fact consented and the defendant genuinely believed that he/she was aged 16 or above.
6. Whether the prosecution bears the burden to prove the absence of such belief.



Department of Justice's Summary of the Court's rulings

(full text of the CFA's judgment at http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=115035&QS=%2B&TP=JU; press summary issued by the Judiciary at http://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2017/FACC000011_2017_files/FACC000011_2017ES.htm)

7. A statutory offence is presumed to require proof of *mens rea* (mental element) unless the presumption is displaced expressly or by necessary implication. The manifest intention of section 122(2) of the Ordinance is to confer special protection on a class of vulnerable persons (namely, the underage) who are potential objects of indecent acts. Accordingly, the presumption of *mens rea* is clearly displaced in respect of indecent assaults on persons under the age of 16. (paragraphs 37 & 38)
8. For indecent assault, actual consent of an alleged victim under 16 is deemed irrelevant. (paragraphs 30 & 76)
9. The CFA however did not consider absolute liability necessary to achieve the statutory purpose of section 122(2). The CFA distinguished the present case from a previous decision of the Court of Appeal (CA) where the CA held that the offence of unlawful sexual intercourse with an under-aged girl (contrary to section 124 of the Ordinance) was one of absolute liability. The two offences had different legislative histories and the CA's decision was given prior to subsequent CFA's decisions which recognized the less draconian, intermediate bases of liability. (paragraphs 43, 47 & 53)
10. The appropriate mental requirement for an offence under section 122(2) would be to require a defendant to prove, on the balance of probabilities, that he/she honestly and reasonably believed that the alleged victim was 16 or over. This is a suitably demanding standard, better reflecting the statutory purpose, and designed to encourage potential defendants to steer clear of indecent conduct with young persons who may fall within the protected class. (paragraph 67)
11. A reverse onus is placed on the defendant, but is rationally connected with the legitimate aim of giving heightened protection to vulnerable under-aged persons and is no more than necessary to achieve such a level of protection. A reasonable balance is struck in the context of the fair trial for the defendant. (paragraphs 68 & 69)

**Prosecutions Division
Department of Justice**

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