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Mistake Of Age As A Defense To Statutory Rape

MISTAKE OF AGE AS A DEFENSE TO STATUTORY RAPE

The uniform rule in the United States has been that a mistake as to the age of a female is not a defense to the crime of statutory rape.[1] It has been followed even though the defendant had a reasonable belief,[2] had exercised care to find out her age,[3] or had been told by the female that she was over age.[4] This rule is an exception to the general defense of mistake of fact,[5] which states that if the defendant

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[1]Miller v. State, 16 Ala. App. 534, 79 So. 314 (1918); People v. Ratz, 115 Cal. 132, 46 Pac. 915 (1896); Manship v. People, 58 P.2d 1215 (Colo. 1936); Askew v. State, 118 So. 2d 219 (Fla. 1960); People v. Lewellyn, 314 Ill. 106, 145 N.E. 289 (1924); Heath v. State, 173 Ind. 296, 90 N.E. 310 (1910); Commonwealth v. Murphy, 165 Mass. 66, 42 N.E. 504 (1896); People v. Gengels, 218 Mich. 632, 188 N.W. 398 (1922); State v. Houx, 109 Mo. 654, 19 S.W. 35 (1892); State v. Duncan, 82 Mont. 170, 266 Pac. 400 (1928);

People v. Marks, 146 App. Div. 11, 130 N.Y. Supp. 524 (1911); State v. Wade, 224 N.C. 760, 32 S.E.2d 314 (1944); Zent v. State, 3 Ohio App. 473 (1914); Law v. State, 92 Okla. Crim. 444, 224 P.2d 278 (1950); Edens v. State, 43 S.W. 89 (Tex. Crim. App. 1897); Lawrence v. Commonwealth, 71 Va. (30 Gratt.) 845 (1878); United States v. Crimmins, 123 F.2d 271 (2d Cir. 1941) (dictum); State v. Suennen, 36 Idaho 219, 209 Pac. 1072 (1922) (dictum); State v. Dombroski, 145 Minn. 278, 176 N.W. 985 (1920) (dictum); accord, Anderson v. State, 384 P.2d 669 (Alaska 1963) (contributing to delinquency of minor by persuading her to engage in sexual intercourse);

Brown v. State, 23 Del. (7 Penne.) 159, 74 Atl. 836 (1909) (harboring a prostitute under age of eighteen); State v. Sherman, 106 Iowa 684, 77 N.W. 461 (1898) (assault with intent to commit rape on a female under age of thirteen); State v. Johnson, 85 Kan. 54, 116 Pac. 210 (1911) (receiving female under eighteen for purpose of prostitution); Commonwealth v. Sarricks, 161 Pa. Super. 577, 56 A.2d 323 (1948) (contributing to delinquency of minor by engaging in sexual intercourse).

[2]Heath v. State, 173 Ind. 296, 90 N.E. 310 (1910); State v. Houx, 109 Mo. 654, 19 S.W. 35 (1892).

[3]Manning v. State, 43 Tex. Crim. 302, 65 S.W. 920 (1901).

[4]People v. Marks, 146 App. Div. 11, 130 N.Y. Supp. 524 (1911); Edens v. State, 43 S.W. 89 (Tex. Crim. App. 1897).

[5]E.g., Stone v. United States, 167 U.S. 178 (1897); People v. Cohn, 358 Ill. 326, 193 N.E. 150 (1934); Brown v. Commonwealth, 86 Va. 466, 10 S.E. 745 (1890).

" 'That a mistake of facts on reasonable grounds, to the extent that, if the facts were as believed, the acts of the prisoner would make him guilty of no offense at all, is an excuse....' " The Queen v. Tolson, 23 Q.B.D. 168, 190 (1889). See Perkins, Criminal Law 825 (1957); 1 Wharton, Criminal Law and Procedure 5157 (Anderson ed. 1957).

"The defendant's criminality must be determined by his state of mind toward the situation in which he acted, and his state of mind will depend upon his impression of the facts. Hence he should be dealt with as if the facts were what he believed them to be. Then if, according to his belief concerning the facts, his act is criminal, he has the criminal mind as distinguished from motive, desire, or intention, and should be punished. If, on the other hand, his act would be innocent provided the facts were what he believed them to be, he does not have the criminal mind, and consequently should not be punished for his act." Keedy, Ignorance and Mistake in the Criminal Law, 22 Harv. L. Rev. 75, 82 (1908).

believed there existed certain facts, which had they been true would have rendered the action lawful, then he was not guilty because he was incapable of entertaining the intent[6] necessary to constitute the crime.

The recent California case of *People v. Hernandez*[7] brings into question the validity of the rule that mistake as to the age of the female is no defense. The defendant was charged with statutory rape.[8] During the trial the defendant attempted to present evidence that he had a reasonable good faith belief the girl was over eighteen years old. The trial court's refusal to allow the introduction of this evidence was the sole grounds for appeal. The Supreme Court of California in a unanimous decision held that it was improper to exclude this offer of proof. The conviction was reversed, and the sixty-eight year old precedent of *People v. Ratz*[9] was overruled. The basis for the decision was the application of the defense of mistake of fact to the crime of statutory rape. "[I]f he participates in a mutual act of sexual intercourse, believing his partner to be beyond the age of consent, with reasonable grounds for such belief, where is his criminal intent?"[10] "[I]n the absence of a legislative direction otherwise, a charge of statutory rape is defensible wherein a criminal intent is lacking."[11] The court, feeling that the previous decisions in California did not give proper emphasis to intent, reasserted the necessity and importance of establishing intent.[12]

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[6]For a discussion of the mental element in crime see Remington, The Mental Element in Crime—A Legislative Problem, 1952 Wis. L. Rev. 644; Sayre, Mens Rea, 45 Harv. L. Rev. 974 (1932).

[7]39 Cal. Rptr. 361, 393 P.2d 673 (1964).

[8]Cal. Pen. Code § 261. "Rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under either of the following circumstances:

1. Where the female is under the age of eighteen years;
2. Where she is incapable, through lunacy or other unsoundness of mind, whether temporary or permanent, of giving legal consent;
3. Where she resists but her resistance is overcome by force or violence;
4. Where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, or by any intoxicating narcotic, or anesthetic substance, administered by or with the privity of the accused;
5. Where she is at the time unconscious of the nature of the act, and this is known to the accused;
6. Where she submits under the belief that the person committing the act is her husband, and this belief is induced by an artifice, pretense, or concealment practiced by the accused, with intent to induce such belief."

[9]115 Cal. 32, 56 Pac. 915 (1896).

[10]People v. Hernandez, 39 Cal. Rptr. 361, 364, 393 P.2d 673, 676 (1964).

[11]Id. at 365, 393 P.2d at 677.

[12]The California court's renewed emphasis on the necessity of intent can be seen in the case of People v Vogel, 46 Cal. 2d 798, 299 P.2d 850 (1956). This was a

An examination of the cases holding that mistake of age is no defense reveals that two different approaches have been used to reach this result. The first view states that the defendant acted at his peril and is strictly liable for his act.[13] This approach, in effect, holds that neither general nor specific intent is a necessary element of the crime. The second view recognizes general intent as a necessary element, but it holds that, while the defendant did not have the intent to commit statutory rape, he did have an intent to do something wrong. This intent to do a lesser wrong is enough to establish the mental element necessary for statutory rape.[14]

Strict liability is the most popular rationale used to reject mistake of age as a defense. This rationale holds that no criminal intent is required to establish the crime. Since mistake of fact is a defense only in so far as it negates intent, it has no effect in this type of crime. Until the principal case, California had used this approach. *People v. Ratz* held that the defendant acted at his peril and would "not be heard against the evidence to urge his belief that the victim of his outrage had passed the period which would make his act a crime."[15] The *Ratz* case relied on *Regina v. Prince*[16] as its authority for this holding. The *Prince* case did not involve statutory rape but abduction of a girl under the age of sixteen. The jury found that the defendant had a reasonable bona fide belief that the girl was eighteen. This was held by a majority of the court, fifteen to one, not to constitute a defense. The opinion of Blackburn, J. stated that neither this crime nor that of statutory rape were intended by Parliament to depend upon the defendant's knowledge of the female's age. "It seems impossible to suppose that the intention of the legislature in those two sections [abduction and statutory rape] could have been to make the crime depend upon the knowledge of the prisoner of the girl's actual age."[17] It is important to note that the English court is not holding that

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bigamy case where the husband had a good faith belief that his first marriage was ended when in fact it was not. Mistake of fact generally has not been considered a defense for bigamy. See Perkins, Criminal Law 835-40 (1957); Annot., 56 A.L.R.2d 915 (1957).

[13]E.g., Miller v. State, 16 Ala. App. 534, 79 So. 314 (1918); Heath v. State, 173 Ind. 296, 90 N.E. 310 (1910); People v. Gengels, 218 Mich. 632, 188 N.W. 398 (1922); People v. Marks, 146 App. Div. 11, 130 N.Y. Supp. 524 (1911); Lawrence v. Commonwealth, 71 Va. (30 Gratt.) 845 (1878).

[14]E.g., Brown v. State, 23 Del. (7 Penne.) 159, 74 Atl. 836 (1909); State v. Johnson, 85 Kan. 54, 116 Pac. 210 (1911); State v. Houx, 109 Mo. 654, 19 S.W. 35 (1892); Edens v. State, 43 S.W. 89 (Tex. Crim. App. 1897).

[15]115 Cal. 132, 46 Pac. 915, 916 (1896).

[16]L.R. 2 Cr. Cas. Res. 154 (1875).

[17]Id. at 171.

Parliament meant this to be a crime for which no intent whatsoever is necessary, but only that knowledge[18] of the girl's age is not a necessary element.[19] The *Ratz* case in relying on *Prince* did not recognize that the English court had limited itself to excluding only a specific intent based on knowledge. The *Prince* case actually held a general intent to be necessary. When it is misread for the proposition that no intent is necessary, the result is that statutory rape is interpreted as a crime for which no intent, either general or specific is required, so that the defendant is liable regardless of his belief as to the facts.[20]

Not all courts have followed the phraseology of the *Ratz* reasoning, but they have reached the same result, holding that the legislature intended to eliminate intent as an element of the crime of statutory rape. Some of these decisions[21] have equated statutory rape to public welfare offenses such as the sale of adulterated food and sale of liquor to minors.[22] None of them adequately discuss the question of intent.[23] Normally, intent is not excluded as an element of a crime unless the statute expressly provides that intent is excluded or unless it is a necessary implication.[24]

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[18]The word knowledge can have several meanings when referring to criminal intent. See Perkins, Criminal Law, 681 (1957).

[19]The opinion of Blackburn, J., with whom nine judges concurred states that the basis of the crime is taking the girl out of the possession of her father against his will. The intent necessary is the intent to unlawfully take her knowing that he trespassed on the father's rights. "[H]e took her, knowing he trespassed on the father's rights, and had no colour of excuse for so doing." Note 16 supra at 170. Mistake of age is not a defense because it did not negate the intent which constituted this crime. Bramwell, B., with seven judges concurring felt that a mistake which did negate the intent constituting the crime would be a defense. "If the taker believed he had the father's consent, though wrongly, he would have no mens rea; so if he did not know she was in anyone's possession, nor in the care or charge of anyone." Id. at 175.

[20]"As in the Ratz case the courts often justify convictions on policy reasons which in effect eliminate the element of intent." People v. Hernandez, 39 Cal. Rptr. 361, 364, 393 P.2d 673, 676 (1964).

[21]McCutcheon v. People, 69 Ill. 601 (1873); State v. Sherman, 106 Iowa 684, 77 N.W. 461 (1898); Zent v. State, 3 Ohio App. 473 (1914). Commonwealth v. Sarricks, 161 Pa. Super. 577, 56 A.2d 323 (1948).

[22]For full discussion of public welfare crimes see Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55 (1933).

[23]"[T]he courts have uniformly failed to satisfactorily explain the nature of the criminal intent present in the mind of one who in good faith believes he has obtained a lawful consent before engaging in the prohibited act." People v. Hernandez, 39 Cal. Rptr. 361, 364, 393 P.2d 673, 676 (1964).

[24]"Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but

Statutory rape is a common law offense,[25] it is *malum in se*,[26] and it is regarded as a grave offense.[27] These three tests are used to determine whether a crime is one requiring *mens rea*.[28] By all three, statutory rape seems to require a mental element. A more valid test than these three for determining whether a mental element is necessary is to look first at the character of the offense and then at the nature of the penalty.[29] If the offense is merely one of a regulatory nature, not aimed at singling out individual wrongdoers, and if the crime involves light fines rather than imprisonment, the crime is usually considered to require no intent. However, statutory rape is not of a regulatory nature and involves heavy penalties.[30]

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merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law." Morissette v. United States, 342 U.S. 246, 251 (1952). Where statutes are silent as to the requirement of intent the court must determine the intent of the legislature. E.g., Leonard v. State, 38 Ala. App. 138, 79 So. 2d 803 (1955); People v. Daniels, 118 Cal. App. 2d 340, 257 P.2d 1038 (1953); Commonwealth v. Fine, 166 Pa. Super. 109, 70 A.2d 677 (1950); State v. Winger, 41 Wash. 229, 248 P.2d 555 (1952).

[25]The first time carnal knowledge of a female child was made a crime was in 1275 with the statute of Westminister I, 3 Edw. 1, c. 13. The Statute of 18 Eliz., c. 7, § IV (1576) specified the age of consent and made the crime a felony. These statutes were passed early enough for the crime to be considered a common law offense. "Rape is felony by the Common Law, declared by Parliament, for the unlawful and carnal knowledge and abuse of any woman above the age of ten years against her will, or of a woman-child under age of ten years with her will, or against her will...." 3 Coke, Institutes, 60 (4th ed. 1669). Nider v. Commonwealth, 140 Ky. 684, 131 S.W. 1024 (1910); Commonwealth v. Roosnell, 143 Mass. 32, 8 N.E. 747 (1886); Commonwealth v. Bennet, 4 Va. (2 Va. Cas.) 235 (1820).

[26]" 'An offense malum in se is properly defined as one which is naturally evil, as adjudged by the sense of a civilized community. An act which is malum prohibitum is wrong only because made so by statute.' " State v. Trent, 259 Pac. 893, 898 (Ore. 1927). " '[G]enerally speaking, crimes malum in se involve "moral turpitude." ' " In re Pearce, 136 P.2d 969, 971 (Utah, 1943). "Malum in se is defined as: 'An act involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law.' " Whitlock v. State, 187 Tenn. 522, 216 S.W.2d 22, 24 (1948). See generally Hall, General Principles of Criminal Law 337-42 (2d ed. 1960); Perkins, Criminal Law 692-99 (1957).

[27]The crime is "too infamous to bear discussion." People v. Ratz, 115 Cal. 132, 46 Pac. 915, 916 (1896).

[28]Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 70-72 (1933).

[29]"The line distinguishing offenses which do and those which do not require mens rea in the absence of statutory direction depends upon (a) the character of the offense, and (b) the nature of the penalty involved in its violation. In general, offenses not requiring mens rea are minor violations of laws regulating the sale of intoxicating liquor, impure or adulterated food, milk, drugs or narcotics, criminal nuisances, violations of traffic or motor-vehicle regulations, or of general police regulations passed for the safety, health, or well-being of the community and not in general involving moral delinquency." Id. at 83.

[30]E.g., statutory rape punishable at jury's discretion for not more than one year

Strict liability is a means of reaching a result which public policy demands: the protection of young girls who are too naive to comprehend fully the act of sexual intercourse.[31] Since protection can still be afforded even if intent is recognized as an element,[32] there is no reason for continuing to interpret statutory rape as a strict liability crime.[33]

The second rationale used to reject mistake of age as a defense recognizes that a general intent is an element of the crime, and if the defendant lacks this general intent, he is not guilty.[34] The question is whether a mistaken belief as to the female's age constitutes a mistake of fact sufficient to negate this general intent.[35] The courts following this view have universally held that it does not. Even though the defendant, who reasonably believed the girl was overage, did not intend to commit statutory rape, he did intend to do something wrong:[36]

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in county jail or not more than fifty years in state prison. Cal. Pen. Code § 264. Punishable at jury's discretion for not less than five years and up to death. Va. Code Ann. § 18.1-44 (repl. vol. 1960).

[31]"The protection of society, of the family, and of the infant, demand that one who has carnal intercourse under such circumstances shall do so in peril of the fact...." People v. Ratz, 115 Cal. 132, 46 Pac. 915, 916 (1896). "Public policy requires it." Sayre, note 28 supra at 74.

[32]"With reference to the strict liability imposed, it has been noted in the above discussion of that subject that no evidence supporting the assumed need for such arbitrariness is available. In these circumstances, one may certainly believe that application of the usual restriction of ignorantia facti to reasonable mistakes would result in convictions in the vast majority of such cases." Hall, General Principles of Criminal Law 374 (2d ed. 1960).

[33]The California court adheres to the policy of protecting naive underage girls and feels this can still be done when intent is recognized as an element. "Our departure from the views expressed in Ratz is in no manner indicative of a withdrawal from the sound policy that it is in the public interest to protect the sexually naive female from exploitation.... [T]here is nothing in the record to indicate that the purposes of the law as stated in Ratz can be better served by foreclosing the defense of a lack of intent." People v. Hernandez, 39 Cal. Rptr. 361, 365, 393 P.2d 673, 677 (1964).

[34]Brown v. State, 23 Del. (7 Penne.) 159, 74 Atl. 836 (1909); State v. Johnson, 85 Kan. 54, 116 Pac. 210 (1911); Commonwealth v. Murphy, 165 Mass. 66, 42 N.E. 504 (1896); State v. Houx, 109 Mo. 654, 19 S.W. 35 (1892); State v. Wade, 224 N.C. 760, 32 S.E.2d 314 (1944); Edens v. State, 43 S.W. 89 (Tex. Crim. App. 1897). See generally Perkins, Criminal Law 832-35 (1957).

[35]Conceivably there could be an innocent mistake of fact sufficient to be a defense. If the defendant was married, and through a mistake of identity had intercourse with a female below the age of consent, whom he believed to be his wife, he would be excused because, "there was no offense, for none was intended, either in law or morals." State v. Ruhl, 8 Iowa 447, 450 (1859).

[36]"The testimony offered [that the defendant had a reasonable belief the prosecutrix was overage] was, therefore, irrelevant—for the only effect of it would have been to show that he intended one wrong, and by mistake committed another." State v. Ruhl, 8 Iowa 449, 451 (1859).

to commit fornication. This intent to do wrong is enough to establish the general intent necessary for statutory rape.[37] The mistake of age is "merely a mistake as to the extent of the wrong and is not sufficient to excuse the actual wrong.[38]

This is the best rationale for the approach that denies mistake of age as a defense. It is in line with the reasoning of the leading case on the subject, *Regina v. Prince,* and it adequately deals with the requirement of general intent. In those states which no longer recognize a single act of fornication as being a crime,[39] it is apparent that the defendant could not have intended to do a criminal wrong. At the most, his intent was to do a moral wrong. Such an intent may be enough to establish the general intent necessary for the crime of statutory rape, but the cases are not definite on this point.[40]

Hernandez did not have an intent to do a criminal wrong, because fornication is not a crime in California.[41] By not discussing whether his act was immoral or whether the intent to do a moral wrong would be sufficient to establish the mental element necessary for statutory rape, the court adopts a view consistent with the trend that purely moral and religious standards will not be enforced by the courts.[42] The court will still support the policy of protecting naive females,[43]

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[37]" 'His intent to violate the laws of morality and the good order of society, though with the consent of the girl, and though in a case when he supposes he shall escape punishment, satisfies the demands of the law, and he must take the consequence.' " State v. Houx, 109 Mo. 654, 19 S.W. 35, 37 (1892).

[38]Perkins, Criminal Law 127 (1957).

[39]E.g., In re Lane, 58 Cal. 2d 99, 372 P.2d 897 (1962); State v. Kleiman, 241 N.C. 277, 85 S.E.2d 148 (1954).

[40]State v. Johnson, 85 Kan. 54, 116 Pac. 210 (1911); State v. Houx, 109 Mo. 654, 19 S.W. 35 (1892); Edens v. State, 43 S.W. 89 (Tex. Crim App. 1897), indicate that an intent to do a moral wrong is sufficient to establish the general intent. Brown v. State, 23 Del. (7 Penne.) 159, 74 Atl. 836 (1909); Commonwealth v. Murphy, 165 Mass. 66, 42 N.E. 504 (1896) indicate that an intent to do a moral wrong is not sufficient and that an intent to do a criminal wrong is necessary to establish general intent. In Regina v. Prince the majority felt that an intent to do a moral wrong was sufficient, but the dissent of Brett, J., urged that this was not sufficient. He felt that the defendant was guilty only if there was an intent to do a criminal wrong for which the defendant would be separately indicted. Queen v. Tolson, 23 Q.B.D. 168, 181 (1889) (explaining Prince).

[41]"[N]either simple fornication or adultery alone nor living in a state of cohabitation and fornication has been made a crime in this state." In re Lane 58 Cal. 2d 99, 372 P.2d 897, 900 (1962).

[42]This view is adopted by the American Law Institute in its Model Penal Code. "The Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor." Model Penal Code § 207.1, comment (Tent. Draft No. 4 1955).

[43]See note 33 supra.