The Sunday Business Post Online/Archives-Sunday, June 04, 2006

Supreme Court decision need not have happened

By Kieron Wood

“It was a mad decision,” said one senior counsel, referring to the Supreme Court ruling that a section of the 1935 Criminal Law Amendment Act was unconstitutional.

The court’s decision has led to political panic and legislative hysteria. As convicted child molesters moved to overturn their convictions, the public clamour for political scapegoats has become deafening. Yet a close examination of the Supreme Court judgment shows that the whole saga need never have happened.

The Supreme Court appeal 12 days ago was brought by CC, a young man who faced four charges under the 1935 act for having consensual sex with a 14-year-old girl when he was 16.

He told gardai that the girl had initiated the contact, and that she had claimed to be 16. He claimed that his reasonable belief that the girl was over 15 should be a defence to the charge of underage sex.

The High Court judge, in the earlier hearing, had said the defence of mistake was not available. The judge said: ‘‘The Oireachtas, as a matter of deliberate policy, deprived accused persons of the defence of mistakes as to age made on reasonable grounds.”

Section 1 (1) of the 1935 Criminal Law Amendment Act prescribed a maximum penalty of life imprisonment for anyone having sex with a girl under the age of 15.

The section had been criticised as far back as 1989, when the Law Reform Commission’s consultation paper on child sexual abuse said: ‘‘The absence of any defence to any of the relevant offences of reasonable mistake as to the age of the girl is capable of producing serious injustice.”

Two years later, in its final report, the commission recommended: ‘‘The defence of reasonable mistake as to the age of the girl, not available at present under our law, should be introduced and this, if implemented, will reduce the possibility of serious injustice.”

Senior counsel Peter Charleton, in his 1992 book Offences Against The Person, said: ‘‘It is a matter of politics whether the Oireachtas wish to continue to make intercourse between young people an offence; there may be moral and health reasons for doing so.

‘‘It is difficult, however, to justify a conviction where the accused genuinely believed in a state of affairs which would render him blameless of any legal wrong . . .The question arises whether ignorance by the accused as to the age of the girl, or his belief that she is over the requisite age, constitute a defence. The answer appears to be no. The answer might well, however, be yes if a constitutional challenge were mounted.”

The Supreme Court disagreed.

Mr Justice Adrian Hardiman, in his judgment, said the section did not allow a defence based on a mistake about a girl’s age, even where a defendant had been ‘‘positively and convincingly misled, perhaps by the alleged victim herself’’.

‘‘It is necessary to restate the absolute nature of the offence in question here,” said the judge. ‘‘It affords absolutely no defence once the actus reus [guilty act] is established, no matter how extreme the circumstances.”

Hardiman pointed out that lawyers had been aware of the shortcomings of the 1935 legislation for many years, so a finding that it was unconstitutional ‘‘cannot reasonably be regarded as surprising’’.

The court ruled that section 1 (1) of the 1935 act did not survive the enactment of the 1937 Constitution because it failed to ‘‘respect, defend and vindicate the rights to liberty and to a good name’’ of defendants who were ‘‘mentally innocent’’.

But experienced criminal lawyers have criticised the Supreme Court for its readiness to strike down as unconstitutional a law which might have been interpreted in a constitutional manner. The 1935 legislation was based on an 1876 English decision in the case of R v Prince.

That case revolved around section 55 of the 1861 Offences against the Person Act, which made it a crime unlawfully to remove an unmarried girl under the age of 16 from the possession of her father.

Henry Prince was convicted of unlawfully taking 14-year-old Annie Phillips away from her father, even though the jury accepted his evidence that the girl went with him willingly, that she told him that she was 18, that he believed her and that he had reasonable grounds for his belief.

The Court for Crown Cases Reserved considered whether a guilty intention (in Latin, mens rea) was necessary for a crime to be committed.

In a minority judgment, Judge Brett said: ‘‘There can be no conviction for crime in England in the absence of a criminal mind or mens rea.”

But, speaking for 14 judges in the majority, Judge Blackburn said the intention of the legislature appeared to have been to punish an abductor irrespective of whether he knew a girl was under 16.

‘‘The man who has connection with a child relying on her consent does it at his peril if she is below the statutable age,” said the judge.

Judge Denman, agreeing with Blackburn, said he believed that Prince had ‘‘wrongfully and knowingly violated the father’s rights against the father’s will, and he cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which in fact he was committing’’.

The Irish framers of the 1935 act took the same moral view of abduction or intercourse with an underage girl. But Bunreacht na hEireann, enacted two years later, established a series of personal rights, some of them explicit and some of them unenumerated and implied.

Constitutional lawyers say that, if the defences of duress and necessity can be implied, so can the defence of ‘‘reasonable mistake’’ in relation to criminal charges. This common law defence has always been available in criminal law matters.

For example, if a person sees a friend being attacked by a group of men in the street, he may go to his assistance, using reasonable force if necessary.

If it subsequently transpires that his friend was resisting arrest by a group of plain clothes police officers, the defence of reasonable mistake would be available.

The first time the CC case came before the Supreme Court, in July 2005, Mrs Justice Susan Denham, in a minority judgment, set out the reasons why the defendant was ‘‘entitled to advance the defence of reasonable mistake’’.

She said that R v Prince was ‘‘unsound and bad in law and that it is not applicable in this jurisdiction’’, adding that: ‘‘It is a fundamental concept of our criminal justice system that there be a criminal mind, or, as described traditionally, that there be mens rea. The doctrine of mens rea, the presumption of mens rea, is part of our common law. This means that whenever a section of a statute is silent as to mens rea there is a presumption that we must read in words appropriate to require mens rea.”

That is the approach the Supreme Court should have taken two weeks ago. The 1965 case of McDonald v Bord na gCon made it clear that it is the role of the courts to seek to put a constitutional interpretation on legislation, whether pre-1937 or post-1937, not to strike it down without a thought for the consequences.

The High Court’s release of ‘‘Mr A’’ - a 41-year-old man convicted under the 1935 act of having sex with a 12-year-old girl - was inevitable following the Supreme Court ruling.

Ms Justice Mary Laffoy ruled that, since the 1935 act had not survived the enactment of the Constitution, a person convicted under such non-existent legislation could not be held in prison. As one senior criminal lawyer put it: ‘‘It would be like trying to park a car in a non-existent car park.”

Friday’s successful appeal by the state against the High Court decision will simply give parents and politicians another stick with which to beat the government and the judiciary.

What now? One possibility that the Director of Public Prosecutions may wish to consider is whether to reactivate other charges which may have been laid but not pursued against those convicted of unlawful carnal knowledge.

Where defendants have been convicted of a more serious charge, it is not unknown for the DPP to enter a nolle prosequi in relation to lesser charges. This means that the charges remain on the file. Theoretically, they may be pursued at a later stage.

This happened in the 1986 case of DPP v Quilligan and O’Reilly, where the murder trial of two men collapsed because of a ruling that their arrest was invalid. The Supreme Court reversed the ruling of the Central Criminal Court, but refused to order a retrial on the murder charge.

The DPP had earlier entered a nolle prosequi on a charge of burglary.

This charge was reactivated, and the men were subsequently convicted and given lengthy prison sentences.

This approach is not without its difficulties in the current dilemma, but is a possibility which the DPP could examine.

And what of the future? The current race to legislate is likely to end in tears. Criminal laws should not be rushed through in response to a perceived crisis, no matter how urgent the situation.

In the longer term, the government should establish a criminal law revision committee to recast legislation in the area of sexual offences, and to ensure that only those who are morally, as well as legislatively, culpable are convicted of serious crimes.

Kieron Wood is a barrister.