B v. Director of Public Prosecutions [2000] UKHL 13; [2000] 2 AC 428; [2000] 2 WLR 452; [2000] 1 All ER 833; [2000] Crim LR 403 (23rd February, 2000)

HOUSE OF LORDS

Lord Chancellor Lord Mackay of Clashfern Lord Nicholls of Birkenhead Lord Steyn Lord Hutton

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

B.

(BY HIS MOTHER AND NEXT FRIEND)

(APPELLANT)

v.

DIRECTOR OF PUBLIC PROSECUTIONS

(RESPONDENT)

ON 23 FEBRUARY 2000

LORD IRVINE OF LAIRG L.C.

My Lords,

For the reasons given by my noble and learned friend, Lord Nicholls of Birkenhead, in his speech, which I have had the advantage of reading in draft, this appeal should be allowed.

LORD MACKAY OF CLASHFERN

My Lords,

I have had the advantage of reading in draft the speeches prepared by noble and learned friends Lord Nicholls of Birkenhead, Lord Steyn and Lord Hutton.

In the light of the authorities to which they refer I consider that a defendant is entitled to be acquitted of the offence of inciting a child under 14 to commit an act of gross indecency, contrary to section 1(1) of the Indecency with Children Act 1960, if he holds or may hold an honest belief that the child was aged 14 years or over, unless Parliament expressly or by

necessary implication provided to the contrary. Clearly this has not been done expressly. For the reasons given by my noble and learned friends I consider that there is no sufficiently detailed legislative policy manifested by the Sexual Offences Act 1956 to which the Act of 1960 is an appendix to provide a basis for the necessary implication in respect of what was in 1960 a new offence. Accordingly this appeal should be allowed.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

An indecent assault on a woman is a criminal offence. So is an indecent assault on a man. Neither a boy nor a girl under the age of sixteen can, in law, give any consent which would prevent an act being an assault. These offences have existed for many years. Currently they are to be found in sections 14 and 15 of the Sexual Offences Act 1956. They have their origins in sections 52 and 62 of the Offences against the Person Act 1861.

In the early 1950s a lacuna in this legislation became apparent. A man was charged with indecent assault on a girl aged nine. At the man's invitation the girl had committed an indecent act on the man. The Court of Criminal Appeal held that an invitation to another person to touch the invitor could not amount to an assault on the invitee. As the man had done nothing to the girl which, if done against her will, would have amounted to an assault on her, the man's conduct did not constitute an indecent assault on the girl. That was the case of *Fairclough v. Whipp* [1951] 2 A.E.R. 834. Two years later the same point arose and was similarly decided regarding a girl aged eleven: see *Director of Public Prosecutions v. Rogers* [1953] 1 W.L.R. 1017. Following a report of the Criminal Law Revision Committee in August 1959 (First Report: Indecency with Children (Cmnd. 835)), Parliament enacted the Indecency with Children Act 1960. Section 1(1) of this Act makes it a criminal offence to commit an act of gross indecency with or towards a child under the age of fourteen, or to incite a child under that age to such an act. The question raised by the appeal concerns the mental element in this offence so far as the age ingredient is concerned.

The answer to this question depends upon the proper interpretation of the section. There are, broadly, three possibilities. The first possible answer is that it matters not whether the accused honestly believed that the person with whom he was dealing was over fourteen. So far as the age element is concerned, the offence created by section 1 of the Indecency with Children Act 1960 is one of strict liability. The second possible answer is that a necessary element of this offence is the absence of a belief, held honestly and on reasonable grounds by the accused, that the person with whom he was dealing was over fourteen. The third possibility is that the existence or not of reasonable grounds for an honest belief is irrelevant. The necessary mental element is simply the absence of an honest belief by the accused that the other person was over fourteen.

The common law presumption

As habitually happens with statutory offences, when enacting this offence Parliament defined the prohibited conduct solely in terms of the proscribed physical acts. Section 1(1) says nothing about the mental element. In particular, the section says nothing about what shall be the position

if the person who commits or incites the act of gross indecency honestly but mistakenly believed that the child was fourteen or over.

In these circumstances 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. The common law presumes that, unless Parliament indicated otherwise, the appropriate mental element is an unexpressed ingredient of every statutory offence. On this I need do no more than refer to Lord Reid's magisterial statement in the leading case of *Sweet v. Parsley* [1970] A.C. 132, 148-149:

> '. . . there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea. . . . it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary.'

Reasonable belief or honest belief

The existence of the presumption is beyond dispute, but in one respect the traditional formulation of the presumption calls for re-examination. This respect concerns the position of a defendant who acted under a mistaken view of the facts. In this regard, the presumption is expressed traditionally to the effect that an honest mistake by a defendant does not avail him unless the mistake was made on reasonable grounds. Thus, in *The Queen v. Tolson* (1889) 23 Q.B.D. 168, 181, Cave J. observed:

> 'At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim 'actus non facit reum, nisi mens sit rea'. Honest and reasonable mistake stands on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy. . . . So far as I am aware it has never been suggested that these exceptions do not equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication.'

The other judges in that case expressed themselves to a similar effect. In *Bank of New South Wales v. Piper* [1897] A.C. 383, 389-390, the Privy Council likewise espoused the 'reasonable belief' approach:

> '. . . the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of facts which, if true, would make the act charged against him innocent.'

In *Sweet v. Parsley* [1970] A.C. 132, 163, Lord Diplock referred to a general principle of construction of statutes creating criminal offences, in similar terms:

> '. . . a general principle of construction of any enactment, which creates a criminal offence, [is] that, even where the words used to describe the prohibited conduct would not in any other context connote the necessity for any particular mental element, they are nevertheless to be read as subject to the implication that a necessary element in the offence is the absence of a belief, held honestly and upon reasonable grounds, in the existence of facts which, if true, would make the act innocent.'

The 'reasonable belief' school of thought held unchallenged sway for many years. But over the last quarter of a century there have been several important cases where a defence of honest but mistaken belief was raised. In deciding these cases the courts have placed new, or renewed, emphasis on the subjective nature of the mental element in criminal offences. The courts have rejected the reasonable belief approach and preferred the honest belief approach. When mens rea is ousted by a mistaken belief, it is as well ousted by an unreasonable belief as by a reasonable belief. In the pithy phrase of Lawton L.J. in *Regina v. Kimber* [1983] 1 W.L.R. 1118, 1122, it is the defendant's belief, not the grounds on which it is based, which goes to negative the intent. This approach is well encapsulated in a passage in the judgment of Lord Lane C.J. in *Regina v. Williams (Gladstone)* (1983) 78 Cr.App. R. 276, 281:

> 'The reasonableness or unreasonableness of the defendant's belief is material to question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognise that the victim was not consenting . . . and so on.'

Considered as a matter of principle, the honest belief approach must be preferable. By definition the mental element in a crime is concerned with a subjective state of mind, such as intent or belief. To the extent that an overriding objective limit ('on reasonable grounds') is introduced, the subjective element is displaced. To that extent a person who lacks the necessary intent or belief may nevertheless commit the offence. When that occurs the defendant's 'fault' lies exclusively in falling short of an objective standard. His crime lies in his negligence. A statute may so provide expressly or by necessary implication. But this can have no place in a common law principle, of general application, which is concerned with the need for a mental element as an essential ingredient of a criminal offence.

The traditional formulation of the common law presumption, exemplified in Lord Diplock's famous exposition in *Sweet v. Parsley*, cited above, is out of step with this recent line of authority, in so far as it envisages that a mistaken belief must be based on reasonable grounds. This seems to be a relic from the days before a defendant in a criminal case could give evidence in his own defence. It is not surprising that in those times juries judged a defendant's state of mind by the conduct to be expected of a reasonable person.

I turn to the recent authorities. The decision which heralded this development in criminal law was the decision of your Lordships' House in *Director of Public Prosecutions v. Morgan* [1976] A.C. 182. This was a case of rape. By a bare majority the House held that where a defendant had sexual intercourse with a woman without her consent but believing she did consent, he was not guilty of rape even though he had no reasonable grounds for his belief. The intent to commit rape

involves an intention to have intercourse without the woman's consent or with a reckless indifference to whether she consents or not. It would be inconsistent with this definition if an honest belief that she did consent led to an acquittal only when it was based on reasonable grounds. One of the minority, Lord Edmund-Davies, would have taken a different view had he felt free to do so. In *Regina v. Kimber* [1983] 1 W.L.R. 1118, a case of indecent assault, the Court of Appeal applied the approach of the majority in *Morgan's* case. The guilty state of mind was the intent to use personal violence to a woman without her consent. If the defendant did not so intend, he was entitled to be found not guilty. If he did not so intend because he believed she was consenting, the prosecution will have failed to prove the charge, irrespective of the grounds for the defendant's belief. The court disapproved of the suggestion made in the earlier case of *Regina v. Phekoo* [1981] 1 W.L.R. 1117, 1127, that this House intended to confine the views expressed in *Morgan's* case to cases of rape.

This reasoning was taken a step further in *Reg. v. Williams (Gladstone)* (1983) 78 Cr. App. R. 276. There the Court of Appeal, presided over by Lord Lane C.J., adopted the same approach in a case of assault occasioning actual bodily harm. The context was a defence that the defendant believed that the person whom he assaulted was unlawfully assaulting a third party. In *Beckford v. The Queen* [1988] A.C. 130 a similar issue came before the Privy Council on an appeal from Jamaica in a case involving a defence of self-defence to a charge of murder. The Privy Council applied the decisions in *Morgan's* case and *Williams*' case. Lord Griffiths said, at page 144:

> 'If then a genuine belief, albeit without\ reasonable grounds, is a defence to rape because it negatives the necessary intention, so also must a genuine belief in facts which if true would justify self-defence be a defence to a crime of personal violence because the belief negatives the intent to act unlawfully.'

Lord Griffiths also observed, at a practical level, that where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held. Finally in this summary, in *Blackburn v. Bowering* [1994] 1 W.L.R. 1324, the Court of Appeal, presided over by Sir Thomas Bingham M.R., applied the same approach to the exercise by the court of its contempt jurisdiction in respect of an alleged assault on officers of the court while in the execution of their duty.

The Crown advanced no suggestion to your Lordships that any of these recent cases was wrongly decided. This is not surprising, because the reasoning in these cases is compelling. Thus, the traditional formulation of the common law presumption must now be modified appropriately. Otherwise the formulation would not be an accurate reflection of the current state of the criminal law regarding mistakes of fact. Lord Diplock's dictum in *Sweet v. Parsley* [1970] A.C. 132, 163, must in future be read as though the reference to reasonable grounds were omitted.

I add one further general observation. In principle, an age-related ingredient of a statutory offence stands on no different footing from any other ingredient. If a man genuinely believes that the girl with whom he is committing a grossly indecent act is over fourteen, he is not intending to commit such an act with a girl under fourteen. Whether such an intention is an essential

ingredient of the offence depends upon a proper construction of section 1 of the 1960 Act. I turn next to that question.

The construction of section 1 of the Indecency with Children Act 1960

In section 1(1) of the Indecency with Children Act 1960 Parliament has not expressly negatived the need for a mental element in respect of the age element of the offence. The question, therefore, is whether, although not expressly negatived, the need for a mental element is negatived by necessary implication. 'Necessary implication' connotes an implication which is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence.

I venture to think that, leaving aside the statutory context of section 1, there is no great difficulty in this case. The section created an entirely new criminal offence, in simple unadorned language. The offence so created is a serious offence. The more serious the offence, the greater is the weight to be attached to the presumption, because the more severe is the punishment and the graver the stigma which accompany a conviction. Under section 1 conviction originally attracted a punishment of up to two years' imprisonment. This has since been increased to a maximum of ten years' imprisonment. The notification requirements under Part I of the Sex Offenders Act 1997 now apply, no matter what the age of the offender: see Schedule 1, paragraph 1(1)(*b*). Further, in addition to being a serious offence, the offence is drawn broadly ('an act of gross indecency'). It can embrace conduct ranging from predatory approaches by a much older paedophile to consensual sexual experimentation between precocious teenagers of whom the offender may be the younger of the two. The conduct may be depraved by any acceptable standard, or it may be relatively innocuous behaviour in private between two young people. These factors reinforce, rather than negative, the application of the presumption in this case.

The purpose of the section is, of course, to protect children. An age ingredient was therefore an essential ingredient of the offence. This factor in itself does not assist greatly. Without more, this does not lead to the conclusion that liability was intended to be strict so far as the age element is concerned, so that the offence is committed irrespective of the alleged offender's belief about the age of the 'victim' and irrespective of how the offender came to hold this belief.

Nor can I attach much weight to a fear that it may be difficult sometimes for the prosecution to prove that the defendant knew the child was under fourteen or was recklessly indifferent about the child's age. A well known passage from a judgment of that great jurist, Sir Owen Dixon, in *Thomas v. The King* (1937) 59 C.L.R. 279, 309, bears repetition:

> 'The truth appears to be that a reluctance on the part of courts has repeatedly appeared to allow a prisoner to avail himself of a defence depending simply on his own state of knowledge and belief. The reluctance is due in great measure, if not entirely, to a mistrust of the tribunal of fact - the jury. Through a feeling that, if the law allows such a defence to be submitted to the jury, prisoners may too readily escape by deposing to conditions of mind and describing sources of information, matters upon which their evidence cannot be adequately tested and contradicted, judges have been misled into a failure steadily to

> adhere to principle. It is not difficult to understand such tendencies, but a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code.'

Similarly, it is far from clear that strict liability regarding the age ingredient of the offence would further the purpose of section 1 more effectively than would be the case if a mental element were read into this ingredient. There is no general agreement that strict liability is necessary to the enforcement of the law protecting children in sexual matters. For instance, the draft criminal code bill prepared by the Law Commission in 1989 proposed a compromise solution. Clauses 114 and 115 of the bill provided for committing or inciting acts of gross indecency with children aged under thirteen or under sixteen. Belief that the child is over sixteen would be a defence in each case: see the Law Commission, Criminal Law, A Criminal Code for England and Wales, vol 1, Report and draft Criminal Code Bill, p. 81 (Law Com. No. 177).

Is there here a compellingly clear implication that Parliament should be taken to have intended that the ordinary common law requirement of a mental element should be excluded in respect of the age ingredient of this new offence? Thus far, having regard especially to the breadth of the offence and the gravity of the stigma and penal consequences which a conviction brings, I see no sufficient ground for so concluding.

Indeed, the Crown's argument before your Lordships did not place much reliance on any of the matters just mentioned. The thrust of the Crown's argument lay in a different direction: the statutory context. This is understandable, because the statutory background is undoubtedly the Crown's strongest point. The Crown submitted that the law in this field has been regarded as settled for well over one hundred years, ever since the decision in *Reg v. Prince* (1875) L.R. 2 C.C.R. 154. That well known case concerned the unlawful abduction of a girl under the age of sixteen. The defendant honestly believed she was over sixteen, and he had reasonable grounds for believing this. No fewer than fifteen judges held that this provided no defence. Subsequently, *in R. v. Maughan* (1934) 24 Cr.App.R. 130 the Court of Criminal Appeal (Lord Hewart C.J., Avory and Roche JJ.) held that a reasonable and honest belief that a girl was over sixteen could never be a defence to a charge of indecent assault. The court held that this point had been decided in *Rex v. Forde* (1923) 17 Cr.App.R. 99. The court also observed that in any event the answer was to be found in *Prince's* case. Building on this foundation Mr. Scrivener Q.C. submitted that the Sexual Offences Act 1956 was not intended to change this established law, and that section 1 of the Indecency with Children Act 1960 was to be read with the 1956 Act. The preamble to the 1960 Act stated that its purpose was to make 'further' provision for the punishment of indecent conduct towards young people. 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 1956 Act.

This is a formidable argument, but I cannot accept it. I leave on one side Mr. O'Connor Q.C.'s sustained criticisms of the reasoning in *Prince's* case and *Maughan's* case. Where the Crown's argument breaks down is that the motley collection of offences, of diverse origins, gathered into the Sexual Offences Act 1956 displays no satisfactorily clear or coherent pattern. If the interpretation of section 1 of the Act of 1960 is to be gleaned from the contents of another

statute, that other statute must give compelling guidance. The Act of 1956 as a whole falls short of this standard. So do the two sections, sections 14 and 15, which were the genesis of section 1 of the Act of 1960.

Accordingly, I cannot find, either in the statutory context or otherwise, any indication of sufficient cogency to displace the application of the common law presumption. 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 fourteen years of age or above. The burden of proof of this 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. I would allow this appeal.

I add a final observation. As just mentioned, in reaching my conclusion I have left on one side the criticisms made of *Prince's* case and *Maughan's* case. Those cases concerned different offences and different statutory provisions. The correctness of the decisions in those cases does not call for decision on the present appeal. But, without expressing a view on the correctness of the actual decisions in those cases, I must observe that some of the reasoning in *Prince's* case is at variance with the common law presumption regarding mens rea as discussed above. To that extent, the reasoning must be regarded as unsound. For instance, Bramwell B. (at p. 174) seems to have regarded the common law presumption as ousted because the act forbidden was 'wrong in itself'. Denman J. (at p. 178) appears to have considered it was 'reasonably clear' that the Act of 1861 was an Act of strict liability so far as the age element was concerned. On its face this is a lesser standard than necessary implication. And in the majority judgment, Blackburn J. reached his conclusion by inference from the intention Parliament must have had when enacting two other, ineptly drawn, sections of the Act. But clumsy parliamentary drafting is an insecure basis for finding a necessary implication elsewhere, even in the same statute. *Prince's* case, and later decisions based on it, must now be read in the light of this decision of your Lordships' House on the nature and weight of the common law presumption.

LORD STEYN

My Lords,

The first certified question is whether a defendant is entitled to be acquitted of the offence of inciting a child under 14 to commit an act of gross indecency, contrary to section 1(1) of the Indecency with Children Act 1960, if he holds or may hold an honest belief that the child was 14 years or over. In other words, the question of statutory interpretation before the House is whether mens rea is an ingredient of the offence or whether the subsection creates an offence of strict liability.

The charge and proceedings below

On 19 August 1997 a girl aged 13 years was a passenger on a bus in Harrow. The appellant, who was aged 15 years, sat next to her. The appellant asked the girl several times to perform oral sex with him. She repeatedly refused. The appellant was charged with inciting a girl under 14 to commit an act of gross indecency contrary to section 1(1) of the Indecency with Children Act

1960. In January 1998 the appellant stood trial at the Harrow Youth Court. Initially, the appellant pleaded not guilty. The primary facts, as well as the fact that the appellant honestly believed that the girl was over 14 years, were admitted. The defence argued that on the admitted facts the appellant was entitled to be acquitted. The prosecution submitted that the offence was one of strict liability. The justices were asked to rule whether the appellant's state of mind could constitute a defence to the charge. They ruled that it could not. As a result of this ruling the appellant changed his plea to guilty. In law his plea of guilty constituted a conviction. The justices imposed a supervision order on the appellant for 18 months.

The justices were asked to state a case, and they did so. The case stated set out the primary facts. The admitted facts did not cover the question whether the appellant had reasonable grounds for his belief. And there was no finding on this point. The case stated raised the question of law of the correct interpretation of section 1(1) of the Act of 1960. The appellant appealed by way of case stated to the Divisional Court. In three separate judgments the Divisional Court (Brooke L.J., Tucker and Rougier J.J.) affirmed the ruling of the justices and dismissed the appeal; *R. v. B (A Minor) v. Director of Public Prosecutions* [1999] 3 W.L.R. 116.

The genesis of section 1(1) of the Act of 1960

Before the enactment of the Act of 1960 there was already in existence a relatively comprehensive statute, the Sexual Offences Act 1956, which served to protect young children against sexual exploitation. In particular the Act of 1956 contained provisions making it an offence to commit an indecent assault on a man or a woman: sections 14 and 15. The statute provided that girls and boys under 16 cannot in law give consent which would prevent the act being an assault. These provisions were effective so far as they went but decided cases revealed a gap in the protective net of the Act of 1956: *Fairclough v. Whipp* [1951] 2 All E.R. 834 and *Director of Public Prosecutions v. Rogers* [1953] 1 W.L.R. 1017. The statute made no provision for cases where an adult invited a child to touch or handle him indecently: in such cases there was sometimes no ingredient of assault which could trigger the indecent assault provisions of the Act of 1956, namely sections 14 and 15. In 1959 the Home Secretary invited the Criminal Law Revision Committee to consider the point and to make recommendations for an amendment of the law. The Committee produced a clear and succinct report dated 18 June 1959: Cmnd 835. The Committee cautioned itself against recommending too broad a provision: instead it concentrated on the gap in the Act of 1956. It considered the appropriate age limit. The Committee recommended the creation of an entirely new offence in respect of acts of gross indecency towards children under the age of 14. The Committee annexed a Draft Bill to its Report. Clause 1(1) of the Bill was in due course enacted as section 1(1) of the Act of 1960. There is no discussion in the Report of the question whether the proposed new offence would be one of strict liability or not.

Section 1(1)

The long title of the Act of 1960 describes it as an Act "to make further provision for the punishment of indecent conduct towards young children." Section 1(1) provides as follows:

> "Any person who commits an act of gross indecency with or towards a child under the age of fourteen, or who incites a child under that age to such an act with him or another, shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months, to a fine not exceeding the prescribed sum, or to both."

Section 1(1) creates an age-based offence. It is of the essence of the offence that the child is under the age of 14 years. The offence is an exception to the general law which does not make it an offence to commit or to incite another to commit an act of indecency or gross indecency. The only criminalisation of acts of gross indecency in the Act of 1956 is to be found in section 13 which makes acts of indecency between men an offence. This is, however, not an age-based offence. It is common ground that this link between the two Acts is neutral and throws no light on the problem before the House.

The Act of 1956

In the Divisional Court Rougier J. described the Act of 1960 as an appendix to the Act of 1956 and I would adopt this description. At the hearing of the appeal to the House counsel for the appellant demonstrated how the Act of 1956 consists of a collection of disparate offences deriving from diverse earlier enactments. Leaving to one side procedural provisions in the Act of 1956 regarding the powers and procedure for dealing with offences and powers of arrest and search, and concentrating on the substantive provisions, the immediate precursors of the present day offences is to be found in legislation dating from 1861, 1885, 1889, 1912, 1913, 1922, 1929 and 1933. And the precursors of some of the sexual offences in the Act of 1861 go back to medieval times. The Crown accepts that it would be wrong to describe the Act of 1956 as the product of a legislative initiative designed to devise a more rational system. It would be more accurate to describe it as the bringing together in one statute of a range of offences pragmatically created at different times in response, no doubt, to the perceived demands of public interest at the time. But, as counsel for the Crown pointed out, there is nevertheless a strong theme running through the various provisions of the Act of 1956, namely the protection of young children from sexual depredations.

For present purposes it is unnecessary to review all the detailed substantive provisions of the Act of 1956. But three matters need to be mentioned. First, sections 5 and 6 create a "pair" of offences, namely offences of having sexual intercourse with girls under 13 (section 5) and with girls under 16 (section 6). Under section 6(3) there is a so called "young man's defence." That is a defence available to men under the age of 24, who have not previously been charged with a like offence, who act in the belief that the girl is of the age of 16 or over and has reasonable cause for such a view. This defence is not available upon a charge under section 5 which plainly creates an offence of strict liability. Secondly, in the Statement of Facts and Issues and in oral argument counsel described sections 14 and 15 of the Act of 1956 as for present purposes the most relevant comparators in the Act of 1956. They provide as follows:

> "14. (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 sixteen 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 sixteen), the invalidity does not make the husband guilty of any offence under this section by reason of her incapacity to consent while under that 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.
"15. (1) It is an offence for a person to make an indecent assault on a man.
"(2) A boy under the age of sixteen cannot in law give any consent which would prevent an act being an assault for the purposes of this section.
"(3) A man 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 him to be a defective.
"(4) Section thirty-nine of this Act (which relates to the competence as a witness of the wife or husband of the accused) does not apply in the case of this section, except on a charge of indecent assault on a boy under the age of seventeen.
"(5) For the purposes of the last foregoing subsection a person shall be presumed, unless the contrary is proved, to have been under the age of seventeen at the time of the offence charged if he is stated in the charge or indictment, and appears to the court, to have been so."

It has been held that it is no defence on charges under sections 14 and 15 that the defendant believed the girl or boy to be under 16 and to be consenting: *Rex v. Forde* [1923] 2 K.B. 400, C.A.; *Rex v. Maughan* (1934) 24 Cr.App.R. 130, C.C.A. Counsel for the appellant challenged the correctness of these decisions. The third point is a more general one. Counsel for the Crown submitted that a study of the Act of 1956 reveals a general legislative policy to protect young children under the age of 16 years from sexual abuse. This proposition is uncontroversial: the legislative policy described by counsel is evidenced by numerous provisions of the Act of 1956. In these circumstances it is unnecessary to refer to other provisions of the Act of 1956.

The correct approach

My Lords, it will be convenient to turn to the approach to be adopted to the construction of section 1(1) of the Act of 1960. While broader considerations will ultimately have to be taken into account, the essential point of departure must be the words of section 1(1). The language is general and nothing on the face of section 1(1) indicates one way or the other whether section 1(1) creates an offence of strict liability. In enacting such a provision Parliament does not write on a blank sheet. The sovereignty of Parliament is the paramount principle of our constitution. But Parliament legislates against the background of the principle of legality. In *Reg. v. Secretary of State for the Home Department, Ex parte Pierson* [1998] AC 539 many illustrations of the application of the principle were given in the speech of Lord Browne-Wilkinson and in my

speech: 573G-575D, 587C-590A. Recently, in *Reg. v. Secretary of State for the Home Department, Ex parte Simms* [1999] 3 WLR 328 the House applied the principle to subordinate legislation: see in particular the speeches of Lord Hoffmann (at 341F-G), myself (at 340G-H) and Lord Browne-Wilkinson (at 330E). In *Ex parte Simms* Lord Hoffmann explained the principle as follows (at 341F-G):

> "But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

This passage admirably captures, if I may so, the rationale of the principle of legality. In successive editions of his classic work Professor Sir Rupert Cross cited as the paradigm of the principle the "'presumption' that mens rea is required in the case of statutory crimes": *Statutory Interpretation* 3 ed. (1995), p. 166. Sir Rupert explained that such presumptions are of general application and are not dependent on finding an ambiguity in the text. He said they "not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate as constitutional principles which are not easily displaced by a statutory text": ibid. In other words, in the absence of express words or a truly necessary implication, Parliament must be presumed to legislate on the assumption that the principle of legality will supplement the text. This is the theoretical framework against which section 1(1) must be interpreted.

It is now necessary to examine the practical application of the principle as explained by the House in *Sweet v. Parsley* [1970] A.C. 132. The decision is of great importance not for the actual decision but for the clear statement of general principle in the speeches. Lord Reid observed (at 148G-149E):

> "Our first duty is to consider the words of the Act: if they show a clear intention to create an absolute offence that is an end of the matter. But such cases are very rare. Sometimes the words of the section which creates a particular offence make it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea. . . . it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary.

"It is also firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word "knowingly," is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is

necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say "must have been" because it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted."

Lord Reid drew a distinction between "a truly criminal act" and acts which are not truly criminal in any real real sense, but are "acts which in the public interest are prohibited under a penalty": at 149F. He reaffirmed his observations in *Reg. v. Warner* [1969] A.C. 256 where he gave examples of the latter category of offences. In *Sweet v. Parsley* he said that in cases of truly criminal acts it is wrong to take into account "no more than the wording of the Act and the character and seriousness of the mischief which constitutes the offence": at 150A. Lord Morris of Borth-y-Gest and Lord Pearce delivered concurring speeches which do not differ in any material way from the approach outlined by Lord Reid. Lord Wilberforce dealt with the case on a narrower basis. Subject to one qualification the speech of Lord Diplock is to the same effect as the speech of Lord Reid. Lord Diplock invoked (at 163A-B):

> "a general principle of construction of any enactment, which creates a criminal offence, that, even where the words used to describe the prohibited conduct would not in any other context connote the necessity for any particular mental element, they are nevertheless to be read as subject to the implication that a necessary element in the offence is the absence of a belief, held honestly and upon reasonable grounds, in the existence of facts which, if true, would make the act innocent." (my emphasis).

The qualification is contained in the underlined words. It is not to be found in the other speeches in *Sweet v. Parsley*. It is a point to which I will return later in this judgment. Counsel for the Crown accepted that the approach as outlined in *Sweet v. Parsley*, and in particular in the speech of Lord Reid, is an authoritative and accurate statement of the law. It is only necessary to refer one further decision. In *Lim Chin Aik v. The Queen* [1963] A.C. 160, at 174, the Privy Council observed that in considering how the presumption can be displaced "it is not enough in their Lordships' opinions merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended." Their Lordships no doubt had in mind that the prevalence of even a grave social evil does not necessarily throw light on the question of what technique was adopted to combat the evil, viz. the creation of an offence of strict liability or an offence of which mens rea is an ingredient.

Concentrating still on the wording of section 1(1) of the Act of 1960, I now address directly the question whether the presumption is prima facie applicable. Two distinctive features of section 1(1) must be taken in to account. First, the actus reus is widely defined. Unlike the position under sections 14 and 15 of the Act of 1956, an assault is not an ingredient of the offence under section 1(1). Any act of gross indecency with or towards a child under the age of 14, or incitement to such an act, whether committed in public or private, is within its scope. The subsection is apt to cover acts of paedophilia and all responsible citizens will welcome effective legislation in respect of such a great social evil. But it also covers any heterosexual or homosexual contact between teenagers if one of them is under 14. And the actus reus extends to incitement of a child under 14: words are enough. The subsection therefore extends to any verbal sexual overtures between teenagers if one of them is under 14: see the telling examples given by

Brooke L.J. in the instant case: at 128H-129C. For the law to criminalise such conduct of teenagers *by offences of strict liability* would be far reaching and controversial. The second factor is that section 1(1) creates an offence of a truly criminal character. It was initially punishable on indictment by a custodial term of up to two years and by subsequent amendment the maximum term has been increased to ten years' imprisonment. Moreover, as Lord Reid observed in *Sweet v. Parsley* (at 146H) "a stigma still attaches to any person convicted of a truly criminal offence, and the more serious or more disgraceful the offence the greater the stigma." Taking into account the cumulative effect of these two factors, I am persuaded that, if one concentrates on the language of section 1(1), the presumption is prima facie applicable. It is, however, now necessary to examine weighty contrary arguments based on the broader context in which section 1(1) must be seen. Since counsel for the Crown adopted as part of his argument the reasoning of the Divisional Court, and in particular the reasoning of Rougier J., it is unnecessary to summarise the judgments. Instead I propose to examine directly the major planks of the reasoning contained in the judgments of the Divisional Court and in the submissions of counsel for the Crown. But I would respectfully record my tribute to the careful and elegant judgments in the Divisional Court.

The Acts of 1960 and 1956 are a code

Counsel for the Crown submitted that the Acts of 1960 and 1956 are a code of sexual offences. He said that the two Acts should be read as one always speaking statute to be interpreted in the world of today: *Reg. v. Ireland* [1998] AC 147, at 158D-G. I regard this approach as sound but by itself it constitutes no positive reason in favour of the displacement of the presumption. If the Act of 1956 is to impress a particular meaning on the Act of 1960 it must be on the basis that its concrete terms provide a consistency of theme.

Counsel for the Crown was faced with the immediate difficulty that the weight to be attached to a comparison of the language of the two statutes is materially diminished by the history of the evolution of the legislation, which I have already described. The point can be illustrated from a citation in *Reg. v. Ireland*, supra. The context was an argument based on differences in the wording of sections 18, 20 and 47 of the Offences Against the Person Act 1861. Observing that the difference in language was not a significant factor, I quoted in *Ireland* from the commentary of *Greaves*, the draftsman: The Criminal Law Consolidation and Amendment Acts (1861). The passage is at page 159E-F of my judgment which was given with the approval of all members of the Appellate Committee. For convenience I set it out:

> "If any question should arise in which any comparison may be instituted between different sections of any one or several of these Acts, it must be carefully borne in mind in what manner these Acts were framed. None of them was rewritten; on the contrary, each contains enactments taken from different Acts passed at different times and with different views, and frequently varying from each other in phraseology, and . . . these enactments, for the most part, stand in these Acts with little or no variation in their phraseology, and, consequently, their differences in that respect will be found generally to remain in these Acts. It follows, therefore, from hence, that any argument as to a difference in the intention of the legislature, which may be drawn from a difference in the terms of one clause from those in another, will be entitled to no weight in the

> construction of such clauses; for that argument can only apply with force where an Act is framed from beginning to end with one and the same view, and with the intention of making it thoroughly consistent throughout."

This explanation led to the description of the Act of 1861 (a precursor of the Act of 1956) as containing "a rag-bag of offences brought together from a variety of sources with no attempt, as the draftsman frankly acknowledged, to introduce consistency as to substance or as to form": *Reg. v. Parmenter* [1992] 1 A.C. 699, at 752, *per* Lord Ackner, quoting Sir John Smith Q.C. [1991] Cr. L.R. 43. Counsel for the Crown accepted that this is an accurate characterisation of the genesis of the Acts of 1960 and 1956 read together.

The express provision in the Act of 1956

Adopting the reasoning of Rougier J. counsel for the Crown laid stress on express provisions in the Act of 1956 allowing a defence of mistake. The argument is that where the legislature has been silent on mistake the offence must be one of strict liability. Counsel drew attention to the following provisions. Section 6(3) permits a statutory defence for young men who believe on reasonable grounds a girl to be aged 16 or over. Section 7(2) provides for proof of knowledge in the case of intercourse with an idiot or imbecile. The same applies to procurement of a defective: section 9(2). It also applies to indecent assault on a female defective: section 14(4). Finally, there is such a defence in respect of the offence of permitting a defective to use premises for intercourse: section 27(2). This argument fails to make adequate allowance for the haphazard way in which the Act of 1956 evolved. It is not the product of a rational scheme. The appeal to its diverse provisions enacted in response to the felt necessities of different times does not deserve the weight which the Divisional Court and counsel for the Crown put on it. Moreover, it fails to take account of the force of the presumption, and in particular Lord Reid's observation in *Sweet v. Parsley*, supra, at 149D that it is "firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word "knowingly," is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence." In my view the express references to knowledge in the Act of 1956 does not sufficiently clearly displace the presumption.

Sections 14 and 15 of the Act of 1956.

Counsel for the Crown also put forward a narrower but more formidable argument. Section 13 of the Act of 1956, which deals with acts of gross indecency between men, is the closest comparator to section 1(1) of the Act of 1960. But, it does not involve an age-based offence. In these circumstances he described section 14 and 15 as the most significant comparators in the present context. He relied on the fact that it had been held in the cases of *Forde* and *Maughan* that an honest belief that the girl or boy is under 16 is no defence. On that basis he rhetorically asked: Why should the same not apply to section 1(1) of the Act of 1960? As I have already pointed out counsel for the appellant challenged the correctness of these decisions. For my part it is not necessary to examine the legal position under section 14 and 15. While I accept that the matter is finely balanced, I am persuaded that the balance of arguments point to a rejection of this submission. The scope of sections 14 and 15 is markedly narrower than section 1(1) with which this case is concerned. Under sections 14 and 15 an assault is an ingredient of the offence.

And an assault necessarily requires an intentional act: an accidental contact would not be an assault. To that extent at least mens rea is an ingredient. By contrast section 1(1) does not require an assault. It criminalises a far wider spectrum of acts. And the age of the victim is of the essence of the offence. Absent the age factor, such conduct is not criminal. By contrast any indecent assault has been a crime for centuries. In my view a comparison of the language of sections 14 and 15 and section 1(1) does not point towards the displacement of the presumption. It is not a solid basis for a necessary implication rendering the principle enunciated in *Sweet v. Parsley* inapplicable.

The legislative policy of the Act of 1956.

Counsel for the Crown next submitted that a necessary implication negativing mens rea as an ingredient of the offence is to be found in the general legislative policy of the Act of 1956 to protect girls under the age of 16: see section 5, 6, 14, 15, 26 and 28. It is undoubtedly right that there is a clear legislative policy prohibiting the sexual exploitation of girls. It is unquestionably a great social evil as Lord Hutton has so clearly explained. Whatever can be done sensibly and justly to stamp it out ought to be done. The real question is: what does this policy tell us about the critical question whether section 1(1) is an offence of strict liability or not? It is not enough to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended: see *Lim Chin Aik v. The Queen,* supra, at 174. Moreover, upon analysis the argument is far from compelling. It infers from the premise of the legislative policy directed against the mischief a conclusion that the legislature gave clear expression to a choice of the solution of creating an offence of strict liability rather than an offence containing mens rea as an ingredient. The cardinal principle of construction described by Lord Reid in *Sweet v. Parsley* is not to be displaced by such speculative considerations as to the chosen legislative technique. I would reject this argument.

Prince's case

Counsel for the Crown also relied on what he described as a principle of construction established in *Reg. v. Prince* (1875) L.R. 2 C.C.R. 154. In *Prince* the defendant was convicted under a Victorian statute of unlawfully taking an unmarried girl under the age of 16 out the possession of her father. The defendant bona fide and on reasonable grounds believed that the girl was under 16. The judge referred the question of the availability of the defence to the Court for Crown Cases Reserved. The court consisted of 16 judges. The prisoner was not represented. By a majority of 15 to 1 the court held that there was no such defence. The leading judgment was given by Blackburn J. with the concurrence of nine other judges. Blackburn J. relied strongly on a drafting flaw in sections 50 and 51 of the Offences Against the Person Act 1861. The two sections respectively provided for offences of sexual intercourse with a girl under ten (section 50) and above the age of ten years and under the age of twelve years (section 51). The first was a felony and the latter a misdemeanour. Blackburn J. produced what Professor Sir Rupert Cross in a magisterial article described as a "knock-out" argument: Centenary Reflections on *Prince's* case (1975) 91 L.Q.R. 540. The passage in Blackburn's J. judgment reads as follows.

> "It seems impossible to suppose that the intention of the legislature in those two sections could have been to make the crime depend upon the knowledge of the prisoner of the

> girl's actual age. It would produce the monstrous result that a man who had carnal connection with a girl, in reality not quite ten years old, but whom he on reasonable grounds believed to be a little more than ten, was to escape altogether. He could not, in that view of the statute, be convicted of the felony, for he did not know her to be under ten. He could not be convicted of the misdemeanour, because she was in fact not above the age of ten. It seems to us that the intention of the legislature was to punish those who had connection with young girls, though with their consent, unless the girl was in fact old enough to give a valid consent. The man who has connection with a child, relying on her consent, does it at his peril, if she is below the statutable age. The 55th section, on which the present case arises, uses precisely the same words as those in sections 50 and 51, and must be construed in the same way."

Eventually the distinction between felonies and misdemeanours was abolished and the drafting flaw in the earlier legislation no longer exists. The principal ground of the decision of Blackburn J. has disappeared. It is true that Bramwell B. gave a separate judgment in which seven judges concurred. This judgment is largely based on the view that the defendant was guilty in law because if the facts had been as he supposed he would have acted immorally. For the further reasons given by Sir Rupert Cross in his article one can be confident that the reasoning of Bramwell B., if tested in a modern court, would not be upheld: see also *DPP v. Morgan* [1976] A.C. 182, at 238, *per* Lord Fraser of Tullybelton; and the valuable discussion by Brooke L.J. of the context of *Prince's* case: at 130B-132B. Significantly, *Prince's* case was cited in *Sweet v. Parsley* but was not mentioned in any of the judgments. The view may have prevailed that it was not necessary to overrule it because its basis had gone and that the principle laid down in *Sweet v. Parsley* would in future be the controlling one. In any event, I would reject the contention that there is a special rule of construction in respect of age- based sexual offences which is untouched by the presumption as explained in *Sweet v. Parsley.* Moreover, *Prince's* case is out of line with the modern trend in criminal law which is that a defendant should be judged on the facts as he believes them to be: *D.P.P. v. Morgan* [1976] A.C. 182; *Williams* (1984) 78 Cr.App.R. 276; *Beckford v. R.* [1988] A.C. 130. This development has led the Criminal Law Revision Committee to recommend that the rules be harmonised and that the prosecution should prove that the man realised that the girl was under 16: Fifteenth Report, 1984, paras. 5.5-5.15. Its recommendation was repeated by Brooke L.J. in the instant case: at 136B-E. For all these reasons I would reject counsel's attempt to reinvigorate *Prince's* case: it is a relic from an age dead and gone. It is no longer possible to extract from *Prince's* case a special principle of construction applicable only to age-based sexual offences.

Practical difficulties

Counsel for the Crown finally submitted that it would in practice be difficult for the Crown to disprove defences of lack of knowledge of the age of the victim. In my view counsel has overstated the difficulties. After all, the legislature expressly made available such an excuse in the case of the so-called "young man's defence" under section 6(3). Moreover, as Brooke L.J. pointed out in the Divisional Court recklessness or indifference as to the existence of the prohibited circumstance would be sufficient for guilt: at 129B. And in practice the Crown would only have to shoulder the burden of proving that the defendant was aware of the age of the victim if there was some evidential material before the jury or magistrates suggesting the possibility of

an honest belief that the child was over 14. In these circumstances the suggested evidential difficulties ought not to divert the House from a principled approach to the problem.

Conclusion

My Lords, for these reasons, as well as reasons given by Lord Hutton, I would answer the principal certified question in the affirmative.

The supplementary certified questions:

Given my conclusion on the first certified question the following supplementary certified questions arise:

(a) Must the belief be held on reasonable grounds?
(b) On whom does the burden of proof lie?

Counsel for the Crown did not argue, in the alternative, that the belief must be held on reasonable grounds. Nevertheless, I initially regarded such a requirement as an acceptable solution. A basis for this view would be Lord Diplock's observation in *Sweet v. Parsley*. This view is however contrary to the way in which our criminal law has subsequently developed. In *D.P.P. v. Morgan* [1976] A.C. 182 the House of Lords held by a majority of three to two that when a defendant had sexual intercourse with a woman without her consent, genuinely believing that she did consent, he was not guilty of rape, even if he had no reasonable grounds for his belief. The importance of this decision for the coherent development of English law was not immediately appreciated. The next stage in the development was the decision of the Court of Appeal in *Reg. v. Williams* (1983) 78 Cr.App.R. 276. The charge was assault. The defendant argued that he used force in the honest belief that he was protecting somebody else from an unlawful assault. Holding that the jury had been materially misdirected, the Court of Appeal, applying the logic of *Morgan*, held that if the defendant believed, reasonably or not, in the existence of facts which would justify the force used in self- defence, he did not intend to use *unlawful* force. The decision in *Williams* was followed and approved and applied by the Privy Council in *Beckford v. The Queen* [1988] A.C. 130. It was held that if the defendant honestly believed the circumstances to be such as would, if true, justify his use of force to defend himself from attack and the force was no more than reasonable to resist the attack, he was entitled to be acquitted of murder; since the intent to act unlawfully would be negatived by his belief, however mistaken or unreasonable. *Morgan* was described as the "a landmark decision in the development of the common law": *Beckford v. R.* supra, at 145C. There has been a general shift from objectivism to subjectivism in this branch of the law. It is now settled as a matter of general principle that mistake, whether reasonable or not, is a defence where it prevents the defendant from having the mens rea which the law requires for the crime with which he is charged. It would be in disharmony with this development now to rule that in respect of a defence under subsection 1(1) of the Act of 1960 the belief must be based on reasonable grounds. Moreover, if such a special solution were to be adopted, it would almost certainly create uncertainty in other parts of the criminal law. It would be difficult to confine it on a principled basis to subsection 1(1). I would answer question (a) in the negative.

That leaves question (b). In *Woolmington v. D.P.P.* [1935] A.C. 462, at 481, Viscount Sankey L.C. observed that "throughout the web of the English criminal law one golden thread is to be seen, that it is the duty of the prosecution to prove the prisoner's guilt." It provides the answer to question (b). There is no legally sound basis on which it would be possible to rule that the burden is on the defendant to prove an honest belief that the victim was over 14 years.

Conclusion

My Lords, I am in general agreement with the speech of Lord Hutton. For the reasons I have given, as well as for reasons given by Lord Hutton, I would allow the appeal and quash the conviction of the appellant.

LORD HUTTON

My Lords,

The governing principle on the issue of strict liability in a statutory offence was stated by Lord Reid in *Sweet v. Parsley* [1970] A.C. 132, 148H:

> "… whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea.
> . . .it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary. It is also firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word 'knowingly', is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say 'must have been' because it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted."

And at page 163B Lord Diplock said:

> ". . . [it is] a general principle of construction of any enactment, which creates a criminal offence, that, even where the words used to describe the prohibited conduct would not in any other context connote the necessity for any particular mental element, they are nevertheless to be read as subject to the implication that a necessary element in the offence is the absence of a belief, held honestly and upon reasonable grounds, in the existence of facts which, if true, would make the act innocent. As was said by the Privy Council in *Bank of New South Wales v. Piper* [1897] A.C. 383, 389, 390, the absence of mens rea really consists in such a belief by the accused."

The principle has also been formulated by stating that the requirement for mens rea is only ruled out if by necessary implication this is the effect of the statute. In *Brend v. Wood* [1946] 175 L.T. 306, 307 Lord Goddard C.J. said:

> "It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."

And in *Gammon (Hong Kong) Ltd. v. Attorney-General of Hong Kong* [1985] A.C. 1, 14, in delivering the judgment of the Board Lord Scarman referred to "necessary implication" in the third proposition:

> "In their Lordships' opinion, the law relevant to this appeal may be stated in the following propositions (the formulation of which follows closely the written submission of the appellants' counsel, which their Lordships gratefully acknowledge): (1) there is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is 'truly criminal' in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act."

Section 1(1) of the 1960 Act does not clearly rule out mens rea as a constituent part of an offence, and therefore the crucial question is whether it rules it out by necessary implication. On this issue I consider the arguments for the appellant and the Crown to be almost evenly balanced. In my opinion the points advanced by the Crown carry considerable weight. The purpose of Section 1(1) is clearly to protect children under the age of fourteen from sexual corruption: to protect their "sexual integrity" (to employ the term used by Professor Ashworth in his illuminating article on "Interpreting Criminal Statutes: A Crisis of Legality?" 107 L.Q.R. 419, 446). This purpose may be impeded if the happiness and stability of a child under fourteen is harmed by the violation of his or her innocence by some act of gross indecency or incitement to gross indecency committed by a person who honestly believes that the child is older than fourteen. Although more than a century has passed since the judgments in *Regina v. Prince* (1875) L.R. 2 C.C.R. 154, and although his reasoning was strongly influenced by the drafting error in Sections 50 and 51 of the Offences Against the Person Act 1861, I consider that there is still force in the view of Blackburn J., at page 171 which, although stated in relation to carnal knowledge of a girl under the age of ten or under the age of twelve, is also applicable to indecent conduct towards a child under fourteen:

> "It seems to us that the intention of the legislature was to punish those who had connection with young girls, though with their consent, unless the girl was in fact old

> enough to give a valid consent. The man who has connection with a child, relying on her consent, does it at his peril, if she is below the statutable age."

Therefore I recognise the force of the approach taken by Rougier J. in the Divisional Court at page 120G:

> "Though any violation of a child's innocence attracts very grave stigma, yet the protection of children from sexual abuse is a social and moral imperative."

This approach recognises, rightly in my opinion, that in a criminal statute intended to protect children the courts should not focus solely on the rights of the accused but should also take into account the right of children to be protected. In the article to which I have referred Professor Ashworth states at page 446 that most English writers on criminal law "have laid emphasis on liberal ideals such as the principle of legality (in terms of non-retroactivity, maximum certainty and restrictive construction), the presumption of innocence, the principle of autonomy and subjective principles of liability, the doctrine of fair opportunity and so forth".

In the next paragraph Professor Ashworth says:

> "It is not sought to deny that the liberal ideals mentioned in the last paragraph have a central place in criminal law doctrine, but they should not be presented as if they stand alone as absolutes. It was suggested above that some judges derive their motivation directly from a conception of the aim of criminal law as penalising those who cause major harms. One of the policies derived from this perspective is the 'thin ice' principle, discussed above; whilst there is a tendency to use a broad phrase such as 'public policy' or 'social defence' to encompass these policies, it is necessary to look more closely at distinct policies and the ends they are claimed to serve. It would not stretch the truth too far to suggest that the typical academic approach has been to emphasise liberal values and the traditional judicial approach to emphasise what they regard as social values in these matters. The first step is to recognise that values of both kinds do and should form part of criminal law doctrine. The next step is to recognise that they will frequently conflict and that, whilst careful discussion of the principles and policies will give some indication as to how conflicts should be resolved, situations will occur in which the courts must make that choice. This makes it crucial that the policies and principles are openly discussed, rather than concealed behind high-sounding phrases about 'legislative intent', 'public policy' or 'the principle of legality'."

Two further interrelated points support the argument of the Crown. One is that, as Rougier J. states, the Act of 1960 is an appendix to the Act of 1956, and the wording of Sections 5 and 6 of the 1956 Act relating respectively to intercourse with a girl under thirteen and to intercourse with a girl under sixteen, but with the latter section providing in subsection (3) for "the young man's defence", makes it plain that the offence under Section 5 is an offence of strict liability. Therefore it is clear that in the Act of 1956 Parliament intended that there should be strict liability when a man had sexual intercourse with a girl under thirteen, and accordingly it can be argued that it is in accordance with the intention of Parliament that there should be strict liability when a person is guilty of gross indecency towards a child under fourteen. The second point is

that in addition to Section 6(3) there are a number of sections in the Act of 1956 which expressly provide for a defence of mistake. In the case of intercourse with a woman who is a defective Section 7(2) provides a defence if the man does not know and has no reason to suspect the woman to be a defective. The same applies to the offence of procurement of a defective: see Section 9(2). The same defence applies to indecent assault on a woman defective: see Section 14(4). The same defence is available in respect of permitting a defective to use premises for intercourse or causing or encouraging the prostitution of a defective: see Section 27(2) and Section 29(2). Therefore the Crown can argue with considerable force that when Parliament intends that there should be a defence of mistake it makes express provision for this defence, so that where there is no express provision for such a defence the statute by implication intends that the defence will not be available. This point is well stated by Tucker J. in his judgment at page 127H:

> "I deduce from all these statutory provisions that 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 of 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."

Therefore I consider that it would be reasonable to infer that it was the intention of Parliament that liability under Section 1(1) of the Act of 1960 should be strict so that an honest belief as to the age of the child would not be a defence. But the test is not whether it is a reasonable implication that the statute rules out mens rea as a constituent part of the crime - the test is whether it is a necessary implication. Applying this test, I am of opinion that there are considerations which point to the conclusion that it is not a necessary implication. One is that the various provisions of the Act of 1956 have not been drafted to give effect to a consistent scheme but are a collection of diverse provisions derived from a variety of sources: see the description of the Offences Against the Person Act 1861, a precursor of the Act of 1956, by Lord Ackner in *Regina v. Savage* [1992] 1 A.C. 699, 752, quoting Sir John Smith Q.C. (1991) Cr. L.R. 43. A further consideration is that in *Sweet v. Parsley* Lord Reid stated at page 149D:

> "It is also firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word 'knowingly', is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence."

Whilst, as I have stated, I think there is force in the view expressed by Blackburn J. at page 171-2 of *Regina v. Prince*, I am of opinion that to the extent that *Prince's* case can be viewed as establishing a general rule that mistake as to age does not afford a defence in age-based sexual offences, that rule cannot prevail over the presumption stated by this House in *Sweet v. Parsley*.

Therefore, for the reasons which I have stated, I would allow this appeal and I would answer the first certified question in the affirmative. For the reasons which have been stated by my noble and learned friend Lord Steyn, and with which I agree, I would answer part (a) of the second certified question in the affirmative, and I would answer part (b) by stating that the burden of

proof rests on the Crown once the defendant has raised some evidence before the jury or magistrates that he or she honestly believed the child was over fourteen.

I am conscious that the decision by this House to allow this appeal may make it more difficult to convict those who are guilty of an offence under Section 1(1) of the Act of 1960 and thus reduce the protection given to children, but I have come to the conclusion that as Parliament has failed to state by express provision or by necessary implication that mens rea as to age is not necessary, the legal presumption stated by Lord Reid that mens rea is required must be applied. If Parliament regards the decision in this case as giving rise to undesirable consequences it will be for it to change the law, and I share the regret of Brooke L.J. expressed in his judgment at page 136A-H that Parliament does not take account of the expert advice which it has received over the years from the Criminal Law Revision Committee and the Law Commission, and does not address its mind, in enacting legislation creating or restating criminal offences, to the issue whether mens rea should be a constituent part of the offences and does not state in clear terms whether or not mens rea is required.