**Merely naughty or seriously wrong? ‘Childish sexual experimentation’ and the presumption of doli incapax**

**R v PF [2017] EWCA Crim 983**

**Keywords: Doli incapax; historic sexual offencding;**

On 14th September 2016 PF, then aged 47, was charged with sexual offences against two of his sisters, X and Y. He was convicted of two counts involving X, namely indecent assault and indecency with a girl under 14. He was acquitted of three sexual offences against Y. The trial judge imposed a six month community order with a four month curfew, to be served concurrently on each count.

PF had been between the ages of 10 and 14 at the time of the offences, and X was then aged between 9 and 13. X had been unsure when the offences took place. Accordingly, the trial judge treated PF as being under 14 so that the rebuttable presumption of doli incapax applied, ‘meaning [PF], as a child, was to be deemed incapable of committing a crime unless the prosecution could rebut that presumption’ (at [8]).

The judge gave the jury written directions, which explained that the prosecution had to prove:

a) the genital touching took place in the way described on the Indictment and

b) he knew at the time that right thinking people would say touching his sister in this way (or her doing so to him) was indecent and

c) he knew at the time that this act was seriously wrong not merely naughty or mischievous. (at [11])

After retiring to consider their verdict, the jury asked a question about the age at which a person becomes criminally culpable. In response, the judge essentially repeated his written directions and reminded the jury that they had to be sure both that the physical act had taken place and that PF ‘realised it [was] indecent and seriously wrong’ (at [12]).

PF appealed on the single ground that the judge ought to have directed the jury that, in order to be satisfied that PF knew his conduct was seriously wrong, ‘there had to be clear positive evidence distinct from the doing of the alleged act itself’ (at [13]).

During the course of the trial, the prosecution adduced evidence from both X and Y that PF coerced and bribed them for sexual favours. Their home life was ‘clearly difficult’ (at [3]). There was evidence that the children did not have enough to eat and X testified that she touched PF sexually because he bribed or rewarded her with food or cigarettes. She also stated that she was ‘fearful’ of PF (at [22]).

PF denied any sexual contact with Y but admitted there had been a ‘modest degree of sexual contact’ with X (at [24]). He described ‘looking at each other, touching and finding out about different parts of our bodies’, adding that ‘[i]t didn’t seem wrong to us’ (at [24]).

On appeal, counsel for the prosecution submitted that the judge had directed the jury extensively concerning PF’s ‘bullying and coercive behaviour’, arguing that such conduct ‘was evidence well capable of rebutting the presumption of incapacity which the jury must have considered as part of their conclusions’ (at [21]).

Counsel for PF pointed out that ‘the jury were never directed specifically to decide whether the bullying or coercion ever occurred’ (at [25]). Notably, PF denied any sexual activity with Y and was acquitted of all offences alleged against Y (although in relation to two counts, this was on the direction of the judge following successful submissions of no case to answer). PF had, however, admitted sexual contact with X and ‘it was possible that convictions resulted simply from the jury’s satisfaction that the sexual acts took place against X’ (at [24]).

**Held, allowing the appeal,** the jury ought to have been directed that the presumption of doli incapax could only be rebutted by evidence independent of the acts alleged. In this case they were not told that the alleged bullying and coercion was relied on by the Crown as independent evidence capable of rebutting the presumption.

PF had admitted childish sexual experimentation with X. In such a case ‘it is particularly important to focus the jury’s attention upon the evidence said to be properly capable of demonstrating that the particular defendant must have known that his conduct went well beyond the “mere rude or naughty”’ (at [28]).

**Commentary**

The presumption that a child lacked the capacity to commit a criminal offence (*doli incapax*)*,* applied to children aged 10-13 until its abolition by s. 34 of the Crime and Disorder Act 1998. The burden had been on the prosecution to rebut the presumption by adducing clear and cogent evidence that the child knew their conduct was seriously wrong, rather than an act of naughtiness or childish mischief (*R v Gorrie* (1919) 83 JP 136; *B v R* (1958) 44 Cr App R 1; *C v DPP* [1996] AC 1). In the leading case of *C v DPP,* the House of Lords confirmed (at p.38) that this evidence ‘must not be the mere proof of the doing of the act charged, however horrifying or obviously wrong that act may be’. Evidence of things said or done by the child before or after the alleged offence might be relied upon to rebut the presumption, but such evidence had to be approached with care as it could be equivocal. For example, evidence of running away after committing an offence would not usually be sufficient to establish the requisite capacity because a child who knows they have been naughty is just as likely to run away as a child who knows their conduct is seriously wrong (*C v DPP* at p39)*.*

Evidence confirming that a child was *doli capax* could include their responses to police questioning, a psychological or psychiatric assessment, or evidence from a teacher, parent or social worker as to the child’s general ability to understand the nature of their conduct. The doctrine was said to cause difficulties for the prosecution, who would be unable to rely on responses to the police if the child had remained silent in interview. Similarly, there was no power to compel a child to submit to a psychological or psychiatric examination. In addition, parents, teachers or social workers were often unwilling to testify as to do so could jeopardise their ongoing relationship with the child in question. The practical difficulties faced by prosecutors in rebutting the presumption contributed to its eventual abolition.

However, s. 34 of the 1998 Act is not retrospective. Thus, whenever a defendant is prosecuted for offences arising out of conduct that took place before 30th September 1998 and the defendant was (or may have been) aged 10-13 at the time of that conduct, a prosecutor must adduce independent evidence that the defendant had, at the time, the capacity to understand that his acts were seriously wrong, as opposed to merely naughty. This principle was recently reiterated by the Court of Appeal in *R v DM* [2016] EWCA Crim 674.

DM was convicted of three offences involving sexual activity with his half-sister. It was unclear from the complainant’s evidence whether DM was aged 13 or 14 at the time of the conduct that was the subject of the first count on the indictment. The trial judge directed the jury ‘in terms similar’ to the judge in the present case (at [17]) and did not refer to the need for independent evidence to establish DM’s knowledge that the act was seriously wrong. The Court of Appeal quashed DM’s conviction on the relevant count.

In *DM*, as in the present case, the jury heard evidence of the appellant’s conduct beyond the evidence of the offences that were alleged. The prosecution adduced testimony about two earlier acts of indecency by DM against the same complainant. The first incident involved DM persuading the complainant to kiss him with her tongue, after which he told her that, if asked by her mother, she should deny that anything had happened. The second incident involved DM trapping the complainant in the changing room at a swimming pool until she performed oral sex upon him. As in the present case, the jury had not been specifically directed that this could constitute independent evidence capable of rebutting the presumption. In DM’s case, it was not suggested that the admission of this extraneous evidence, and its consideration by the jury, was sufficient to enable the Court of Appeal to consider the conviction was safe. Similarly, in the present case, in the absence of a specific direction as to the relevance of PF’s alleged bullying and coercive behaviour, the mere admission of independent evidence could not save the conviction.

*PF* confirms that in any case where a defendant is (or may have been) below the age of 13 at the time of an offence that took place before 30th September 1998, it is essential that the prosecutor adduces separate evidence to establish the defendant’s capacity and that the judge draws the jury’s attention to that evidence and to its potential effect on the presumption of *doli incapax*.

Here, if the jury had been properly directed, and if they had been sure that X’s account of PF’s bullying and coercive behaviour was true, they would surely have found that he had the relevant capacity. Alternatively, if they believed that PF’s account of childish sexual experimentation was (or might have been) right, they would likely have found that the presumption had not been rebutted. , Acknowledging that children may well engage in such behaviour without understanding it to be ‘seriously wrong’, McCombe LJ quoted from the Australian case of *RP v The Queen* [2016] HCA 53 (at [33]):

“It is common enough for children to engage in forms of sexual play and to endeavour to keep it secret, since even very young children may appreciate that it is naughty to engage in such play. The appellant’s conduct went well beyond ordinary childish sexual experimentation, but this does not carry with it a conclusion that he understood his conduct was seriously wrong in a moral sense, as distinct from it being rude or naughty.”

An interesting aspect of PF’s case was that he and X were just one year apart in age. Clearly there was a disparity between the accounts of X and PF and, had X’s account also been of childish experimentation, perhaps there would have been no prosecution. However, if a defendant in a similar case were to be prosecuted for conduct taking place after 30th September 1998, a jury would not have to consider whether he regarded his conduct as seriously wrong. *Doli incapax* was abolished from that date, so childish experimentation would be no defence. Of course, one could argue that prosecutorial discretion would prevent charging where it is accepted that a young defendant was engaging in consensual sexual experimentation with another child of a similar age. But prosecutorial discretion is never a very satisfactory for the reason that it is just that: a discretion. Whether someone as young as 10 should be exposed to even the potential of criminal conviction for ‘ordinary childish sexual experimentation’ is surely a matter that merits debate. As some have argued recently, discussion of the minimum age of criminal responsibility may be politically unpopular but to avoid the issue is to disregard the available evidence on developmental immaturity and the abilities of children to regulate their behaviour (see, for example R. Arthur, ‘Exploring Childhood, Criminal Responsibility and the Evolving Capacities of the Child: The Age of Criminal Responsibility in England and Wales’ (2016) 67(3) NILQ 269, B Goldson ‘Unsafe, Unjust and Harmful to Wider Society: Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales’ [2013] 13(2)Youth Justice 111).

In 2012 an open letter was signed by more than 50 individuals and organisations with expertise in youth justice matters, calling on the government to accept the need to raise the age of criminal responsibility (www. https://www.theguardian.com/society/2012/dec/05/age-criminal-responsibility-childrens-rights). England and Wales currently has one of the youngest ages of criminal responsibility in Europe; ten years of age is well below the international average and breaches international rights instruments. Lord Dholakia’s Private Members Bill, which seeks to raise the minimum age of criminal responsibility to 12, will receive its Second Reading in the Lords on Friday 8th September 2017. Perhaps it is also time to consider how the law regulates young people’s sexuality and sexual experimentation.