

THE SUPREME COURT

Appeal No. 2022/82

BETWEEN

C.W.

PLAINTIFF/RESPONDENT

AND

**THE MINISTER FOR JUSTICE,
IRELAND AND THE ATTORNEY GENERAL**

DEFENDANTS/APPELLANTS

AND

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

SUBMISSIONS ON BEHALF OF THE AMICUS CURIAE

Introduction.....	2
The constitutional values and rights underlying the right to a fair trial.....	2
The presumption of innocence as an aspect of the right to a fair trial	4
The presumption of innocence in the context of the right to a fair trial	5
A principled approach to the protection of fair trial rights	7
Application of these principles	9
The ECHR caselaw is too underdeveloped to yield useful principles	11
Other jurisdictions.....	13
The special case of mental disorder	16
The possible application of the mental disorder approach to prosecutions generally	18
Presumptions of Fact and proportionality.....	21
Application of these principles to S.3(5) of the 2006 Act	23
Proportionality and evidence	25

Introduction

1. A statute which reverses the onus of proof, casting a legal burden onto the accused to disprove an element of an offence, interferes with a core procedural right protected by Article 38.1 of the Constitution. The *Amicus Curiae* ('the Commission') submits that compelling justification is required for such a step and that the Court must be satisfied that the interference is not so great as to render a trial for such an offence otherwise than "in due course of law" in the sense in which that phrase is used in Article 38.
2. Transfer of the legal burden cannot be justified solely by reference to the gravity of an offence or the importance of the rights protected by that offence. The Commission would endorse the standard applied in cases such as *R v Chaulk*¹: that justification for the transfer of the legal burden requires that the prosecution of the offence would otherwise be rendered 'unworkable'. Even then, such justification has previously been found to exist in Irish law only in the case of a regulatory offence or having regard to the unique considerations that arise from the presence of mental disorder.
3. It is submitted that this test has not been met, in respect of S.3(5) of the Criminal Law (Sexual Offences) Act of 2006 as amended. Accordingly, the High Court correctly concluded that the section was incompatible with the Constitution.

The constitutional values and rights underlying the right to a fair trial

4. Although the parties have rightly characterised the right at issue in these proceedings as the presumption of innocence, the protection which is threatened by the impugned statute is its corollary²: proof beyond reasonable doubt. The key question is whether a trial resulting in a conviction, notwithstanding that a reasonable doubt remains as to guilt, can nevertheless be described as a trial in 'due course of law'.
5. Before considering this question, it is necessary to consider the Article 38.1 right, as well as the rights of victims and the community engaged in the criminal context. What values underlie these rights, and how are they to be vindicated in the constitutional scheme?

¹ *R v Chaulk* [1990] 3 S.C.R. 1303.

² *DPP v D O'T* [2003] 4 I.R. 286 per Hardiman J at p.290.

6. This has relevance to any proportionality assessment that must be conducted. In the case of *Nottinghamshire County Council v KB*³, O'Donnell J, as he then was, said:

'The analysis of whether any particular restriction or limitation is consistent to the Constitution may be assisted by the structure proportionality analysis provides, but only if it is explained why any particular provision is permitted by the Constitution, and is proportionate. In my view it is an error to approach the constitutional issue by simply asking, almost in the abstract, whether any particular provision is proportionate as an almost self-standing test of constitutionality and detached from careful consideration of the text and the values necessarily implied by it.'

7. In *People (DPP) v Gilligan*⁴, Denham J as she then was said that Article 38.1 was *'a right inherent in the concept of justice, which is at the core of the constitution'*.

8. As well as being the means by which personal rights are vindicated, justice has a strong social value. There is a high community interest in ensuring the integrity of the justice system. It is important to recall, in particular in any analysis of whether or to what extent there are competing rights at stake, that the Article 38.1 right is more than an individual right. As Keane J. observed in *Kelly v. O'Neill*⁵:

"As has been frequently pointed out, the right to a fair trial in due course of law guaranteed under the Constitution is not simply a right vested in those who happen to be accused of particular crimes; it is the interest of the community as a whole that the right should be protected and vindicated by the State and its organs".

9. This goal is apparent, for example, in the standards applied by the Irish Courts in respect of miscarriage of justice applications. The Courts have gone considerably further than the minimum requirements of the Convention, or the practice in our neighbouring jurisdiction. A miscarriage of justice will be declared, and damages will be payable, not just where an innocent person has been convicted, but also where a person has been convicted following

³ *Nottinghamshire County Council v KB* [2011] IESC 48 at paragraph 87.

⁴ *DPP v Gilligan* [2005] IESC 78 at paragraph 83.

⁵ *Kelly v O'Neill* [2000] 1 IR 354 at 375.

a ‘grave defect in the administration of justice’⁶ or following ‘a failure of the judicial system to attain the ends of justice’⁷.

The presumption of innocence as an aspect of the right to a fair trial

10. In *P.O’C v DPP*⁸, Murray J described the presumption as being ‘*personal to the dignity and status of every citizen*’. Respect for individual dignity is a core constitutional value, underpinning the protection of ‘the person’ in Article 40.3.1.⁹, and is closely allied to the constitutional value of justice.

11. In the case of *Nolan v Minister for Justice*¹⁰, Edwards J acknowledged that the presumption of innocence, while it finds specific application in Article 38.1, was:

‘in itself a higher legal principle of universal application. It is now well established that when Article 40.4.1° of the Constitution speaks of no citizen being deprived of his personal liberty "save in accordance with law", the word "law" is not to be construed in a positivist way but as referring to the fundamental norms of the legal order postulated by the Constitution...

125. This Court is satisfied that one of those fundamental norms is the presumption of innocence. It is much more than a mere procedural trial right. It is recognised in the vast majority of the world's legal systems as being a fundamental principle of the justice to which every person is entitled as an aspect of their humanity. It is as old as the hills.’

12. Similar reasoning is evident in the Judgment of Hardiman J in the case of *CC*¹¹, where he said that:

‘[To] criminalise in a serious way a person who is mentally innocent is indeed ‘to inflict a grave injury on that person's dignity and sense of worth’ and to treat him as ‘little more than a means to an end’ ... It appears to us that this, in turn, constitutes a failure

⁶ *Martin Conneely v DPP* [2014] IECCA 31 at paragraph 42.

⁷ *The People (DPP) v Hannon* [2009] 4 I.R. 147 at p.156.

⁸ *P. O’C v DPP* [2000] 3 IR 87.

⁹ *Simpson v Governor of Mountjoy Prison & Ors* [2020] 3 IR 113 at para 11 of O’Donnell J’s Judgment.

¹⁰ *Nolan v Minister for Justice & Equality* [2012] IEHC 249 at paragraph 124.

¹¹ *C.C v Ireland* [2006] 4 IR 1 at paragraph 44.

by the State in its laws to respect, defend and vindicate the rights to liberty and to good name of the person so treated, contrary to the State's obligations under Article 40 of the Constitution.'

13. These are the values which, it is submitted, have informed the reasoning of the Irish Courts in cases like *Forsey*¹² and *Smyth*¹³; and which require that an extremely high value would be placed on the presumption of innocence within the constitutional scheme.

The presumption of innocence in the context of the right to a fair trial

14. The presumption is clearly a core protection in the context of the fair trial right. This leads to the question whether a breach of the presumption leads to the nullification of the essence of the fair trial right. In this regard, the judgment of Costello P in *Donnelly v DPP*¹⁴ seemed to reject any balancing approach, once it was established that the fair trial right had been breached:

'When the validity of a statute enacted to assist victims of crime is challenged on constitutional grounds, this challenge can be formulated in different ways. For example, it may be suggested that the victims of crime have "rights" and that an accused has "rights" and that the court's task is to balance these rights, and decide whether the rights of the accused have been unduly restricted by laws designed to uphold victims rights. It seems to me, however, that this is not the way to approach the task with which the Court is now confronted ... there can be no question of balancing conflicting rights – if the procedures are unfair this section must be condemned.'

15. These comments may reflect a related concern voiced by the same Judge in *Murray v Ireland*¹⁵, about the *'the indiscriminate ascriptions of "rights" to the State'*. This Court has found, however, that the rights of victims and the right of the community to protection are

¹² *DPP v Forsey* [2019] 2 IR 417.

¹³ *DPP v Smyth* [2010] IECCA 34.

¹⁴ *Donnelly v DPP* [1997] WJSC – HC 703 at paragraph 39.

¹⁵ *Murray v Ireland* [1985] ILRM 542 at paragraph 17.

engaged in the criminal context, and not just State interests. O'Higgins C.J. said, *In the Matter of the Criminal Law (Jurisdiction) Bill, 1975*¹⁶ that:

'The phrase "due course of law" requires a fair and just balance between the exercise of individual freedoms and the requirements of an ordered society.'

16. Similarly, Hamilton C.J. said in *Rock v Ireland*¹⁷:

'The protection of citizens from attacks on their person or property is, to some degree, an aim of all criminal legislation. It is a constitutional duty which is imposed on the State and the State is entitled to act on it, as long as due regard is had for the constitutional rights of accused persons. To suggest, therefore, as counsel for the applicant did in this case, that there is no conflict of rights in this instance, is misleading.'

The question to be considered by this Court is whether the restrictions which the impugned sections place on the right to silence is any greater than is necessary to enable the State to fulfil its constitutional obligation.'

17. It might be noted that in *Rock*, the Supreme Court went on to refer to both the *Heaney* proportionality test and to *Tuohy v Courtney* and found that:

*'the legislature was seeking to balance the individual's right to avoid self-incrimination with the right and duty of the State to defend and protect the life, person and property of all its citizens. In this situation, the function of the Court is not to decide whether a perfect balance has been achieved, but merely to decide whether, in restricting individual constitutional rights, the legislature have acted within the range of what is permissible.'*¹⁸

18. The Commission would respectfully suggest however, that the '*range of what is permissible*' in respect of Article 38.1 is constrained by the importance of the rights

¹⁶ *In the Matter of the Criminal Law (Jurisdiction) Bill, 1975* [1977] IR 129 at paragraph 70.

¹⁷ *Rock v Ireland* [1997] 3 IR 484 at paragraph 94.

¹⁸ *Ibid* at paragraph 98.

involved and the language in which they are expressed. It is submitted that the Court should fix the limits of what is permissible by the application of the following principles.

A principled approach to the protection of fair trial rights

19. First, while it is acknowledged that some rights may be more important than others, constitutional rights do not exist in a fixed hierarchical structure applicable in all contexts.

20. In *The People (DPP) v Shaw*¹⁹, Griffin J said:

“If possible; fundamental rights under a Constitution should be given a mutually harmonious application, but when that is not possible, the hierarchy or priority of conflicting rights must be examined both as between themselves and in relation to the general welfare of society. This may involve the toning down or even the putting into temporary abeyance of a particular guaranteed right so that, in a fair and objective way, the more pertinent and important right in a given set of circumstances may be preferred and given application.”

21. What is required, therefore, is a harmonious balancing of rights.

22. Secondly, the exercise of achieving balance between competing rights must pay due regard to the particular context in which the balancing exercise occurs. There may be situations in which a stark conflict is presented by a dispute between two parties grounded on competing claims to engage in activities or pursue objectives in purported exercise of different constitutional rights. Such a dispute may be capable of being resolved simply by weighing the relative importance of the rights at stake. Thus the right to freedom of speech will yield to the right to life, where the latter might be imperilled by extreme forms of political speech. The right to property cannot be exercised in a manner injurious to the bodily integrity of those living in neighbouring properties.

23. Thus, O’Donnell J, as he then was, said in the case of *Sunday Newspapers v Gilchrist*²⁰ that:

¹⁹*The People (DPP) v Shaw* [1982] IR 1 at p.56.

²⁰ *Sunday Newspapers Limited v Gilchrist and Rogers* [2017] IESC 18 at [36] to [40].

'... rights are best considered in context, with an appreciation not of some sense of the abstract importance of the right, but by reference to a particular restriction with particular effects that is imposed for a particular reason. That is not to deny that some rights might be generally more important than others; this is of course true, and this should be stated by courts where appropriate. It is instead to say that this importance is useful only insofar as it helps a court resolve a particular clash of rights in context by helping to weigh a right when it conflicts with another.'

24. The context of the exercise of the right to a fair trial is objectively different, indeed is of a different order, to the stark but straightforward clashes illustrated above. Rather than simply weighing competing rights, the Court is presented with a more complex question. When one citizen complains that their personal rights have been invaded by the actions of another, what minimum protections are required to ensure that the complaint is determined fairly and constitutionally? In particular, where the complaint is of criminal wrongdoing, to what extent can the State, as guarantor of the rights of the complainant, be relieved of the ordinary and long-established burden of proving to the required standard every element of the allegation made against the accused?
25. Thirdly, it is submitted that clear guidance as to the importance of protecting the right to a fair trial exists in the way in which that right is expressed and protected in the Constitution itself. Although the Article 38.1 right to a trial in due course of law is both reflective of and instrumental in protecting the personal rights provided for by Article 40.3 of the Constitution, it is itself not merely a specifically enumerated right, but one expressed in absolute terms. The words "*No person shall be tried ...*" admit of no exceptions. Article 38.1 in effect sets a minimum standard.
26. This view of Article 38.1 underlies the dicta of Denham J. in *D v. DPP*²¹ that

"The applicant's right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On a hierarchy of constitutional rights it is a superior right."

²¹ *D v DPP* [1994] 2 IR 465 at p. 474.

A court must give some consideration to the community's right to have this alleged crime prosecuted in the usual way. However, on the hierarchy of constitutional rights there is no doubt that the applicant's right to fair procedures is superior to the community's right to prosecute.”

27. In the same case, Finlay CJ, albeit without expressly describing the right as “superior”, said that “*the right of an individual to a fair trial is of fundamental constitutional importance*”.²²
28. The Commission respectfully submits that the use of the word “superior” in this context is capable of being misunderstood. For the reasons stated above, the particular context in which fair trial rights arise is such as not to present a stark and readily resolved conflict with the rights of another citizen, such that one of those rights must be held to be superior to the other. Instead, the Article 38 right should properly be seen as a restraint on the exercise of the power of the State to condemn and punish one citizen for a wrong allegedly done to another.
29. This is clearly what Denham J meant. She did not, after all, say that the right to a fair trial is superior to other personal rights of the citizen. Instead she said that it was superior to the community’s right to prosecute.

Application of these principles

30. The Appellants submit that the rights of children are engaged in respect of S.3(5) of the 2006 Act and they point to the inalienable and imprescriptible status of their rights by virtue of Article 42A, which include the core personal rights in Article 40.3.2. However, any suggestion that the right to a fair trial is in conflict with the rights of children and that one must yield to the other would be an error of reasoning.
31. The Commission of course agrees that the State has a vital duty, through its criminal laws, to protect children from harm.

²² *Ibid.* at p.467.

32. In the context of the impugned section, the rights of children are reflected in the existence of the substantive offence of defilement and the requirement that the tribunal of fact must have regard to an objective standard of reasonableness when assessing whether the accused was in fact mistaken as to age. Imposing at least a mandatory evidential burden on a person accused of defilement would also be appropriate, to reflect the duty of protection owed to children.
33. It is not obvious, however, that the imposition of a legal, as opposed to an evidential, burden on an accused is strictly necessary in order to achieve the specific purpose of convicting the guilty in cases of defilement or the general purpose of protecting children. Another way of phrasing this is to ask whether the task of the prosecution would be rendered unworkable in the absence of a legal burden being transferred?
34. It may be helpful in this context to consider the decision of the Supreme Court in *People (DPP) v. Murray*²³. There can be no question of the importance of protecting the right to life – there is no right superior to that – and the members of an unarmed police force who selflessly risk their lives for the safety of others in a free society, as Garda Michael Reynolds did, are entitled to the greatest possible protection. Even so, this Court decided that *mens rea* as to all the elements of the offence of capital murder, including the concomitant circumstance of the status of the victim as a member of An Garda Síochána acting in the course of his duties, was required to be proved by the prosecution.
35. The reason why that is so is plain. The presumption of innocence does not conflict with the right to life; rather it holds the State to a certain minimum standard when it acts to protect, defend and vindicate that right, in a manner consistent with the framing by the Constitution of the State’s duty so to act – “*as far as practicable*” and “*as best it may*”. The position is no different in respect of other personal rights, including those of children.
36. When one of the elements of the offence is that the victim be a child, or a child below a certain age, that concomitant circumstance is an element of the offence in respect of which *mens rea* is required to be proved to the criminal standard by the prosecution.

²³*People (DPP) v Murray* [1977] IR 360.

The ECHR caselaw is too underdeveloped to yield useful principles

37. In respect of the ECHR rights forming part of our domestic law through the ECHR Act 2003, the organs of the State have duties to victims of crime, including in particular to children. In *K.U. v Finland*²⁴, the ECtHR noted that:

'States have a positive obligation inherent in Article 8 of the Convention to criminalise offences against the person, including attempted offences, and to reinforce the deterrent effect of criminalisation by applying criminal-law provisions in practice through effective investigation and prosecution (see, mutatis mutandis, M.C. v. Bulgaria, cited above, § 153). Where the physical and moral welfare of a child is threatened, such injunction assumes even greater importance.'

38. The ECtHR has recognised the obligation of States to provide an effective remedy, under Article 13 ECHR, against State failures and inaction leading to breach of victim's rights under Articles 2, 3 and 8 ECHR. This includes an obligation on States to provide adequate substantive and procedural measures to ensure that crime is prevented, properly investigated and prosecuted effectively. A margin of appreciation is afforded to States however. It is unlikely that a provision which provided for an evidential burden only on an accused in respect of an offence of defilement would be held by the ECtHR to be incompatible with the rights of children under Article 3 or 8 ECHR.

39. The European Convention on Human Rights, like the Canadian Charter, Constitution of Australia, New Zealand Bill of Rights and South African Constitution, expressly provides for protection of the presumption of innocence. But under Convention caselaw, as is also the case in most common law jurisdictions, shifting of the legal burden onto an accused is not absolutely prohibited.

40. In *Deweere v Belgium*²⁵, the ECtHR noted that the right to be presumed innocent in Article 6(2) is a 'specific application' of the general right to fair trial in Article 6(1). But notwithstanding the Court's acceptance of the principle that breach of the presumption of innocence renders a trial unfair, the ECtHR has never held that transfer of the legal burden

²⁴ *Case of K.U. v Finland*, (App no. 2872/02) (02 December 2008) at paragraph 46.

²⁵ *Case of Deweere v Belgium*, (App no. 6903/75) (27 February 1980) at paragraph 56.

of itself renders a trial unfair. Its caselaw has not expressly acknowledged any critical distinction between legal and evidential burdens. Instead, the Court has referred to presumptions of law and fact as being permissible, subject to the necessity to have reasonable limits on such presumptions and to maintain the ‘rights of the defence’.

41. It is not clear how a provision which shifts the legal burden in respect of the *mens rea* of an offence can be said to maintain the ‘rights of the defence’, if the result is a conviction notwithstanding a doubt remaining about guilt. Such an outcome would appear to be contrary to the presumption of innocence and thus in breach of Article 6(2). It is worth noting the comments of Lord Hoffman in *R v G*²⁶, in respect of the ‘reasonable limits’ test referred to in *Salabiaku*:

‘No one has yet discovered what this paragraph means but your lordships were referred to a wealth of academic learning which tries to solve the riddle... I think that judges and academic writers have picked over the carcass of this unfortunate case so many times in attempts to find some intelligible meat on its bones that the time has come to call a halt.’

42. The presumptions under consideration in the ECtHR caselaw have been mainly regulatory or minor in nature²⁷. However, in the early 1990’s, the European Commission of Human Rights rejected the admissibility of complaints about the transfer of the legal burden in respect of the both the insanity defence²⁸ and diminished responsibility²⁹, albeit with limited analysis of the issues arising.
43. The ECtHR does not review the legislation which shifts the burden,³⁰ but instead looks to the full facts of the case to assess whether or not the presumption of innocence was substantially respected in the trial. It has on occasion³¹ found that the manner in which a trial was conducted breached the presumption of innocence notwithstanding that the legal burden had ostensibly remained on the prosecution at all times. However, such a focused

²⁶ *R v G* [2008] UKHL 37 at paragraph 5.

²⁷ *AG v Malta*, (App no. 1664/90), *Bates v United Kingdom* [1996] E.H.R.L.R 312, *Brown v United Kingdom*, (App no. 44233/98).

²⁸ *Case of H v United Kingdom*, (App no. 9580/81) (09 June 1988).

²⁹ *Case of Robinson v United Kingdom*, (App no. 20858/92) (5 May 1993).

³⁰ *Case of Pham Hoang v France*, no. 1319/87 (25 September 1992).

³¹ For example, *Telfner v Austria*, no. 33501/96 (20 March 2001).

assessment is problematic in terms of drawing conclusions at the level of principle about the protection afforded by the Convention.

44. The Appellants have highlighted the comment of the ECtHR in *G.I.E.M. v Italy*³² that the *'limits will be overstepped where a presumption has the effect of making it impossible for an individual to exonerate himself from the accusations against him'*. This does not appear to have been posited by the Court as a threshold standard. Rather, it was a reflection of the particular facts of the cases cited. If such was the threshold, then it would be far below the standards applied in this jurisdiction and elsewhere in the common law world.

Other jurisdictions

45. Where a legal burden is placed on an accused to disprove an element of an offence, they can be convicted notwithstanding that there is a doubt about their guilt. This is what is at stake. It is worth referring to the South African Constitutional Court case of *Mbatha*³³, where Langa J said as follows:

'[10] No legal system can guarantee that no innocent person ever be convicted. Indeed, the provision of corrective action by way of appeal and review procedures is an acknowledgement of the ever-present possibility of judicial fallibility.

Yet it is one thing for the law to acknowledge the possibility of wrongly but honestly convicting the innocent and then provide appropriate measures to reduce the possibility of this happening as far as is practicable; it is another for the law itself to heighten the possibility of a miscarriage of justice by compelling the trial court to convict where it entertains real doubts as to culpability and then to prevent the reviewing court from altering the conviction even if it shares in the doubts.'

46. In the High Court, Stack J was of the view that such a state of affairs could never be permitted: *'Put simply, a trial which permits conviction where there is a reasonable doubt as to the guilt of the accused is not a fair trial.'*³⁴

³² *G.I.E.M. and Others v Italy*, no. 1828/06 (28 June 2018).

³³ *S v Mbatha, S v Prinsloo* (CCT 19/95; CCT 35/95) [1996] ZACC 1 (9 February 1996) at paragraph 10.

³⁴ *C.W. v The Minister for Justice* [2022] IEHC 336 at paragraph 47.

47. This is a view which has been expressed with equal force in other jurisdictions. In the landmark U.S. case in respect of shifting the legal burden, *Winship*³⁵, the Supreme Court, per Harlan J, said:

'Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'

48. This approach reflected a focus, similar to the approach of the Irish Courts to Article 38.1, on the social value of justice being seen to be done. Harlan J said:

*'use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.'*³⁶

49. This protection was extended by the U.S. Supreme Court to 'affirmative defences', such as provocation, in the case of *Mullaney v Wilbur*³⁷, without any distinction being drawn between an element of an offence and a mitigatory defence. This is of note in the present case, as the Learned High Court Judge distinguished the outcome of *Heffernan*³⁸ on the basis that diminished responsibility related to a special mitigatory defence which was available to an accused notwithstanding that the elements of the offence had been proven.

50. However, in the later case of *Patterson v New York*³⁹, the Supreme Court split 4-3 and held that the legal burden of proof could, consistent with due process, be placed on the accused to prove the mitigatory defence of 'extreme emotional disturbance' in a case of murder. That defence approximates to our own defence of diminished responsibility.

³⁵ *Re Winship* 397 U.S. 358 (1970) at p.364

³⁶ *Ibid.*

³⁷ *Mullaney v Wilbur*, 421 U.S. 684 (1975).

³⁸ *DPP v Heffernan* [2017] 1 I.R. 82.

³⁹ *Patterson v New York* 432 U.S. 197.

51. In the context of assessing the section impugned in these proceedings, it must be questioned whether it is necessary to draw a critical distinction between an element of the offence, and a defence. What is characterised as a defence may remove the *mens rea* of an accused, or alter it so as to render the accused guiltless in respect of particular offence charged, though guilty of a lesser offence.

52. It is respectfully submitted that the essential test should be broader: as to whether a presumption of fact has the consequence that an accused can be convicted while a doubt remains about their guilt in respect of the offence charged. As noted by Dickson CJC in the Canadian case of *R v Whyte*⁴⁰:

‘The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.’

53. Referring with approval to *Whyte* in the UK House of Lords case of *R v Johnstone*⁴¹, Lord Nicholls said:

‘This consequence of a reverse burden of proof should colour one’s approach when evaluating the reasons why it is said that, in the absence of a persuasive burden on the accused, the public interest will be prejudiced to an extent which justifies placing a persuasive burden on the accused.’

54. In *Johnstone* a degree of deference was afforded to the choice of Parliament, in a manner that reflects the *Tuohy v Courtney* standard of review. Even so, Lord Nicholls said:

‘The court will reach a different conclusion from the legislature only when it is apparent the legislature has attached insufficient importance to the fundamental right of an individual to be presumed innocent until proved guilty.’

55. The House of Lords concluded that:

⁴⁰ *R v Whyte* [1988] 86 N.S. 328 (SCC) at 493.

⁴¹ *R v Johnstone* [2003] 1 W.L.R. 1736 at paragraph 50.

‘there must be a compelling reason why it is fair and reasonable to deny the accused person the protection normally guaranteed to everyone by the presumption of innocence.’

56. It is submitted that this is the minimum standard of review, for a statute that reverses the legal burden of proof. Deference to the choice of the Oireachtas is appropriate, having regard to the presumption of constitutionality and the separation of power, but there must still be a very constrained range of circumstances in which such reversal will be permissible and the courts will assess this in a rigorous way.

57. The application of such exacting standards is not universal across the common law world, however. In Australia, the transfer of the legal burden to an accused to disprove their knowledge of drug possession has been permitted, in a manner which appears out of step with similar provisions in Ireland and most other jurisdictions. This burden was justified on a rather pragmatic basis by the High Court of Australia in *Momcilovic v the Queen*⁴². Heydon J noted that while the placement of the legal burden on the defendant in relation to the possession of drugs might be *‘unpalatable’*, doing so increased *‘the likelihood of the accused entering the witness box more than a reverse evidential burden would’*.⁴³

The special case of mental disorder

58. While the Learned High Court Judge drew a distinction between the impugned section and other reverse onus provisions which do not relate to an element of the offence itself, transfer of the legal burden to disprove a core element of an offence does occur in Irish law, in at least one context.

⁴² *Momcilovic v The Queen* (2011) 245 CLR 1 at paragraph 467

⁴³ *Ibid.* In the context of certain online sexual offences against children, Australian law has also placed a legal burden on the accused to show that they did not intend to derive gratification from the presence of a child during sexual activity. The Australian Law Reform Commission has recommended reform in this area, with particular attention being paid to those provisions which reverse the burden in respect of essential elements of culpability, as these require the ‘strongest justification’.

59. Unlike diminished responsibility, the defence of insanity negatives *mens rea*. This is clear from the Judgment of this Honourable Court in *Abdi v DPP* where Charleton J held as follows:

‘... insanity has always been regarded on a better view of the relevant authorities as a fundamental negation of criminal responsibility... Basic to criminal liability is a guilty mind. In insanity that is completely absent.’

60. It is doubtful, however, whether that is properly to be seen as capable of being authority for the proposition that the imposition of a legal burden on an accused in respect of an element of a serious offence is permissible. In truth, in the case of insanity, as the words of Charleton J acknowledge, it is not that a particular element of a particular offence is in issue; rather the entire basis of criminal liability – a mind capable of forming the necessary intent – is undermined by the presence of mental disorder. That is a categorical distinction, which is really of no assistance to an analysis of a statute such as that at issue in these proceedings.

61. In other common law countries and under the ECHR, the transfer of the legal burden in respect of the insanity defence has been upheld as valid. For example, in the United States, the federal burden of proof has been codified in U.S.C. 18 17(b) which requires that ‘*clear and convincing evidence*’ of insanity be provided by the Defence.⁴⁴

62. The legal burden to prove insanity has never been subject to constitutional challenge in this jurisdiction. If it ever were, the justification offered might be the same as in the case of *R v Chaulk*, a Canadian case cited with approval in *Heffernan*⁴⁵ and *Abdi*⁴⁶: that the burden on the prosecution of disproving insanity beyond a reasonable doubt would be ‘*unworkable*’.

63. In *Chaulk*⁴⁷, the Canadian Supreme Court, *per* Larmer CJ, held that the transfer of the legal burden to prove insanity:

⁴⁴ At the state level however, the burden can still be apportioned as the legislature sees fit. For a time in the state of Oregon, the legal burden placed on the accused was actually to the standard of beyond reasonable doubt. Somewhat surprisingly, the Supreme Court upheld that burden as constitutional in *Leland v Oregon*, 343 U.S. 790 (1952).

⁴⁵ *DPP v Heffernan* [2017] 1 I.R. 82.

⁴⁶ *The People (at the suit of the DPP) v Yusif Ali Abdi* [2022] 2 ILRM 1.

⁴⁷ *Supra* note 1.

'... represents an accommodation of three important societal interests: avoiding a virtually impossible burden on the Crown; convicting the guilty; and acquitting those who truly lack the capacity for criminal intent. The result of this compromise is that some guilty people will be acquitted ... and some insane (and therefore not guilty) people will be convicted and will be stigmatized and punished as criminals. ...

This result is the inevitable consequence of the uncertainty of our scientific knowledge and of our commitment (as expressed in s. 11(d)) not to convict those who were insane at the time of the offence...

While the effect of s. 16(4) on the presumption of innocence is clearly detrimental, given the importance of the objective that the Crown not be encumbered with an unworkable burden and given that I have concluded above that s. 16(4) limits s. 11(d) as little as is reasonably possible, it is my view that there is proportionality between the effects of the measure and the objective.'

64. The analysis of the Court was clear-eyed and stark: transferring the legal burden would result in the innocent being convicted in some cases. Indeed, the facts of *Abdi* demonstrate the real risk of the innocent being convicted, despite *bona fide* efforts to assess the culpability of an accused⁴⁸.

The possible application of the mental disorder approach to prosecutions generally

65. It is submitted that a compelling basis is required to justify the transfer of the legal burden, where this may result in the conviction of the innocent or in doubts about the guilt of the accused. In this regard, the test applied in *Chaulk*, that the burden on the prosecution would be '*unworkable*' if transfer of the burden was not permitted, may be capable of a broader application. If a serious offence cannot be prosecuted, then the consequences for protection of the community and for the vindication of the rights of the victim would be such that

⁴⁸ There is even an example of a jury convicting an accused, notwithstanding that the prosecution had supported the insanity defence: *DPP v Alchimionek* [2019] IECA 49.

rights beyond those of an accused would then have significant weight in a proportionality assessment.

66. In the U.S. Supreme Court in *Patterson v New York*⁴⁹, the Court had split in respect of the constitutionality of transferring the legal burden to prove a defence equivalent to diminished responsibility. On behalf of the majority permitting the transfer, White J first acknowledged the Court's previous finding in *Winship*, that:

*'the requirement of proof beyond a reasonable doubt in a criminal case is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." Winship, 397 U.S. at 397 U. S. 372 (Harlan, J., concurring).'*⁵⁰

67. He continued, however:

*'The social cost of placing the burden on the prosecution to prove guilt beyond a reasonable doubt is thus an increased risk that the guilty will go free. While it is clear that our society has willingly chosen to bear a substantial burden in order to protect the innocent, it is equally clear that the risk it must bear is not without limits; and Mr. Justice Harlan's aphorism provides little guidance for determining what those limits are. Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.'*⁵¹

68. If it is constitutionally acceptable to allow for the possible conviction of the innocent, in order to vindicate the rights of victims and the community, then this must be based on a proper evidential grounding showing why a prosecution would otherwise be unworkable. It is submitted that this test will rarely be met, as it is questionable to what extent the difference between a legal and evidential burden on the defence will actually be decisive. As Powell J, on behalf of the minority, noted in *Patterson*:

⁴⁹ *Patterson v New York*, 432 U.S. 197 at 224.

⁵⁰ *Ibid.* at p.208.

⁵¹ *Ibid.*

'Ever since this Court's decision in Davis, federal prosecutors have borne the burden of persuasion with respect to factors like insanity, self-defense, and malice or provocation, once the defendant has carried [the evidential burden]...

*I know of no indication that this practice has proven a noticeable handicap to effective law enforcement.'*⁵²

69. The High Court decision in *McNally v Ireland*⁵³ is consistent with the proposition that the creation of an unworkable burden on the prosecution may merit the transfer of the legal burden to the accused. S.99 of the Charities Act 2009 created an offence of selling a mass card otherwise than pursuant to an arrangement with a recognised person. The legislation provided for a system of verification with a Bishop or a provincial (of which it would appear there were 7000 worldwide) by which it could be ensured that a mass would take place. The impugned section provided that in a prosecution, it was to be presumed that no such arrangement was in place. This presumption could be rebutted by an accused on the balance of probabilities. McMenamin J held that absent such a legislative framework, the existence of an offence would not be susceptible to proof as the prosecution would be required to negative the possibility of thousands of possible arrangements that an accused might have with a Bishop or provincial.

70. The outcome of *McNally* is also consistent with cases including from Canada⁵⁴ and the United Kingdom⁵⁵, in respect of placing an onus on an accused in a regulatory prosecution to prove matters peculiarly within their own knowledge, such as the existence of a valid licence for what would otherwise be unlawful conduct. It must, however, remain open to question whether, beyond the special case of insanity / diminished responsibility or regulatory offences, such as in *McNally*, the imposition of a legal burden on an accused could be constitutionally permissible.

⁵² *Ibid* at p.197.

⁵³ *McNally v Ireland* [2011] 4 IR 431.

⁵⁴ *R v Schwarz* (1988) 55 D.L.R. (4th) 1 (S.C.C.).

⁵⁵ *R v Hunt* [1987] A.C. 352, *R v Edwards* [1975] Q.B. 27 (CA).

Presumptions of fact and proportionality

71. The impugned provision creates a presumption of fact: that a person who has sex with a child under 17 must have known that they were under 17. This is a mandatory, persuasive presumption: mandatory, as the jury must find the presumed fact unless the accused persuades them otherwise; and persuasive, in that the accused must prove otherwise to the civil standard of proof.

72. In *McNulty v Ireland*⁵⁶, Murray J. as he then was, addressed a presumption of fact created by statute in the context of the shifting of an evidential burden. He said as follows:

‘... it would never be permissible to have a rule of law, in a statute or otherwise, which arbitrarily deemed proof of a particular fact to be evidence of another fact, when there was no reasonable connection between the two. In other words, any statutory provision which declares that proof of one fact shall be evidence as to the existence of another fact, the former fact must be reasonably capable of giving rise to a conclusion that the latter fact may be inferred.’

73. This finding has particular resonance in the context of statutes which shift the legal burden. Some examples from other common law jurisdictions demonstrate this. In the South African case of *Mbatha*⁵⁷, cited above, a presumption required that the jury find, unless persuaded to the contrary by the accused, that a firearm found in a premises was in the possession of the occupier of that premises. Despite the Constitutional Court being presented with evidence of a national crisis arising from gun crime and the difficulty in proving such offences, the Court declared the presumption unconstitutional and held that:

‘The application of the presumption does not depend on there being a logical or rational connection between the presumed fact and the basic facts proved, nor can it be claimed that in all cases covered by the presumption, the presumed fact is something which is more likely than not to arise from the basic facts proved.’

⁵⁶ *McNulty v Ireland and Attorney General* [2015] 2 IR 592 at paragraph 6

⁵⁷ *Supra* note 33.

74. The US Supreme Court has held that the due process clause in the US Constitution imposes limits on the power of Congress to *‘make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated’*.⁵⁸

75. The U.S. Supreme Court, in *County Court of Ulster County v Allen*⁵⁹, distinguished between the approach appropriate to a permissive presumption on the one hand and a mandatory presumption on the other. A *‘more likely than not standard’* was appropriate where the presumption was permissive only; but a mandatory presumption (one which created either an evidential or a legal burden to disprove the presumption) was deemed to be *‘a far more troublesome evidentiary device’*. The Court held that such a *‘presumption must be rejected unless the evidence necessary to invoke the inference is sufficient for a rational jury to find the inferred fact beyond a reasonable doubt.’*⁶⁰

76. A similar approach was taken in the Canadian Supreme Court case of *R v Morrison*⁶¹, in respect of an offence of child ‘luring’. The facts related to an on-line encounter between the accused and an undercover police officer who was posing as a young girl. The issue of fact was whether the accused genuinely believed the police officer was underage, or whether he believed the person he was communicating with was an adult who was ‘role-playing’. The section at issue created a presumption that proof that the other person was represented to the accused as being under 16 would, absent evidence to the contrary, stand in for proof of the essential element that the accused believed the other person was under 16.

77. The Canadian Supreme Court said:

‘The nexus requirement for demonstrating that a statutory presumption does not offend the presumption of innocence is strict: the connection between proof of the substituted fact and the existence of the essential element it replaces must be nothing less than inexorable. An inexorable link is one that necessarily holds true in all cases. Here, the mere fact that a representation of age was made to the accused does not lead inexorably

⁵⁸ See *Tot v United States* 319 US 463 (1943) at 467 per Roberts J. The test adopted by the Court in respect of the constitutionality of such a provision was that there must be *‘rational connection between the facts proved and the fact presumed’*.

⁵⁹ *County Court of Ulster County v Allen* 442 US 140 (1979).

⁶⁰ *Ibid.*

⁶¹ *R v Morrison* [2019] 2 SCR 3.

to the conclusion that the accused believed that representation, even absent evidence to the contrary... This contravenes the presumption of innocence.'

78. The Commission would respectfully adopt as correct, the principle that a presumption which entails the transfer of the legal burden will not be proportionate if the facts which ground the application of the presumption are not of themselves sufficient to amount to proof beyond reasonable doubt.

Application of these principles to S.3(5) of the 2006 Act

79. In the instant case, the presumed fact created by the statute is that an accused who has sex with a child under the age 17 was not mistaken about their age. Unlike other contexts in which a presumptions exist in Irish criminal law, such as the presumption of sanity or the presumption that an accused intended the natural and probable consequences of their actions, it is questionable whether this presumption matches well with reality. Just because a person has sex with someone under the age of 17, it is not overwhelmingly likely from that fact alone that they must have known the child's age, or have been subjectively reckless in respect of their age.

80. There are clearly scenarios in which a person, most likely a young person, might mistakenly believe without any culpable recklessness on their part, that their sexual partner is over the age of 17. It is respectfully submitted that a presumption to the contrary cannot validly be drawn with sufficient certainty to justify the imposition of a legal burden.

81. The Commission notes the comments of the House of Lords in *R v G*⁶², relied on by the Appellants, in respect of the inherent moral culpability of any person who has sex with a child. The reasoning of the House of Lords relies heavily on the dissenting Judgment of McLachlin J in the Canadian cases of *R v Hess*, *R v Nguyen*⁶³. But this Court in *CC*, per Hardiman J, described McLachlin J's reasoning as '*crudely utilitarian*'⁶⁴, and irreconcilable with our own Constitution. It is not constitutionally permissible to criminalise a person on the basis that they should have taken care to ensure their sexual

⁶² *Supra* note 26

⁶³ *R v Hess, R v Nguyen* (1990) 2 S.C.R. 906

⁶⁴ *Supra* note 11 at paragraph 58.

partner was over 17, without also establishing to the requisite standard of proof that they did not in fact take such care.

82. There may well be circumstances in which an accused has been subjectively reckless in respect of the age of their sexual partner. It is not suggested that the law does not criminalise such conduct. It is submitted that proof of recklessness, in the sense of advertent to but disregarding a serious risk, establishes the *mens rea* of the defilement offence. However, the availability of a defence of reasonable mistake encompasses circumstances in which the accused will be mentally innocent, in that they were genuinely and reasonably mistaken as to age and not reckless.

83. Seen in this way, the defence of mistake is correctly described as the negating of the *mens rea*. As noted in *Charleton & McDermott's Criminal Law and Evidence*, at [25.01]:

'Where a statute requires that an accused act culpably, with intent or recklessness or knowledge or belief, the failure to prove that definitional mental element is an absence of requisite proof whereby the offence is made out. It is incorrect, in this context, to refer to a mistake as a defence at all, as it is merely an application of the rule that the prosecution must prove all the relevant elements of the offence.'

84. To impose criminal liability notwithstanding the absence of a culpable mental element would appear to treat the accused as a *'little more than a means to an end'*, contrary to the prohibition of this Court in *CC*. For the same reason, imposing a legal burden on the accused which will lead to the conviction of the mentally innocent would also breach the principles set out by Hardiman J in *CC*.

85. The Commission further submits that it has not been demonstrated that it is necessary to place a legal, as opposed to an evidential burden, on an accused in a defilement prosecution. In the case of both burdens, the accused must engage with the evidence against them, mostly likely by setting out, during garda interview or in the witness box, the reasonable grounds that led them to their genuine belief. If the accused does not do so, they will likely be convicted irrespective of the burden of proof they carry. If an accused does engage with these necessary proofs, what then is the difficulty with the jury assessing the evidence in the usual way and with the presumption of innocence intact?

Proportionality and evidence

86. Specific considerations have been held to be relevant in other jurisdictions in the context of assessing the constitutionality of a reverse burden of proof. These can be described as minimum standards or proportionality considerations: whether the presumption of fact matches well with reality; whether the legal burden relates to an element of the offence or a mitigatory defence; or relates to a fact peculiarly within the knowledge of the accused. These are all issues of law, which will not ordinarily require evidence.

87. In *Donnelly v Minister for Social Protection & Ors*⁶⁵, O'Malley J referred to the Canadian case of *Oakes*, where various national reports and international instruments were relied on by the Canadian Supreme Court when assessing the validity of the legislation. She continued as follows:

There may... be many cases where it is possible to conduct the argument largely on the basis of the terms of the statute without the need for evidence going beyond the effect of the measure on the interests of the plaintiff. As it happens, the courts in this jurisdiction have dealt with the proper application of evidential presumptions and reverse onuses in cases very similar to Oakes. Although this has been considered in the context of appeals against criminal convictions (see, e.g., DPP v. Smyth [2010] 3 I.R. 688 and DPP v Heffernan [2017] 1 I.R. 82), the issues could also have been dealt with in a challenge to the constitutionality of the legislation. Had that path been taken, it is entirely conceivable that the litigation would have focussed on the terms of the provision and on legal argument, with, perhaps, very little evidence being required by either party.'

88. In the context of this appeal, Oireachtas Committee reports have been put before the Court. The Commission does not suggest that these reports are of no value to the Court's assessment. For the purposes of statutory interpretation, this Court has on occasion⁶⁶ had

⁶⁵ *Donnelly v Minister for Social Protection & Ors* [2022] 2 ILRM 185 at paragraph 182.

⁶⁶ *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, *Maheer v Attorney General* [1973] IR 140, *Twil Ltd v Kearney* [2001] 4 IR 490.

regard to the content of reports which were the impetus for the enactment of legislation. That issue does not arise here, but the reports considered in the Court below may be instructive in respect of the concerns motivating the enactment of the legislation.

89. The issue whether the imposition of a legal burden on an accused is necessary in order to avoid the prosecution burden being rendered unworkable is one which a court could potentially assess without recourse to evidence. But if evidence either for or against the proposition is put before a court, then the court can and ought to have regard to it.
90. Academic commentary, such as *Kelly, The Irish Constitution*⁶⁷ and *Foley, 'The proportionality test- present problems'*⁶⁸, suggests that there has been inconsistency and overlap between the application of the *Tuohy* and *Heaney* tests. The Commission would note that almost universally in the international caselaw, proportionality reviews of varying degrees of intensity have been conducted. But this is often in conjunction with comments acknowledging the deference to be afforded to the legislature in respect of choices made, particularly where delineating substantive criminal liability. That is undoubtedly a matter of social policy, to which a degree of deference is due.
91. However, the respectful position of the Commission is that if *Tuohy* is interpreted to require that significant weight is to be afforded to the choice of the Oireachtas in determining when it is appropriate to shift the legal burden, then that standard would be unduly deferential. The justification for transferring the legal burden is not primarily dependent on questions of social policy, like the delineation of criminal liability is. It is the impact of the transfer on the fairness of a criminal trial which determines whether the measure is proportionate and constitutional.
92. As noted by Stack J, once policy choices are reflected in legislation and applied to a criminal trial, the impact on the trial process is a question of law. In this regard, there are specific minimum standards that apply to of the shifting of the legal burden. The Court is well placed to identify, as a matter of law, whether these minimum standards have been met.

⁶⁷ Hogan et al., “*Kelly: The Irish Constitution*” (2018) (Bloomsbury Professional) 5th Edn., at [7.193 – 7.1.98]

⁶⁸ B. Foley, “The Proportionality Test: Present Problems” (2008).

Mark Lynam BL

Sean Guerin SC

1 March 2023

[8,621 words]