

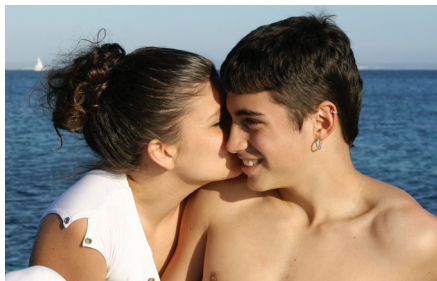
# Life in crime

## Benjamin Newton discusses the inadequacy of the law on sexual activity in adolescence

**IN THIS COLUMN** on 20 May 2008 I discussed the Court of Appeal's decision in *R v T*, whereby the abolition of the defence of *doli incapax* was confirmed and the convictions upheld of a 12-year-old appellant who had pleaded guilty to 12 counts of causing or inciting a child under 13 to engage in sexual activity. As if to highlight the potential inadequacy of the criminal law when faced with sexual activity in adolescence, on 18 June 2008 the House of Lords handed down judgment in *R v G* [2008] UKHL 37.

The appellant pleaded guilty to the offence of rape of a child under 13 (contrary to s.5 of the Sexual Offences Act 2003), the prosecution accepting that the 12-year-old complainant had consented (in the ordinary sense of the word) and told the 15-year-old defendant that she was herself 15. The Court of Appeal, despite substituting the original sentence of a 12-month Detention and Training Order with a conditional discharge, dismissed the appeal against conviction but certified two questions as being of general public importance. The first question that the House of Lords considered was whether a criminal offence of strict liability violated Art.6(1) and/or Art.6(2) ECHR. The House was unanimous in finding no violation in the instant case, with the most thorough treatment of the arguments coming in the judgment of Lord Hope. Having observed that Art.6 is concerned with procedural fairness, and does not guarantee any particular content of the individual's civil rights, his Lordship interpreted the key point of *Salabiaku v France* [1988] 13 EHRR 379 as being that a state is free to apply the criminal law to any act which is not carried out in the exercise of a Convention right.

It was therefore concluded that as long as the prosecution bears the burden of proof of all elements of the offence, then an offence of strict liability will not violate Art.6(2). Baroness Hale, Lord Carswell, and Lord Mance, all agreed with Lord Hope. Lord Hoffman reaffirmed the position stated in *R v Gemmell* [2003] 1 Cr App R 343 – that the fairness of the provisions of the substantive law of the contracting states is not a matter for investigation – and, unlike Lord Hope, suggested that *Salabiaku* should simply be ignored.



More contentious among their Lordships was the second question: whether convicting a child of rape contrary to s.5 when the circumstances were such that his offence properly fell within s.13 (which deals with sex offences committed by persons under 18 – and more importantly is not termed ‘rape’) was compatible with his Art.8 rights.

Unfortunately Lord Hoffman's analysis of this question covers little more than one page (in what is overall a rather ‘succinct’ judgment) and demonstrates a reluctance to engage with the issues in the same depth that Lord Hope or Baroness Hale achieved subsequently. Rather surprisingly, his Lordship found the case to have “nothing to do with article 8 or human rights”, and simply stated that either the state is justified in treating conduct as unlawful or it is not. “Prosecutorial policy and sentencing do not fall under article 8. If the offence in question is a justifiable interference with private life, that is an end of the matter”.

### Not disproportionate

Lord Hope (in a contrastingly detailed and well-reasoned judgment) explicitly disagreed with that proposition, observing that “where choices are left to the prosecutor they must be exercised compatibly with the Convention rights”. In considering whether the decision in this case was compatible, his Lordship did not find it to be disproportionate for a child under 15 to be prosecuted for committing a consensual sexual act with a child under 13, acknowledging the need to protect such children from physical and psychological harm, but did find “grounds for thinking that the sanctions that can be imposed under s.13 for mutual sexual activity by a person under 18 with a child under 13 provide all that is needed by way of punishment that is proportionate to the offence”.

Given that the offence in this case fell properly within the ambit of s.13, Lord Hope found the conviction under s.5 to be disproportionate and consequently unlawful.

Baroness Hale adopted a markedly different stance, emphasising the need for every male (irrespective of age) to restrain himself and to “take responsibility for what he chooses to do with what is capable of being, not only an instrument of great pleasure, but also a weapon of great danger”. In the course of a judgment that never ventured far from the perspective of the female complainant, it was Baroness Hale alone who hinted at facts that went behind the acceptance of the basis of plea. Predictably enough then, the “clear rule that children under 13 are incapable of giving any sort of consent . . . does not . . . amount to a lack of respect for the private life of the penetrating male”. Furthermore, “in view of all the dangers resulting from underage sexual activity, it cannot be wrong for the law to apply that label [rape] even if it cannot be proved that the child was in fact unwilling”. The rationale was therefore that a child complainant must be protected and their immaturity (manifested in a legal inability to consent to sex) makes even a mutual sexual act appropriately describable as rape, however a child defendant must understand the message that s.5 reinforces, which is that penetrative sex is the most serious form of sexual activity and can cause long-term physical and psychological harm, and take full responsibility for their actions. The conviction under s.5 was consequently held to be proportionate.

In broad terms Lord Carswell agreed with Lord Hope, and Lord Mance with Baroness Hale, and so the judgment of Lord Hoffman – which seemed to have little to do with the rationale of either camp – proved decisive and the appeal was dismissed. Unsurprisingly, the matter will now progress to Strasbourg on both the Art.6 and Art.8 issues. At the very least it is to be hoped that they will find the case to have something to do with human rights.

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