

# Criminal Law - Statutory Rape - Reasonable Belief of Age

Sandy Kahn

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the past twenty-five years the courts have observed, sanctioned, and even encouraged the growth of an economy which tends to be national in scope and the corresponding rise in the power of the national government<sup>16</sup> (at the expense of a resulting erosion of state and local government). It seems incongruous that these same courts would acquiesce concurrently to an increase in the power of the states or to any additional state barriers to commerce, even though the merchandise involved is intoxicating liquor and the state is specifically given the power to regulate such merchandise under section 2 of the twenty-first amendment. Thus, it is reasonably safe to assume that any future decisions in this area will continue to indicate that the steady trend of the past thirty years is one which has become firmly ensconced in the minds of the arbiters of our law.

*William Levin*

<sup>16</sup> KELLY & HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT*, 749-89 (rev. ed. 1955).

#### CRIMINAL LAW—STATUTORY RAPE—REASONABLE BELIEF OF AGE

The defendant and the prosecutrix, both unmarried, voluntarily engaged in an act of sexual intercourse. The age of the prosecutrix was 17 years and 9 months. Subsequently, the defendant was charged with, and convicted of, statutory rape pursuant to a California statute<sup>1</sup> which provides that an act of sexual intercourse with a female, not the wife of the perpetrator, and under the age of 18, constitutes the offense of statutory rape. On appeal to the California Supreme Court, the judgment was reversed on the ground that the trial court erred in refusing to permit the defendant to present evidence showing that he had reasonably believed the prosecutrix to be 18 years of age. *People v. Hernandez*, 39 Cal. Rptr. 361, 393 P. 2d 673 (1964).

In general, the court's reasoning was based on a California statute<sup>2</sup> which states that, in the absence of a definite legislative intent to impose absolute liability, the existence of a criminal intent is essential to the imposition of criminal sanctions. More specifically, the Supreme Court of California suggested three arguments in support of its decision: (1) the gross injustices of decisions in the past resulting from abandonment of the mens rea requirement; (2) the fact that the defense of reasonable mistake of fact is available in an action for bigamy, which is analagous to

<sup>1</sup> CAL. PEN. CODE § 261(1).

<sup>2</sup> CAL. PEN. CODE § 20.

the crime of statutory rape; and (3) the necessity of criminal intent in the offense of statutory rape, since it is not a regulatory offense.

In contrast to the decision in the *Hernandez* case it has been generally recognized in most jurisdictions<sup>3</sup> that a defendant's reasonable mistake of fact as to the age of the female is *not* a defense to the crime of statutory rape. The basic rationale of such a policy is the protection of young women from committing unwise dispositions of their sexual conduct which will ultimately harm them.<sup>4</sup> Such protection, it is hoped, will be accomplished by imposing criminal sanctions upon the male who is assumed to be responsible for the commission of the sexual act.<sup>5</sup> However, this often results in gross injustices to the male, as exemplified in the case of *Norton v. State*,<sup>6</sup> where a 19 year old male was imprisoned for three years for committing an act of sexual intercourse with a consenting 15 year old female. The Supreme Court of Arkansas held that the defendant male's mistake of fact as to the female's age was no defense. Clearly, the penalty of a lengthy prison term and subsequent loss of reputation are exceedingly harsh in view of the fact that the male believed his act to be innocent.

In addition to the injustices resulting from imposing absolute liability on the male, the past decisions have also been inconsistent with the trend of decisions regarding the analogous crime of bigamy. Statutory rape and bigamy are similar in that they both are sexual offenses, can involve a reasonable mistake of fact, and may result in a severe penalty by way of a conviction and loss of reputation.<sup>7</sup> At common law, reasonable mistake of fact was not a defense to bigamy,<sup>8</sup> but recently, there has been a trend toward allowing such a defense.<sup>9</sup> A particularly important case in this regard is *People v. Vogel*,<sup>10</sup> in which the defendant, who reasonably believed his previous wife had obtained a divorce, was convicted of bigamy. On appeal, the California Supreme Court reversed the

<sup>3</sup> *People v. Ratz*, 115 Cal. 132, 46 Pac. 915 (1896); *People v. Lewellyn*, 314 Ill. 106, 145 N.E. 289 (1924); *People v. Marks*, 146 App. Div. 11, 130 N.Y.S. 524 (1911).

<sup>4</sup> *People v. Hernandez*, 39 Cal. Rptr. 361, 393 P.2d 673 (1964).

<sup>5</sup> *State v. Duncan*, 82 Mont 184-85, 266 Pac. 400, 405 (1928): "conviction depends solely upon proof of intercourse and nonage, and if a man indulge in promiscuity with strange women he has only himself to blame if it later develops that he has unwittingly committed the crime of rape."

<sup>6</sup> 237 Ark. 783, 376 S.W.2d 267 (1964).

<sup>7</sup> *People v. Vogel*, 46 Cal. 2d 798, 299 P.2d 850 (1956).

<sup>8</sup> *Commonwealth v. Mash*, 48 Mass. 472 (1844); *State v. Nichols*, 241 N.C. 615, 86 S.E.2d 202 (1955); *Manahan v. State*, 188 Tenn. 394, 219 S.W.2d 900 (1949).

<sup>9</sup> *Reed v. State*, 187 S.W.2d 660 (Tex. Crim. App. 1944).

<sup>10</sup> *Supra* note 7.

conviction, ruling that one is not guilty of bigamy if he reasonably believes that he is eligible to remarry. The rationale behind this decision was that, in view of the consequences of a conviction for bigamy, the legislature must have intended reasonable mistake of fact to be a defense. Subsequent to this decision, a number of states adopted this view and many have enacted statutes which provide that reasonable mistake of fact is a defense to the crime of bigamy.<sup>11</sup> The change in Illinois<sup>12</sup> is in accord with the fundamental principle of the Illinois Criminal Code: the condemnation of conduct as criminal be limited when such behavior is without fault.<sup>13</sup> Pursuant to this policy<sup>14</sup> Illinois has discarded the felony of statutory rape and created the misdemeanor of "contributing to the sexual delinquency of a child,"<sup>15</sup> for which mistake of fact is a partial defense. The incorporation of the rationale of the *Vogel* case<sup>16</sup> into the *Hernandez* case,<sup>17</sup> provides future legislators with case support for establishing reasonable mistake of fact as a complete defense to the crime of statutory rape.

Mistake of age has been recognized as an exception to the general rule that reasonable mistake of fact is a defense to a criminal offense requiring mens rea. In spite of this fact, reasonable mistake of age as a defense is well accepted where an infant's misrepresentation of age results in a civil action. Notwithstanding some cases which have held to the contrary,<sup>18</sup> the great bulk of decisions in this type of civil action have either estopped an infant who fraudulently represented his age from disaffirming his contract,<sup>19</sup> or have permitted a tort action against the infant for deceit.<sup>20</sup>

<sup>11</sup> ILL. REV. STAT. ch. 38, § 11-12 (1961); WIS. STAT. ANN. § 944.05 (1955); NEV. REV. STAT. § 201.160 (1957).

<sup>12</sup> ILL. ANN. STAT. ch. 38, § 11-12 (Comm. Comments) (Smith-Hurd 1961): "Punishing him for making a reasonable mistake in remarriage would be attaching vicarious felony liability contrary to the general principles of this code."

<sup>13</sup> ILL. REV. STAT. ch. 38, § 1-2(b) (1961).

<sup>14</sup> ILL. ANN. STAT. ch. 38, § 11-4 (Comm. Comments) (Smith-Hurd 1961).

<sup>15</sup> ILL. REV. STAT. ch. 38, § 11-5 (1961).

<sup>16</sup> *People v. Vogel*, *supra* note 7.

<sup>17</sup> *Supra* note 4, at 365, 393 P.2d at 677: "Equally applicable to the instant case are the following remarks . . . of the *Vogel* decision: 'The severe penalty imposed for bigamy, [and] the serious loss of reputation conviction entails, [makes] it extremely unlikely that the Legislature meant to include the morally innocent to make sure the guilty did not escape.'"

<sup>18</sup> *Sternlieb v. Normandie National Securities Corp.*, 263 N.Y. 245, 188 N.E. 726 (1934); *Raymond v. General Motorcycle Co.*, 230 Mass. 54, 119 N.E. 359 (1918).

<sup>19</sup> *Carney v. Southland Loan Co.*, 92 Ga. App. 559, 88 S.E.2d 805 (1955); *Lewis v. Van Cleve*, 302 Ill. 413, 134 N.E. 804 (1922).

<sup>20</sup> *Byers v. Lemay Bank & Trust Co.*, 365 Mo. 341, 282 S.W.2d 512 (1955); *Royal Finance Co., v. Schaefer*, 330 S.W.2d 129 (Mo. Ct. App. 1959).

Typical of these decisions is the case of *La Rosa v. Nichols*,<sup>21</sup> wherein a 20 year old youth contracted to have his automobile repaired by the defendant, representing that he was over 21. In an action for replevin by the infant, the Court of Errors and Appeals of New Jersey ruled for the defendant and stated:

If a youth . . . by falsely representing himself to be an adult, which he appears to be, for the purpose of inducing another to enter into a contract with him, and thereby, through such representation and appearance the other party is led to believe that such infant is an adult, . . . the minor will not be permitted to set up the privilege of infancy. . . .<sup>22</sup>

It is disturbing that in criminal actions, where the infant's misrepresentation may result in a person's incarceration and loss of reputation, it is thought that the infant must be protected; but under similar circumstances, in civil actions, the courts will not protect the infant when such protection will result in a loss of money by the other party to the suit.

One area of the criminal law in which misrepresentation of age and reasonable mistake of fact will definitely not be allowed as a defense is in the field of regulatory offenses. The most common regulatory offenses concern themselves with the sale of intoxicating liquor to minors.<sup>23</sup> One who sells intoxicating liquor to a minor is subject to criminal prosecution regardless of the minor's false representation of his age.<sup>24</sup> These regulatory statutes are enacted primarily for the purpose of protecting the public health and welfare<sup>25</sup> and consequently, criminal sanctions are relied upon without regard to the need for an element of intent. Moreover, these statutes normally entail a light penalty<sup>26</sup> and seldom result in damage to a person's reputation. Statutory rape, on the other hand, does not meet the basic requirements of a regulatory offense, because a violation of the statute is not necessarily a threat to the public safety.<sup>27</sup>

<sup>21</sup> 92 N.J.L. 375, 105 Atl. 201 (1918).

<sup>22</sup> *Id.* at 380, 105 Atl. at 204.

<sup>23</sup> See *State v. Hartfield*, 24 Wis. 60, 62 (1869): "The act in question is a police regulation, and we have no doubt that the legislature intended to inflict the penalty, irrespective of the knowledge or motives of the person who has violated its provisions."

<sup>24</sup> *People v. Werner*, 174 N.Y. 132, 66 N.E. 667 (1903); *State v. Schull*, 66 S.D. 102, 279 N.W. 241 (1938).

<sup>25</sup> The purpose of a statute prohibiting the sale of intoxicating liquor to a minor is to protect the immature from the physical and psychological imbalance caused by alcohol, rather than to punish the offender.

<sup>26</sup> ILL. REV. STAT. ch. 43, § 131 (1963), which provides for a fine of not more than \$100 or imprisonment in the county jail for not more than 6 months, or both.

<sup>27</sup> MODEL PENAL CODE, § 207.4, comment (Tent. Draft No. 4, 1955): "Pursuit of females who appear to be over 16 betokens no abnormality but only a defiance of religious and social conventions which appear to be fairly widely disregarded."

the specific purpose of rape statutes is to proscribe the punishment for the offender, not to protect the female; and the penalty for the violation of such a statute is often a large fine and lengthy imprisonment in the penitentiary,<sup>28</sup> which results in loss of reputation. Since statutory rape is not a regulatory offense,<sup>29</sup> a mens rea must be required. Consequently, a reasonable mistake of age, inasmuch as it negates a criminal intent, should be a defense as allowed by the *Hernandez* case.<sup>30</sup>

The above analysis has pointed out that past decisions have eliminated the element of criminal intent resulting in gross injustices, and that to disallow the defense of mistake of age is inconstant with the present trend in the law. The defense of mistake of fact has been created by case law and statute in the analogous crime of bigamy. From all indications, it appears that the *Hernandez* case may be the beginning of a similar trend for statutory rape.

*Sandy Kahn*

<sup>28</sup> PA. STAT. tit. 18, § 4721 (1939), which provides a fine of not more than \$7000, or imprisonment for not more than 15 years, or both.

<sup>29</sup> See Sayre, *Public Welfare Offenses*, 33 COLO. L. REV. 55 (1933).

<sup>30</sup> *People v. Hernandez*, *supra* note 4.

## EVIDENCE—TORTS—STANDARD OF CARE REQUIRED OF PHYSICIAN TESTIFYING AS AN EXPERT WITNESS

A nine year old child, who broke her arm while playing, was given emergency treatment in a hospital operated by the defendants. After the course of treatment was completed, the plaintiff brought this action contending that due to improper medical attention her right arm had to be amputated. Among other allegations, the plaintiff claimed that the physician who treated her improperly reduced the fracture in her arm, and was subsequently negligent in not removing the cast despite severe pain and swelling. In the trial court, Dr. Major, a practicing physician in San Francisco, California, was called as an expert medical witness on behalf of the plaintiff, and was allowed to testify over the defendant's objections<sup>1</sup> Dr. Major's testimony tended to prove the plaintiff's allegations of negligence.

<sup>1</sup> *Riley v. Layton*, 329 F.2d 53 (10th Cir. 1964), in reference to the witnesses' experience. Dr. Major was a graduate of Baylor University School of Medicine, and had been engaged in the general practice of medicine for six and a half years in San Francisco, California. Prior to that time he practiced with his two brothers in a small Texas town where they operated a twenty bed hospital. Dr. Major had casted between 120 and 150 fractures similar to the one in question and through his experience, reading, lectures and travels said that he was familiar with the practice in small towns with regard to the treatment of fractures.