**Pietro Ascolese v Law Officers of the Crown**
Royal Court
2nd September, 2015

**JUDGMENT 45/2015**

**Appeal against conviction of indecent assault imposed by the Magistrate's Court of 13th March, 2015**

**Approved Text**
**02.09.2015**

**IN THE ROYAL COURT OF GUERNSEY**

**ON APPEAL FROM THE MAGISTRATE'S COURT**

**Between** **PIETRO ASCOLESE** **Appellant**

**-v-**

**THE LAW OFFICERS OF THE CROWN** **Respondent**

**Appeal against Conviction imposed by the Magistrate's Court on 13th March 2015**
**Before: Richard James McMahon Esq., Deputy Bailiff**

**Hearing date: 21st August 2015**
**Reasons handed down: 2nd September 2015**

**Advocate for the Appellant:** **Advocate P T R Ferbrache**
**Advocate for the Respondent:** **Crown Advocate F M Russell**

**Cases and materials referred to in the Judgment:-**

The Protection of Children (Bailiwick of Guernsey) Law, 1985
The Sexual Offences Act 2003
*B. (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428
*R v K* [2002] 1 AC 462
The Offences against the Person Act 1861
The Criminal Law Amendment Act 1880
The Criminal Law Amendment Act 1922
*R v Forde* [1923] 2 KB 400
*R v Laws* (1928) 21 Cr App R 45
*R v Keech* (1929) 21 Cr App R 125
*R v Maughan* (1934) 24 Cr App R 130
The Sexual Offences Act 1956
*Loi relative à la Protection des Femmes et des Filles mineures* (registered on 27 July 1907)
*Loi relative à la Protection des Femmes et des Filles mineures* (registered on 1 August 1914)
The Offences against Girls (Availability of Defences) Law, 1950
*Loi relative à la Sodomie* (registered 1 June 1929)
*Attorney General v Makarios* 1979 JJ 85

The Indecency with Children Act 1960
*Fairclough v Whipp* [1951] 2 All ER 834
*Director of Public Prosecutions v Rogers* [1953] 1 WLR 1017
*R v Kimber* [1983] 1 WLR 1118
*R v Court* [1989] AC 28
*R v J* [2005] 1 All ER 1
*Blackstone's Criminal Practice* (2003 edition)
*R v Brown* [2013] 4 All ER 860
The Criminal Law Amendment Acts (Northern Ireland) 1885-1923
The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
*R v Rimmington* [2005] 3 WLR 982
The Human Rights (Bailiwick of Guernsey) Law, 2000

Introduction

1. On 13 March 2015, the Appellant was found guilty in the Magistrate's Court of an offence of indecent assault committed against a girl who at the time of the offence in 2013 was 13 years old. He was found not guilty of an alternative charge of gross indecency with the same child on the same date contrary to section 1 of the Protection of Children (Bailiwick of Guernsey) Law, 1985, as amended. On 9 April 2015, the Appellant was sentenced to imprisonment for a period of three months, suspended for two years.

2. By his Notice of Appeal dated 22 April 2015, the Appellant first appeals against this conviction on the following grounds:

> "*That the learned Judge erred in law in relation to his conclusions as to the elements of the offence; and/or*
> *That the learned Judge having concluded on a gross indecency charge and in any event that he could not be sure that the complainant had not consented and that she gave the appearance of being 16 years or above that it was wrong in law to convict me of the offence I was charged with; and/or*
> *That the learned Judge erred in law generally; and/or*
> *That I seek a declaration of incompatibility under section 4 of the Human Rights (Bailiwick of Guernsey) Law, 2000 either as to the elements of the charge that I was convicted of and/or the application and terms of, insofar as it is applicable, the Offences against Girls (Availability of Defences) Law, 1956.*"

   These grounds have been developed on behalf of the Appellant by Advocate Peter Ferbrache, who also appeared at the trial in the Magistrate's Court. The Law Officers of the Crown have been represented throughout by Crown Advocate Russell. I am grateful to both Advocates for their helpful, measured submissions.

3. Advocate Ferbrache has been content to adopt the four questions that Advocate Russell suggested fall to be determined in this appeal:

   (i) Was the Judge of the Magistrate's Court correct in law regarding the ambit and elements of the offence of indecent assault in this jurisdiction?
   (ii) If not, what are the particular requirements of *mens rea* and *actus reus* that must be proved to constitute the offence?
   (iii) Does the offence, however constituted, offend against the Appellant's Convention rights, and if so in what manner?
   (iv) Is a declaration of incompatibility under the Human Rights Law appropriate or required?

   The principal issue in this appeal, therefore, is to consider whether the elements of the offence of indecent assault, a customary or common law offence in this jurisdiction, are sufficiently clear and precise, particularly in relation to the mental element to be proved, to enable the Appellant's conviction for the offence to stand. In considering this issue, the historical

development of the offence and some defences to it here, in England and Wales and in Jersey has been scrutinised in some detail. Anomalies between the positions in each jurisdiction have been identified, but whether or not they assist this Appellant remains one of the issues for determination. It is common ground that the conduct he undertook would not, in the light of the findings of the Magistrate's Court, have resulted in a conviction in England and Wales for an offence contrary to section 9 of the Sexual Offences Act 2003. However, he has been prosecuted and convicted in Guernsey and it is, of course, the Guernsey offence with which this Island's Courts must grapple.

Facts

4. The facts can be stated simply and briefly. On 26 July 2013, the Appellant went to a public house where he met the complainant. They had not met previously. The complainant was drinking alcohol and told him she was 19 years old. She had told others present the same. In fact, she was only 13 years old. At that time, the Appellant was 24 years and eight months old. The complainant, her friend and the Appellant went back to the staff quarters where he lived. Later that evening, when the Appellant and the complainant were alone in the Appellant's room, there was sexual contact between them. The Magistrate's Court found that the Appellant took the girl's hand and placed it on his penis over his clothing, which the Judge regarded as sufficient to establish the *actus reus* of both of the offences for which the Appellant was tried. The Court was further satisfied that the Appellant touched the girl's breasts and her vagina, in each case over her clothing, these being further instances of action forming part of the indecent assault charge. The activity actually involved that night was more extensive than this, although not involving intercourse, as it did include masturbation of the Appellant, but this went more towards the offence of gross indecency.

5. As regards the girl's consent, it was the Crown's case that there had been no consent at all, being at best submission. The Judge of the Magistrate's Court disagreed and found that he was not sure that the girl did not in fact consent to the sexual activity with the Appellant and, even if he were wrong to reach that conclusion, he could not be certain the Appellant did not honestly believe that the girl was consenting. The consequence of these findings is, as Advocate Russell accepts, that the Crown had failed to prove factually the absence of consent or belief in consent, as usually required for the offence of indecent assault.

6. In relation to the girl's age, the Judge took into account that the girl had told the Appellant she was 19 years old and that no one had suggested to the Appellant that the girl, who was known to others to frequent public houses, that she was drinking under-age. The Judge further had regard to a Facebook photograph of the girl from around that time, took the view that she would likely to have presented in a similar fashion on the evening in question and accepted that she may well have given the appearance of being at least 16. The Judge found that the Crown had failed to discharge the burden of proving that the Appellant did not genuinely believe that the girl was not a child. For this reason, the Appellant was found not guilty of the offence of gross indecency. However, because of the terms of the Offences against Girls (Availability of Defences) Law, 1956, the Judge concluded that because of the appellant's age, this was not a further element of the offence of indecent assault that the Crown had to prove, hence the conviction entered against the Defendant.

7. The arguments advanced by Advocate Ferbrache at trial have largely been repeated before this Court. They proceed on the basis that indecent assault is a common law offence in Guernsey. The development of the principles applying to the same offence in England and Wales from the mid-nineteenth century indicates points of similarity and points where the two jurisdictions have diverged.

Development of offence

8. The background to the statutory offence in England and Wales was described in some detail in the two principal cases to which Advocate Ferbrache has referred: *B. (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428 and *R v K* [2002] 1 AC 462. There was apparently no

offence of indecent assault at common law. However, section 52 of the Offences against the Person Act 1861 criminalised "*any indecent assault upon any female*". (There have been offences since that time in relation to men as well, but I will generally refer only to offending against women and girls because that is the context of the present case.) Being a species of assault, it has been acknowledged that, from the outset, the consent of the victim, whatever that person's age, amounted to a defence to the change. When concerns arose as to whether a young child could properly give consent, the UK Parliament intervened. By the Criminal Law Amendment Act 1880 provision was made that it should be no defence to a charge of indecent assault on a young person under the age of 13 to prove that the victim consented to the act of indecency. The legislature removed from defendants the possibility of arguing consent at all in such cases. This bar to the giving of consent was re-enacted in modified form in section 1 of the Criminal Law Amendment Act 1922:

> "*It shall be no defence to a charge or indictment for an indecent assault on a child or young person under the age of sixteen to prove that he or she consented to the act of indecency.*"

9. Moving briefly away from indecent assault, section 2 of the 1922 Act further provided:

> "*Reasonable cause to believe that a girl was of or above the age of sixteen years shall not be a defence to a charge under sections five or six of the Criminal Law Amendment Act, 1885 … Provided that in the case of a man of twenty-three years of age or under the presence of a reasonable cause to believe that the girl was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offence under this section.*"

Section 5 of the 1885 Act as originally enacted provided that:

> "*Any person who – (1) unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of 13 years and under the age of 16 years … shall be guilty of a misdemeanour, … Provided that it shall be a sufficient defence to any charge under subsection (1) of this section if it shall be made to appear to the court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of 16 years.*"

The amendment made in 1922, therefore, was to change what had been a general defence to one available only to men aged 23 or younger. Further, this defence was made available only in respect of an allegation of having unlawful sexual intercourse with a girl aged 13, 14 or 15 and only of the first occasion such an offence was charged. It is generally referred to as the "*young man's defence*". As Lord Bingham of Cornhill explained in R v K (*supra*, para. 10):

> "*If a defendant was charged under section 5(1) with the very serious offence of having unlawful carnal knowledge of a girl aged between 13 and 16, the statutory defence was potentially open to a man of 23 or under charged for the first time. If, however, the man was charged with the lesser offence of indecently assaulting a child or young person under the age of 16 (as offence inevitably committed if he had intercourse with her), there was no express provision enabling the defendant to rely on an honest belief that the child or young person was over the age of 16.*"

His Lordship then referred in his speech to four cases from the 1920s and 1930s that demonstrated how absurd this situation was (R v Forde [1923] 2 KB 400, R v Laws (1928) 21 Cr App R 45, R v Keech (1929) 21 Cr App R 125 and R v Maughan (1934) 24 Cr App R 130). When the offence of indecent assault was included in the Sexual Offences Act 1956, because it was a Consolidation Act, the apparent anomaly could not be corrected.

10. The position in Guernsey was different. The various offences in the 1861 Act have not been replicated through domestic legislation. However, assault, which was well-established within

the customary law, being mentioned in Terrien's well-known work, appears to have developed in such a way that specific types of assault, one being an indecent assault, became known offences. A Requête was presented to the States of Deliberation in September 1906. It was signed by 31 members. The Petitioners considered "*there is urgent need for the inclusion in our insular legal code of a measure for the better protection of women who are minors in cases of crimes against the person*". They referred to the 1885 Act, believed to have "*greatly benefited the Mother Country*", and sought the enactment of a local law, based on similar lines. The matters listed for inclusion did not deal with anything to do directly with indecent assault, although the Requête added that "*there may further be added any and all other provisions as the States of Deliberation may think fit to insert*".

11. The Loi relative à la Protection des Femmes et des Filles mineures was duly presented to the Court of Chiefs Pleas on 2 March 1907. A short newspaper report about the Court sitting explains that HM Comptroller informed the Court the draft was based on the 1885 Act and "*was a literal translation of portions of that Act*". It appears that further provisions from the Act were added and the draft was then presented to the States of Deliberation on 8 May 1907. It was given Royal Sanction on 6 July 1907 and registered on the Records of the Island on 27 July 1907.

12. Article I of the 1907 Law made it a felony to have unlawful carnal knowledge of a girl below the age of 13. Article II created a number of other offences, termed *délits*, which carried a maximum term of imprisonment of two years. Amongst these, at alinéa 7, was:

> "*Qui atteint ou essaye d'atteindre à la pudeur d'une fille de treize ans ou au-dessous de l'âge de seize ans, ou d'atteindre à la pudeur d'une femme ou fille idiote ou imbécile*".

This was made subject, however, to a proviso at the end of the Article:

> "*Pourvu toutefois que lorsqu'il s'agit d'une accusation sous alinéas 7 et 8, il sera censé une défense valable s'il parait à la Cour que l'accusé avait cause raisonnable de croire que la fille était de l'âge de seize ans ou au-dessus.*"

This proviso is, of course, the same proviso as appeared in section 5 of the 1885 Act, relating to unlawful carnal knowledge or an attempt. Whether or not something was lost in translation remains a mystery. If, as HM Comptroller indicated, this Law was a literal translation of the 1885 Act, Article 2(7) created the offence of unlawful sexual intercourse and not indecent assault. Certainly, the proviso applied to such an offence and also the offence drawn from section 6 of the 1885 Act, which is at Article 2(8). If, however, the offence in the 1907 Law was indeed one of indecent assault on a girl aged 13, 14 or 15, it was a specific, and not a general offence of indecent assault and it was short-lived because the entirety of the 1907 Law was repealed by the Loi relative à la Protection des Femmes et des Filles mineures registered on 1 August 1914. Accordingly, if this was an offence of indecent assault protecting a specific class of persons, its repeal did not mean that there was no longer an offence of indecent assault generally. It is a reasonable inference that the general offence, assuming it was already in existence, continued and applied to all indecent assaults and without distinction as regards a girl's age.

13. Article 3 of the 1914 Law does make provision for the offence of having, or attempting to have, unlawful sexual intercourse with a girl aged 13, 14 or 15, in respect of which the same defence of sufficient reason to believe the girl was 16 years or over is made available. The newspaper report about the meeting of the States of Deliberation at which the Projet was considered states that "*H.M.'s Procureur showed that the projet was based on the Criminal Law Amendment Act of 1912, and introduced the principle of flogging.*" In truth, the 1914 Law draws heavily on both the 1885 and 1912 Acts. The reference to increasing the period during which a prosecution could be brought from three to six months was a direct reference to provisions such as section 5 of the 1885 Act as it became introduced in Bailiwick law as Article 3 of the 1914 Law. It is an example of the law of Guernsey choosing, as it often does,

to follow developments in the United Kingdom after the passage of a few years.

14. The next significant event in the development of these types of offences in the Bailiwick was an item of business in the Billet d'État for January 1950 under the heading "Indecent Assault". The President of the States Advisory Council placed before the States of Deliberation a letter dated 9 November 1949 from HM Comptroller in the following terms:

> "*According to the Law of this Island, if a person commits an indecent assault on a boy under 16 years of age, it is no defence that the boy consented. It is questionable, however, whether in the case of an indecent assault on a girl below the age of 16 years the defence that the girl consented is a good one.*
>
> *For the removal of doubt I would be grateful if you will consider asking the President of the States to put before the States a proposal that in the case of indecent assault upon any person, male or female, below the age of 16 years, it shall be no defence to criminal proceedings that consent was given to the act.*
>
> *The legislation which will be necessary to carry out this proposal should also provide that, where the accused is of 23 years of age or under, the presence of reasonable cause to believe that the girl concerned was over the age of 16 years shall be a valid defence; this follows the law as to illegal carnal knowledge of a girl below the age of 16 years, where this defence is available to a man of 23 years of age or under.*"

The proposition was carried and the Offences against Girls (Availability of Defences) Law, 1950 was enacted.

15. As Advocate Russell has pointed out, HM Comptroller's reference to boys was pertinent because section 2 of the Loi relative à la Sodomie, registered on 1 June 1929, has *inter alia* created an offence of indecent assault on a male person and provided that the consent of a person below the age of 16 is no defence. There is, however, no provision made creating a defence where the accused held a reasonable belief that the victim was aged 16 or older.

16. The scheme of the 1950 Law was to provide in section 1 only a young man's defence, rather than one of general application, to a charge of having, or attempting to have, unlawful carnal knowledge of any girl aged 13, 14 or 15 where the defendant had not previously been charged with such an offence or with indecent assault upon a girl aged 13 to 15. The inclusion of the reference to indecent assault immediately shows that Guernsey had chosen to modify the terms upon which such a defence was available in England and Wales. Section 2 provided:

> "*It shall not be a valid defence to a charge of indecent assault upon any girl below the age of sixteen years that the girl consented to the assault:*
> *PROVIDED that in the case of a man under twenty four years of age charged with an indecent assault upon any girl above the age of thirteen years but below the age of sixteen years who consented to the assault, the presence of reasonable cause on his part to believe that the girl was over the age of sixteen years shall be a valid defence if he has not been previously charged either with an offence under paragraph (a) of Article three of the Principal Law or with an indecent assault upon a girl above the age of thirteen years but below the age of sixteen years.*"

17. The inclusion of this version of the young man's defence to a charge of indecent assault marked a departure from the position in England and Wales. It addressed squarely the absurdity identified in the four cases in the 1920s and 1930s to which reference has already been made. It made it clear that the defence was only available to a man aged 23 or under who had not previously been charged with either an offence of unlawful sexual intercourse or indecent assault. The mere fact that the legislature was able to enact such a defence clearly supports the fact that indecent assault was an offence known to the customary law of the Bailiwick at that time.

18. In a letter dated 22 June 1956, also placed before the States of Deliberation by the President of the States Advisory Council, HM Procureur suggested that the 1950 Law "*is unsatisfactory in that it does not distinguish between a person previously charged and convicted and a person previously charged and acquitted and does not afford the defence to a man who has been previously charged and acquitted*". He recommended that the defences in the 1950 Law be modified to enable them to be used where the man had been acquitted but not when he had been convicted. HM Procureur added:

> "*I think it right to tell you that some time ago I consulted the Criminal Division of the Home Office on this matter since an amendment to our Law to this effect would make the Law here different from that in England. They do not disagree that our Law should be amended so as to deny the special defence only to persons previously convicted and they see no reason why we should not proceed to amend our Law even though this has not been done in England.*"

This approach to the States resulted in the Offences against Girls (Availability of Defences) Law, 1956, which remains in force today. Section 2 of that Law provides:

> "*It shall not be a valid defence to a charge of indecent assault upon any girl below the age of sixteen years that the girl consented to the assault:*
> *PROVIDED that, in the case of a man under twenty-four years of age charged with an indecent assault upon any girl who was above the age of thirteen years but below the age of sixteen years and who consented to the assault, the existence of reasonable cause on his part to believe that the girl was over the age of sixteen years shall be a valid defence-*
>
> *(i) if he has not been previously charged either with an offence under paragraph (a) of Article three of the Principal Law or with an indecent assault upon a girl above the age of thirteen years but below the age of sixteen years; or*
> *(ii) if, having previously been so charged, he was acquitted of the charge.*"

This is the provision which is at the heart of this appeal.

19. In the United Kingdom, 1956 also saw the re-enactment of the statutory offence of indecent assault on a woman in section 14 of the Sexual Offences Act 1956:

> "*(1) It is an offence, subject to the exception mentioned in subsection (3) of this section, for a person to make an indecent assault on a woman.*
> *(2) A girl under the age of 16 cannot in law give any consent which would prevent an act being an assault for the purposes of this section.*
> *(3) Where a marriage is invalid under section two of the Marriage Act 1949, or section one of the Age of Marriage Act 1929 (the wife being a girl under the age of 16), the invalidity does not make the husband guilty of any offence under this section by reason of her incapacity to consent while under age, if he believes her to be his wife and has reasonable cause for the belief.*
> *(4) A woman who is a defective cannot in law give any consent which would prevent an act being an assault for the purposes of this section, but a person is only to be treated as guilty of an indecent assault on a defective by reason of that incapacity to consent, if that person knew or had reason to suspect her to be a defective.*"

This offence survived in this form until it was repealed and replaced by other offences by the Sexual Offences Act 2003.

20. The position in Jersey is different once again. As in Guernsey, the offence is one under the customary law rather than being a statutory offence. As the Royal Court of Jersey ruled in Attorney General v Makarios 1979 JJ 85:

> "*This Court considers that the present customary law of Jersey with regard to the crime of indecent assault was probably established before 1922. But, in so far as it may have resulted from the application of English Case Law since 1922, then the Court would add this: in the judgment of the Lords of the Judicial Committee of the Privy Council in Renouf v. Att. Gen., [1936] A.C. 445, extracts from which were cited in the aforesaid judgment in the Thwaites case, their Lordships, having traced the development of the Jersey criminal law, continued "In modern times, however, it has been usual to refer to English legal works and precedents as authorities, and the Royal Court has in many cases regarded the English Law as a guide in laying down the modern law of Jersey". After giving reasons for this and explaining why there has existed a system of treating the criminal law as not being of a rigid character, the judgment continued: "Criminal law in Jersey thus rests almost entirely on the modern practice of the Royal Court, and this tends more and more to imitate English models. It may not be improper to add that a similar practice has been adopted in a number of British dominions including those where English law does not prevail, without, in many cases, any statutory authority for such a course". It is to the knowledge of this Court and it is to the knowledge of all practitioners in this Court that it is quite usual, and was quite usual for the Royal Court in the past, to follow English cases in declaring the criminal law of Jersey. The fact that those cases might in turn have been based on an English statute did not invalidate and does not now invalidate the boundaries which have been drawn by the Royal Court in the past in respect of established categories of crime. Those boundaries, once established and once drawn, are to be followed by this Court in declaring the existing law. I would only add that this judgment is, in the view of the Court, entirely in accordance with the principles set out in the Thwaites case to which we have referred and therefore this Court confirms that when an indecent assault is charged, consent is no defence where the alleged victim is under sixteen years of age, and that applies whether the victim is male or female.*"

At the time, the law of Jersey aligned itself to the position in the law of England and Wales. Through judicial declaration of the customary law, what had been prescribed by statute, most recently in sections 14(2) and 15(2) of the 1956 Act, was found to represent the law of Jersey.

21. It is against that background that Advocate Ferbrache has relied heavily on the House of Lords decision in *R v K* (*supra*), which in turn followed shortly after their Lordships dealt with gross indecency in *B. (A Minor)* (*supra*). His primary submission is that *R v K* changed the elements required to be proved in respect of the offence of indecent assault on a woman contrary to section 14 of the 1956 Act and so should be followed in this jurisdiction. Accordingly, because *mens rea* was an essential element of every offence of a criminal nature unless expressly or by necessary implication excluded, the prosecution was required to prove both that the defendant did not have a genuine belief that the person in respect of whom the assault was alleged was not consenting and, in an age-related case, was not aged 16 or above.

22. As was explained by Lord Nicholls of Birkenhead in *B. (A Minor)* (at page 460F):

> "*... the starting point for a court is the established common law presumption that a mental element, traditionally labelled mens rea, is an essential ingredient unless Parliament has indicated a contrary intention either expressly or by necessary implication.*"

Having analysed how the offence of gross indecency contrary to section 1(1) of the Indecency with Children Act 1960 came about because of the lacuna in the offences of indecent assault where the Crown could not establish any assault (see, eg, *Fairclough v Whipp* [1951] 2 All ER 834 and *Director of Public Prosecutions v Rogers* [1953] 1 WLR 1017), His Lordship noted that the age ingredient was an essential element of the offence and concluded (at page 466A):

> "*In my view the necessary mental element regarding the age ingredient in section 1 of the Act of 1960 is the absence of a genuine belief by the accused that the victim was 14 years of age or above. The burden of proof rests upon the prosecution in the usual*

> *way. If Parliament considers that the position should be otherwise regarding this serious social problem, Parliament must itself confront the difficulties and express its will in clear terms.*"

23. This principle was, of course, accepted and adopted by the Magistrate's Court in the present case. The alternative charge of gross indecency contrary to section 1 of the 1985 Law was dismissed because the same reasoning as was used in *B. (A Minor)* was adopted. This provision was in similar terms to section 1(1) of the 1960 Act, although in the Bailiwick the child in question can also be 14 or 15 years old, and was found to be silent as to the mental element required to be proved. Accordingly, the Judge of the Magistrate's Court ruled that the offence required the prosecution to prove that the defendant did not genuinely believe that the complainant was not a child. He further determined that the Crown had failed to discharge its burden in this regard.

24. The position in relation to indecent assault was then directly addressed in England and Wales in *R v K*. (Brooke LJ, sitting in the Divisional Court, had suggested in *B. (A Minor)* (at page 452B) that "*the time may be coming for the courts to imply as a general rule in relation to statutory sexual offences which are truly criminal and carry serious stigma but are silent about the mens rea requirement, the presumption that if a defendant satisfies an evidential burden as to a defence of honest belief in a person's age (if that age is critical for the determination of guilt or innocence) the prosecution should have the legal burden of disproving that claim to the criminal standard of proof.*") The leading speech in *R v K*, which involved a 26-year-old appellant who had been charged with an offence of indecent assault upon a 14-year-old girl, was given by Lord Bingham of Cornhill and his decision was similarly predicated on the presumption of the statutory offence requiring a mental element. At para. 20, Lord Bingham stated:

> "*Neither in section 14 nor elsewhere in the 1956 Act is there any express exclusion of the need to prove an absence of genuine belief on the part of the defendant as to the age of an under-age victim. Had it been intended to exclude that element of mens rea it could very conveniently have been so provided in or following subsection (2).*"

In this regard, Advocate Ferbrache has also highlighted the criticisms levelled at the 1956 Act as having a "*rag-bag nature*" and section 14 of the Act not being "*part of a single, coherent legislative scheme*" (para. 4). That position was effectively summarised in para. 3:

> "*If the provisions of section 14 were part of a single, coherent legislative scheme and were read without reference to any overriding presumption of statutory interpretation, there would be great force in the simple submission which Mr Scrivener, resisting this appeal on behalf of the crown, based upon them: subsections (3) and (4) define circumstances in which a defendant's belief, knowledge or suspicion exonerate a defendant from liability for which would otherwise be an indecent assault; if it had been intended to exonerate a defendant who believed a complainant to be 16 or over, this ground of exoneration would have been expressed in subsection (2); the omission of such a provision makes plain that no such ground of exoneration was intended.*"

Further, in para. 19, Lord Bingham stated:

> "*It is at once obvious that if an absence of genuine belief as to the age of an under-age victim must be proved against a defendant under section 1 of the 1960 Act but not against a defendant under section 14 of the 1956 Act, another glaring anomaly would be introduced into this legislation.*"

By extension, Advocate Ferbrache submits that there is this type of anomaly in this Bailiwick as a result of the decision of the Magistrate's Court and that it should be corrected by this appeal.

25. If the Courts in this Bailiwick were dealing with a statutory offence of indecent assault, I am satisfied that the same approach would be taken. Indeed, this would be entirely consistent with the approach taken to the offence of gross indecency by the Magistrate's Court. In other words, if an offence drawn from section 14 of the 1956 had found its way into domestic legislation in the same form, although *R v K* would not be binding, there would be no reason to depart from its reasoning and the usual presumption of how to construe statutory offences

would apply. It would also be consistent with the approach of the Royal Court of Jersey, looking to the position in England and Wales so as to declare the ingredients of a purely customary law offence in this jurisdiction.

26. I am further satisfied that the same principle of requiring proof of a mental element applies to common law offences, or offences contrary to the customary law of the Bailiwick, based on the maxim "*actus non facit reum nisi mens sit rea*". Offences of strict liability can arise where the legislature so provides or where by necessary implication it excludes any requirement to prove the usual requisite mental element. Therefore, just because the offence of indecent assault is a customary law offence in this Bailiwick does not mean that the presumption of there being a mental element does not operate. Indeed, it is common ground that the assault element of an indecent assault requires proof by the prosecution of a mental element. As has been noted in the English cases, to have suggested that the offence under section 14 of the 1956 Act (as also other offences) was one of strict liability was a misnomer.

Ambit and elements of offence

27. In this regard, the passage from *R v Kimber* [1983] 1 WLR 1118, 1121-1122, quoted by Lord Bingham in *R v K*, appears to be of equal application to the Bailiwick's non-statutory offence:

> "*The offence of indecent assault is now statutory: section 14 of the Sexual Offences Act 1956. The prosecution had to prove that the appellant made an indecent assault on Betty. As there are no words in the section to indicate that Parliament intended to exclude mens rea as an element in this offence, it follows that the prosecution had to prove that the appellant intended to commit it. This could not be done without first proving that the appellant intended to assault Betty. In this context assault clearly includes battery. An assault is an act by which the defendant intentionally or recklessly causes the complainant to apprehend immediate, or to sustain, unlawful personal violence: see R v Venna [1976] QB 421, 428-429. In this case the appellant by his own admission did intentionally lay his hands on Betty. There had to be evidence that the appellant had intended to do what he did unlawfully. When there is a charge of indecent assault on a woman, the unlawfulness can be proved, as was sought to be done in R v Donovan [1934] 2 KB 498, by evidence that the defendant intended to cause bodily harm. In most cases, however, the prosecution tries to prove that the complainant did not consent to what was done. The burden of proving lack of consent rests upon the prosecution: see R v May [1912] 3 KB 572, 575, per Lord Alverstone CJ. The consequence is that the prosecution has to prove that the defendant intended to lay hands on his victim without her consent. If he did not intend to do this, he is entitled to be found not guilty; and if he did not so intend because he believed she was consenting, the prosecution will have failed to prove the charge. It is the defendant's belief, not the grounds on which it was based, which goes to negative the intent.*"

The elements of the offence were also helpfully summarised in *R v Court* [1989] AC 28 by Lord Ackner as follows (at page 45H):

> "*On a charge of indecent assault the prosecution must prove: (1) that the accused intentionally assaulted the victim; (2) that the assault, or the assault and the circumstances accompanying it, are capable of being considered by right-minded persons as indecent; (3) that the accused intended to commit such an assault as is referred to in (2) above.*"

Finally, in *R v J* [2005] 1 All ER 1, Lord Bingham described the elements of the offence simply as including "*an intentional touching of one person by another in circumstances of indecency, whether or not (where the person touched is a girl under 16) she consents: see Faulkner v Talbot [1981] 3 All ER 468 at 471, [1981] 1 WLR 1528 at 1534.*"

28. Albeit in relation to the statutory offences in England and Wales before they were replaced by the 2003 Act, the elements were described in *Blackstone's Criminal Practice* in the following manner (the most recent edition before the commentary moved on to the 2003 Act being the 2003 edition rather than the 2002 edition to which Advocate Russell referred) (at para. B3.84):

> "*The test for indecent assault is primarily objective. An indecent assault is defined as an assault committed in circumstances of indecency. Circumstances of indecency need not involve any indecent touching of the victim or a threat of indecent touching. The assault or the circumstances accompanying it must, however, be capable of being considered by right-minded persons as indecent (Sargeant (1997) 161 JP 127). Spoken words may constitute circumstances of indecency on the part of the person using them. If the circumstances of the assault are incapable of being regarded as indecent, the assault cannot become indecent because of some secret motive of the accused. Where the assault is indecent in itself, the basic intent needed to establish assault is enough; whether or not the accused was drunk at the time is irrelevant (Culyer (1992) The Times, 17 April 1992). Where the circumstances are such that the assault could be considered indecent, it must at least be proved that the accused intentionally assaulted the victim with knowledge of the indecent circumstances or being reckless as to the existence of them (Court [1989] AC 28). This means intention or recklessness with regard to circumstances which are shown to contravene standards of decent behaviour with regard to sexual modesty or privacy. Whether or not the victim appreciates the fact of the indecency is irrelevant. So, in a sense, is the accused's motive for his act, though evidence of this may be admitted (as it was in Court, where the accused had told the police he had a 'buttock fetish')*."

29. As can be seen from these passages, there was clarity as a matter of English law as to the elements of the statutory offences in that jurisdiction. Because section 14(1) of the 1956 Act did no more really than to enact that indecent assault on a woman was an offence, and set out certain aspects, such as the incapacity in law for a girl under the age of 16 to consent to such an assault, the position in this Bailiwick that it is an offence contrary to the customary law enables us to look generally towards the elements established in England and Wales. That is not to say that the elements of the offence are identical, but that appropriate guidance can be sought in relation to the elements of the offence save where there are differences. To that extent, I am satisfied that the offence does not suffer from any lack of clarity or uncertainty making it susceptible to challenge on that basis. As the cases and commentary on them shows, as the thinking in England and Wales evolved, so it also applied, and can continue to apply, to Guernsey's customary law offence, but that is only up to the point where there is any statutory intervention domestically.

The 1956 Law

30. This is what has happened in respect of the 1956 Law. As the historical description of the developments of the offence in the various jurisdictions has shown, this is where there has been a marked parting of the ways between Guernsey and England. It is why the principle in *R v K* (*supra*) cannot be adopted. The comments made in the cases about the respective roles of the legislature and the judiciary are of equal application in this jurisdiction and explain why this Court cannot simply declare that the position in which the Appellant finds himself is unfair. As Lord Bingham put it in *R v J* (*supra*, at para. 15):

> "*It is the duty of the court to give full and fair effect to the meaning of a statute. In a purely domestic context such as this, it cannot construe the statute by reference to any extraneous legal instrument. It must seek to give effect to all the provisions of a statute. It cannot pick and choose, giving effect to some and discounting others. It has no warrant, in a case such as this where no convention right is engaged (see the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), to resort to the unique interpretative technique required by s 3 of the 1998 Act. If a statutory provision is clear and unambiguous, the court may not decline to give effect to it on the ground that its rationale is anachronistic, or discredited, or unconvincing. The historical derivation of the 1956 Act has been shown to result in much internal inconsistency and lack of coherence (see, for example, R v K [2001] UKHL 41 at [4], [2001] 3 All ER 897 at [4], [2002] 1 AC 462) but the deficiencies of the Act cannot absolve the court from its duty to give effect to clear and unambiguous provisions.*"

In *B. (A minor)* (*supra*), Brooke LJ pointed out (at page 452A) that "*In our constitutional*

*scheme of things it should be for the legislature, not the judiciary, to determine what the policy of the law should be.*" In this appeal, I have paid careful attention to this division of the roles between the two branches.

31. However much Advocate Ferbrache might point out that there is an inherent unfairness in this Appellant not being able to avail himself of a defence that would have been available to him had he been prosecuted (at the relevant time) elsewhere, I cannot ignore that the legislature has seen fit to enact section 2 of the 1956 Law and that it has not been repealed. The task of the Magistrate's Court, and of this Court, is to construe that legislation. There is no option to disregard it. In my judgment, the approach taken by the Judge of the Magistrate's Court cannot be faulted. Advocate Ferbrache's submission is that the proviso in that section applies only to a person of the age specified. It was common ground that the Appellant is above the age specified. Accordingly, the silence of the legislature on the mental element required for a person of a different age, such as this Appellant, means that the presumption found in *R v K* should apply. However, as the Judge noted, this would effectively make the proviso redundant, because the defence of the accused's belief in the complainant being aged 16 or over would become generally available (see, eg, Rougier J in *B. (A Minor)* (at page 440H)). Further, it would place a defendant aged 24 or over in a better position than the young man dealt with in the proviso because there would be no qualification that the defence is only available where the defendant has not previously been charged with unlawful sexual intercourse with, or an indecent assault upon, a girl of 13, 14 or 15 or, having been so charged, had been acquitted of the offence.

32. Indeed, the decisions under English law upon which Advocate Ferbrache relies are littered with examples of their Lordships explaining the position where the legislature had addressed its mind to an issue through including a specific statutory defence. In those cases, the statutory defence in question was the young man's defence as it applied to unlawful sexual intercourse (which was previously found in section 6 of the 1956 Act, with the defence taken from the 1922 Amendment Act, to which reference has already been made, becoming subsection (3)). For example, in *B. (A Minor)*, Tucker J indicated (at page 442F):

> "*... it is the clear intention of Parliament to protect young children and to make it an offence to commit offences against children under a certain age whether or not the defendant knows the age of the victim, and that it was intended that, save where expressly provided, a mistaken or honest belief in the victim's age should not afford a defence. In my judgment it is not open to the courts to create a defence in circumstances such as the present where Parliament clearly intended that no such defence should be available.*"

In the same case, Lord Nicholls of Birkenhead added (at page 465G):

> "*In this field, where Parliament intended belief as to age to be a defence, this was stated expressly: see, for instance, the "young man's defence" in section 6(3) of the Act of 1956.*"

However, it is what was said in *R v K* which, in my judgment, puts the matter beyond question. Towards the end of his speech, Lord Bingham sought to clarify a number of matters, one of which (at para. 23(3)) was in the following terms:

> "*Although properly applied to section 1 of the 1960 Act and section 14 of the 1956 Act, the presumption cannot be applied to sections 5 and 6 of the 1956 Act. Those sections as a pair derive directly from corresponding sections in the 1861 Act, as demonstrated above. The statutory or young man's defence was introduced into what is now section 6. Its omission from what is now section 5 is plainly deliberate. A genuine belief that a child three years under the age of consent was over that age would in any event defy credulity. Section 6(3) of the 1956 Act plainly defines the state of knowledge which will exonerate a defendant accused under that section, and this express provision necessarily excludes the more general presumption.*" [emphasis added]

In Lord Steyn's speech, this was stated even more explicitly (at para. 33): "*The "young man's defence" under section 6(3) makes clear that it is not available to anybody else.*"

33. Advocate Ferbrache attempted to deflect my suggestion that these passages torpedoed his submissions by pointing out that they were directed at a statutory offence rather than a common law offence, which is the position in Guernsey. I am not persuaded that that distinction is warranted. As I have indicated, the presumption is that an offence requires the prosecution to prove the requisite mental element unless the legislature expressly or by necessary implication has provided to the contrary. I am satisfied that this presumption applies to customary law offences as well as statutory ones. These passages demonstrate that the UK Parliament had provided to the contrary in respect of belief in the victim's age in respect of unlawful carnal knowledge, which became unlawful sexual intercourse in the 1956 Act. The House of Lords was clear that the inclusion of the young man's defence in section 6(3) of that Act meant that there could not be any general defence. This was because Parliament had addressed its mind to the circumstances in which belief in age could amount to a defence, thereby excluding application of the general presumption.

34. In the Bailiwick context, the legislature was in a position in the 1950s to recognise what had been judicially noted as an anomaly in England and Wales and so enacted a form of young man's defence for both unlawful carnal knowledge and indecent assault upon a girl. Having done so, if it is now recognised that the defence should perhaps be re-cast in different terms, that is a function of the States of Deliberation and not of this Court. The role of the Courts, as also of other public authorities, is to give effect to the legislation as it currently stands. I am satisfied, therefore, that the proviso to section 2 of the 1956 Law means that the general presumption to which regard was had in *R v K* is inapplicable. The defence of reasonable cause on the part of the defendant to believe the complainant girl was 16 or over is only available to men aged 23 or younger and in the particular circumstances set out in the section and no such defence is available to a person such as the Appellant who is older.

35. The Judge of the Magistrate's Court reached this conclusion by reference to *R v Brown* [2013] 4 All ER 860, a decision of the Supreme Court on appeal from Northern Ireland. The defendant, aged 17, had sexual intercourse with a girl aged 13. In Northern Ireland, section 4 of the Criminal Law Amendment Acts (Northern Ireland) 1885-1923 makes it an offence to have unlawful carnal knowledge of a girl under the age of 14. The age in the section was increased from 13 to 14 in 1950. Other offences in these Acts had originally contained a proviso making available the defence of reasonable belief, although those provisos had since been repealed. One of those offences was unlawful carnal knowledge of a girl aged between 13 and 15. Indeed, these differences are sufficient to show that there is no uniform statutory scheme across the constituent parts of the United Kingdom when it comes to the precise terms of sexual offences. The judgment of the Supreme Court was given by Lord Kerr SCJ, who suggested (at para. 31) that, when conducting an inquiry into whether *mens rea* in relation to the girl's age needed to be proved, "*one must at least begin with an examination of what the legislative intention was before considering whether modification of that intention is justified by later amendments or contemporary social contexts.*" His Lordship rejected the submission that the absence of any reference to the mental element of the offence entailed a requirement to prove that the defendant did not know or reasonably believe that the girl was aged 14 or over. Of course, this is the equivalent offence to unlawful sexual intercourse with a girl aged 12 or under, where it has been accepted that there is no such defence. The principal difference is one of age. Lord Kerr did not find that this meant there was no consistent approach or that it offended contemporary policy considerations:

> "*[37] ... The fact that the age was increased from 13 to 14 does not make the policy inconsistent. It merely represents the evolution of changing views as to when the policy should take effect.*
>
> *[38] Finally, there is nothing in the contemporary social context which militates against the denial of the defence of reasonable belief as to age for a s 4 offence. This issue was dealt with authoritatively in R v G [2008] UKHL 37, [2008] 3 All ER 1071, [2009] AC 92. In that case the appellant had pleaded guilty to an offence of rape of a child under the age of 13, contrary to s 5 of the Sexual Offences Act 2003. The prosecution had accepted the appellant's claim that the girl had consented to sexual intercourse and had told him that she was 15 years old. The appellant himself was 15 at the time of the offence and the girl was aged 12. At para [3] Lord Hoffmann said:*

> *'The mental element of the offence under s 5, as the language and structure of the section makes clear, is that penetration must be intentional but there is no requirement that the accused must have known that the other person was under 13. The policy of the legislation is to protect children. If you have sex with someone who is on any view a child or young person, you take your chance on exactly how old they are. To that extent the offence is one of strict liability and it is no defence that the accused believed the other person to be 13 or over.*'"

36. Quite what the position in the Bailiwick will be in future remains unclear. As long ago as July 2011 the States of Deliberation, after considering a Report dated 10 May 2011 from the Home Department, resolved to introduce new substantive legislation to criminalise inappropriate sexual behaviour. The Report (in Billet d'État No. XIII of 2011) explains how sexual offending has now been addressed in the United Kingdom through the 2003 Act. At paragraph 12, it states that:

> "*... the guiding principles behind an effective sexual offences policy include:*
>
> - *the law should only intervene in situations and in a manner which is fair, necessary and proportionate,*
> - *the law should not intrude on consensual sexual behaviour between those over the age of consent without good cause,*
> - *those who induce or encourage children or other vulnerable people to participate in, or be exposed to, sexual behaviour are criminally culpable, and*
> - *the law must ensure that people who do not have the mental capacity to give informed consent are protected.*"

The Report contains a section on child sex offences, referring to sections 9 to 12 of the 2003 Act. However, it also states:

> "*30. These offences address scenarios of child abuse and it is clear that such activities should be criminalised. As the Home Office policy was to seek to draft precise but complex offences, it is suggested that these offences could be simplified whilst retaining the protection required by children in the Bailiwick.*
>
> *31. It should be noted that the 2003 Act provided that a person could only be guilty of an offence under ss.9 to 12 where he was aged 18 or over. However, it also extended these offences to those under 18 but a lower maximum sentence applied in those cases. For the Bailiwick, it is recommended that the age limit should not be included and the courts should be given the discretion to sentence defendants (whether aged under or over 18 years old) on a case-by-case basis.*"

What is apparent from these extracts is that it is uncertain whether the legislative regime in the Bailiwick will make provision in such a way that what the Appellant did in 2013 would afford him the defence that is available in section 9 of the 2003 Act. The States of Deliberation may take the view that their policy should be to afford greater protection to young persons. As Tucker J put it when starting his judgment in *B. (A Minor)*, "*Parliament has for many years recognised the need to protect young women from the undesirable attentions of men of all ages, and also from their own inclinations.*" This is precisely why it falls to the politicians, and not to the judiciary, to decide whether the appropriate boundaries as regards age and consent lie. Until such time as the draft legislation is published and subsequently relevant provisions are enacted, none of us know whether the delay in progressing this new legislative initiative has disadvantaged the Appellant. All the Magistrate's Court could do, and all this Court can do, is to give effect to extant legislation.

37. For these reasons, I find that the determination of what constituted an indecent assault on a girl aged below 16 in the Magistrate's Court and how that offence operated in relation to the Appellant was correct. As an offence contrary to the customary law of the Bailiwick, but with an express statutory intervention in relation to the capacity to consent to an indecent assault and a limited defence available in the circumstances prescribed, the elements are, in my view, clear, precise and sufficiently certain. In particular, because of the existence of the 1956 Law, the general presumption as given effect in England and Wales in *R v K* (*supra*) does not assist the Appellant. In my judgment, there is no uncertainty to be resolved in favour of the

Appellant.

Human rights

38. The next consideration is whether the Appellant can invoke any Convention right successfully so that it would result in a different outcome. Advocate Ferbrache has referred to Articles 6, 7 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. Because what is involved relates to consensual sexual activity, Advocate Russell has suggested that Article 8 might instead or also be a relevant consideration, although she submitted that the Appellant has failed to demonstrate that any Convention right is properly engaged in the present case.

39. Article 7(1) of the Convention provides:

> "*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*"

As it was put by Lord Bingham in *R v Rimmington* [2005] 3 WLR 982 (at para. 33):

> "*There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable even when the act was done.*"

His Lordship then set out the position in light of the learning on the European Convention (at para. 35):

> "*The effect of the Strasbourg jurisprudence on this topic has been clear and consistent. The starting point is the old rule nullum crimen, nulla poena sine lege (Kokkinakis v Greece (1993) EHRR 397, para 52; SW v United Kingdom (1995) 21 EHRR 363, para 35/33): only the law can define a crime and prescribe a penalty. An offence must be clearly defined in law (SW v United Kingdom 21 EHRR 363), and a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to foresee, if need be with appropriate advice, the consequences which a given course of conduct may entail (Sunday Times v United Kingdom (1979) 2 EHRR 245, para 49; G v Federal Republic of Germany (1989) 60 DR 256, 261, para 1; SW v United Kingdom 21 EHRR 363, para 34/32). It is accepted that absolute certainty is unattainable, and might entail excessive rigidity since the law must be able to keep pace with changing circumstances, some degree of vagueness is inevitable and development of the law is a recognised feature of common law courts (Sunday Times v United Kingdom 2 EHRR 245 para 49; X Ltd and Y v United Kingdom (1982) 28 DR 77, 81, para 9; SW v United Kingdom 21 EHRR 21 EHRR 363, para 36/34). But the law-making functions of the courts must remain within reasonable limits (X Ltd and Y v United Kingdom 28 DR 77, para 9). Article 7 precludes the punishment of acts not previously punishable, and existing offences may not be extended to cover facts which did not previously constitute a criminal offence (ibid). The law may be clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence (X Ltd and Y v United Kingdom 28 DR 77, para 9; G v Federal Republic of Germany 60 DR 256, 261-262). But any development must be consistent with the essence of the offence and be reasonably foreseeable (SW v United Kingdom 21 EHRR 363, para 36/34), and the criminal law must not be extensively construed to the detriment of an accused, for instance by analogy (Kokkinakis v Greece 17 EHRR, 397, para 52).*"

40. As I have just stated, I am satisfied that the elements of the offence of indecent assault on a woman are clear and certain. The elements of the *actus reus* and the basic *mens rea* required are clearly identifiable by reference to how the statutory offence in section 14 of the 1956 Act had developed. They are equally identifiable by reference to the customary law applying in the Island of Jersey. However, in respect of section 14(2), instead of having regard to *R v K* (*supra*), in this Bailiwick one looks to the full terms of the 1956 Law. The combination of the elements or ingredients of the offence drawn from the English jurisprudence coupled with the

clear and unambiguous wording of section 2 of the 1956 Law demonstrate that the Bailiwick offence of indecent assault is sufficiently clear, precise and certain. Accordingly, I do not find that there is any violation of the Appellant's Article 7 rights.

41. Article 6, for these purposes, is to similar effect. Paragraph 3 (a) of the Article provides that:

> "*Everyone charged with a criminal offence has the following minimum rights:-*
>
> *(a) to be informed promptly, in a language which he understands and in detail, the nature and cause of the accusation against him ...*".

This Convention right also goes to the question of whether the ambit of the offence, ie, its elements, is sufficiently clear to enable the offence to be charged. Adopting the same reasoning, I am satisfied that there has been no violation of this Convention right.

42. Advocate Ferbrache concentrated on Article 14. This is, of course, not a standalone right and provides:

> "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origins, association with a national minority, property, birth or other status.*"

The omission of any express reference to age is not problematic because of the reference to "*any ground*". Advocate Ferbrache submits that there is no logical reason to distinguish between a 23-year-old and a 24-year-old. As such, this is an arbitrary distinction and constitutes discrimination on grounds of age, particularly in 2013, ie, the date of the activity between the Appellant and the complainant, where the mindset is quite different from what is was in the 1950s.

43. The difficulty faced by the Appellant is to identify a Convention right where his enjoyment of it is affected by alleged discrimination. It does not appear to be the right found in Article 6 or 7, but, as Advocate Russell indicated, it might be Article 8. This was not, however, how Advocate Ferbrache put the Appellant's case. Moreover Article 8, being the right to respect for a person's private life, envisages interferences being permitted where these are in accordance with the law, necessary and proportionate. In the context of sexual activity with young persons, which is what is in issue here, or even between them, the Bailiwick's domestic law starts from the premises that, in law, a girl under the age of 16 cannot consent to such activity. That is no different from other jurisdictions. The criminal offences provide that below the age of 13, consent is simply irrelevant. However, although in law incapable of consenting, a girl aged 13, 14 or 15 can in fact consent to sexual activity, including intercourse. However, that only affords a man a defence if he holds a reasonable belief that the girl is above the age of consent. If he knows that she is not, then he has no defence. If he believes her to be of an age where consent can be given, he only has a defence if this is the first occasion on which he has been charged with one of the two offences mentioned or he was previously acquitted of such an offence. By making this young man's defence available only to a male up to and including 23 years of age, the law recognises that he is closer in age to the girl and may well be less experienced in these matters and so less able to consider age questions. Accordingly, because Article 8, whether read alone or with Article 14, is not an absolute right it is necessary to consider whether the approach taken in the 1956 Law can be said to be an unlawful interference with the right to respect for private life or indeed is unlawfully discriminatory.

44. I have reached the conclusion that it is not. The starting point is that the removal in law of the capacity of a young girl to consent to sexual activity is, in my view, permissible because it is designed for the protection of health and morals and also for the protection of other persons' (ie, the girls') rights. It is in society's interests for girls not to be exploited sexually. In the present case, it appears that the Magistrate's Court found that the complainant was not an unwilling participant. It is always harder for the legislature to protect those who decline to avail themselves of the protection afforded, but it remains permissible for the legislature to attempt to do so. Whether or not the age of consent or the circumstances in which it can properly be given should be something other than 16 is a matter for a policy judgment within the legislature and not from the judiciary. At para. 44 of *R v K* (*supra*), Lord Millett suggested

 

that:

> "*... the age of consent has long since ceased to reflect ordinary life, and in this respect Parliament has signally failed to discharge its responsibility for keeping the criminal law in touch with the needs of society.*"

Something could well be said in similar terms in this jurisdiction. Having decided in 2011 to update the criminal law of sexual offending, the States of Deliberation perhaps ought to have made better progress than they have so far. It is possible that, had they done so, on the facts as found in the Magistrate's Court, this Appellant would not have been convicted of any offence. Further, there appears to be a real anomaly in that the offence of gross indecency, which is arguably the lesser of the offences the Appellant faced, could not be proved whereas an indecent assault could. When the activity between the Appellant and the complainant is considered in full, many right-thinking people might consider that the contact and surrounding circumstances involved in masturbating a man is of more concern than being touched on the breast or in the vaginal area over clothing where all the activity was not proved to be non-consensual. Despite that, because of the terms of the 1956 Law, the Appellant has no defence to the charge of indecent assault and so stands convicted. However, all the Courts can do is to construe the legislation and, in doing so, assess it against the requirements of the Human Rights (Bailiwick of Guernsey) Law, 2000.

45. There is, therefore, nothing contrary to the Appellant's Convention rights, in my view, in section 2 of the 1956 Law. The legislature must be afforded a margin of appreciation in how to give effect to what it regards as necessary or desirable protection to girls below the age of consent. It has done that by creating a specific defence for men who are within a defined age-range and, in doing so, it has excluded the possibility of a similar defence being advanced on behalf of older men. This is something that falls squarely within the ambit of how a jurisdiction subject to the European Convention can approach these matters. It is consistent with the position in England and Wales in relation to the more serious offence of unlawful sexual intercourse under the 1956 Act before it was repealed and replaced by the 2003 Act. In that regard, I note that para. B3.46 of *Blackstone's Criminal Practice 2003* states:

> "*Even though the choice of age for the defence [in section 6(3) of the 1956 Act] is arbitrary, it does not introduce an element of disproportionality into the offence so as to offend against the ECHR, Articles 6 and 14 (Kirk (2002) The Times, 26 June 2002).*"

In my judgment, despite the passage of more than a decade since that decision, I take the same view. As a matter of law, the choice of the legislature to use a man's 24th birthday as the point at which he loses the opportunity to advance the reasonable belief defence as to the girl's age does not constitute a Convention breach at all. This is, therefore, a case in which the conclusion of the Magistrate's Court is not liable to be reversed on any human rights ground.

46. If I were wrong about there being no Convention right violation, what would follow if there were a finding that the Appellant had demonstrated that one or more of his Convention rights were properly engaged, is that the Court's first task would be to attempt to construe the primary legislation, ie, the 1956 Law, in a Convention-Compliant manner pursuant to section 3 of the 2000 Law. As Advocate Ferbrache mentioned during the hearing, in those circumstances, he wished section 2 to be read in a manner that assisted the Appellant. Although he did not articulate it in precisely this way, I took him to be inviting me to read the problematic reference to "*a man under twenty-four years of age*" as if it were either *"a man of or under twenty-four years of age*" or simply as "*a man*", ie, without any reference to age at all. In my opinion, there is no justification for reading in "*of or*" because all that would do would be to replace one arbitrarily fixed age with another. Instead of men aged 23 or under having the defence in the circumstances prescribed, it would be available to men aged 24 or under. A man aged 25 and some months would then advance a similar argument to that deployed in the present appeal. The alternative of removing any age qualification would lead almost to the same position as if the reasoning of *R v K* (*supra*) were adopted, which is a contention I have already rejected. The difference would be that the defence would not be available to all men, but only those who had not previously been charged with an offence of

unlawful sexual intercourse or indecent assault or, having been so charged, had been acquitted. In my opinion, this would involve too great a departure from the statutory wording that falls to be construed and so trespass into areas that are properly the province of the legislature.

47. In those circumstances, I would potentially have needed to consider whether or not to make a declaration of incompatibility pursuant to section 4 of the 2000 Law. In passing, I should point out that the Appellant's fourth ground of appeal contains an error because a declaration of incompatibility is not available as to the elements of the charge of indecent assault and could only attach to the offending primary legislation. However, because I am satisfied that none of the Appellant's Convention rights has been broken, I do not need to consider this issue further and prefer to leave open whether, in circumstances where section 3 of the 2000 Law has not enabled a Convention-compliant interpretation of the provision, it would be appropriate in these circumstances to make the declaration sought in respect of section 2 of the 1956 Law rather than express any view.

Conclusions

48. In summary, therefore, I have concluded that the approach of the Magistrate's Court was correct in law. The Judge carefully considered whether or not to make it a requirement of both of the offences for which the Appellant was being tried that the prosecution had to prove the absence of a belief, whether genuine or even reasonably held, that the complainant was aged 16 or older. In my judgment he quite properly distinguished between the statutory offence under the 1985 Law of gross indecency and the customary, or common, law offence of indecent assault. It was clearly appropriate to adopt *B. (A Minor)* (*supra*), where the statute was silent as to the *mens rea* that had to be proved and not to adopt the reasoning in *R v K* (*supra*) for the *mens rea* for indecent assault because the States of Deliberation had gone further than the UK Parliament. Instead of silence, there is express provision as regards the availability of the reasonable belief defence in the circumstances prescribed. Because there is such provision it displaces the general presumption being used in those cases. Indeed, the proviso to section 2 of the 1956 Law meets the comment made by Lord Bingham in *R v K* at para. 20: "*Had it been intended to exclude that element of mens rea it could very conveniently have been so provided in or following subsection (2).*" The proviso to section 2 makes that provision, albeit that its inclusion is very inconvenient for this Appellant. I have additionally found that no further assistance can be derived from the rights set out in the European Convention because none of them is engaged in the present case. The age in the proviso to section 2 of the 1956 Law may now appear arbitrary, although it is one that has been used for a century or so, but that does not take the provision outside the ambit of the legislature's margin of appreciation and it is not disproportionate.

49. As a result of those conclusions, I am not persuaded that the Judge of the Magistrate's Court erred in relation to his conclusions as to the elements of the offence of indecent assault or generally. In my judgment, he reached the right conclusions. There is an anomaly, though, in that the elements of the offence of gross indecency require the prosecution to prove the additional mental element relating to belief in age in every case, whereas for indecent assault this is not a general requirement. However, redressing something that might, in the words of Lord Bingham, now be regarded as "*anachronistic, or discredited, or unconvincing*" is a task for the legislature rather than the Courts. The anomaly does not mean that the Appellant's conviction was wrong in law. Finally, because I have not found that the Appellant has suffered any violation of a Convention right, I cannot make any declaration of incompatibility, as I was invited to do.

50. For all these reasons, the Appellant's appeal against his conviction for an offence of indecent assault is dismissed.

 