

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Shetty* [2005] QCA 225

PARTIES: **R**  
v  
**SHETTY, Darshan Suresh**  
(appellant)

FILE NO/S: CA No 8 of 2005  
DC No 1089 of 2004

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 24 June 2005

DELIVERED AT: Brisbane

HEARING DATE: 10 June 2005

JUDGES: McPherson and Keane JJA and McMurdo J  
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **1. Appeal against conviction allowed**  
**2. Conviction quashed**  
**3. Retrial ordered**

CATCHWORDS: CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - WHERE GROUNDS FOR INTERFERENCE WITH VERDICT - PARTICULAR CASES - WHERE APPEAL ALLOWED - where appellant convicted after trial of one count of using the internet to procure a child under 16 years to engage in a sexual act contrary to s 218A *Criminal Code* 1899 (Qld) - where appellant had communicated with a person identified as "Kathy\_volleyball" in an internet chat room - where Kathy\_volleyball represented to the appellant, inter alia, that she was 14, went to high school and was a virgin - where appellant arranged to meet Kathy\_volleyball in public - where it transpired that Kathy\_volleyball was, in truth, a police officer - where s 218A(8) *Criminal Code* provides that "Evidence that a person was represented to the adult as being under the age of 16 years ... is, in the absence of evidence to the contrary, proof that the adult believed the person was under that age" - where appellant gave evidence at trial that

he did not believe the representations made to him by Kathy\_volleyball and had no belief as to her age - where learned trial judge directed the jury that "telling you he didn't have any belief one way or another is not sufficient" and that "you proceed on the basis that he believed the person he was chatting to was under 16 years" - whether giving evidence that no belief was held as to a person's age is "evidence to the contrary" for the purposes of s 218A(8) *Criminal Code*

*Acts Interpretation Act 1954* (Qld), s 14(1)(a)  
*Criminal Code 1899* (Qld), s 218A(1), s 218A(8), s 218A(9)

*DPP v Hore; DPP v Askwith* [2004] VSCA 192; No 7499  
 and No 7500 of 2003, 4 November 2004, cited  
*Hardman v Minehan* [2003] NSWCA 130; (2003) 57  
 NSWLR 390, cited  
*R v SAO* [2005] QCA 115; CA No 8 of 2005, 14 April 2005,  
 cited

COUNSEL: B G Devereaux for appellant  
 D L Meredith for respondent

SOLICITORS: Legal Aid Queensland for appellant  
 Director of Public Prosecutions (Queensland) for respondent

[1] **McPHERSON JA:** I agree with what has been written by Keane JA in this matter, including his Honour's interpretation of s 218A of the *Criminal Code*, and in particular of s 218A(8) of it.

[2] The appeal should be allowed; the conviction quashed; and a new trial ordered.

[3] **KEANE JA:** The appellant has been convicted of one count of using the internet to procure a child under 16 years of age to engage in a sexual act in contravention of s 218A of the *Criminal Code 1899* (Qld). That section provides relevantly as follows:

**"Using internet etc. to procure children under 16**

(1) Any adult who uses electronic communication with intent to-

- (a) procure a person under the age of 16 years, or a person the adult believes is under the age of 16 years, to engage in a sexual act, either in Queensland or elsewhere; or
- (b) expose, without legitimate reason, a person under the age of 16 years, or a person the adult believes is under the age of 16 years, to any indecent matter, either in Queensland or elsewhere;

commits a crime.

Maximum penalty - 5 years imprisonment.

(2) The adult is liable to 10 years imprisonment if the person is-

- (a) a person under 12 years; or
- (b) a person the adult believes is under 12 years.

(3) For subsection (1)(a), a person engages in a sexual act if the person-

- (a) allows a sexual act to be done to the person's body;  
or
- (b) does a sexual act to the person's own body or the body of another person; or
- (c) otherwise engages in an act of an indecent nature.

...

- (7) For subsection (1), it does not matter that the person is a fictitious person represented to the adult as a real person.
- (8) Evidence that the person was represented to the adult as being under the age of 16 years, or 12 years, as the case may be, is, in the absence of evidence to the contrary, proof that the adult believed the person was under that age.
- (9) It is a defence to a charge under this section to prove the adult believed on reasonable grounds that the person was at least 16 years, or 12 years, as the case may be.
- (10) In this section-  
*electronic communication* means email, Internet chat rooms, SMS messages, real time audio/video or other similar communication.  
*procure* means knowingly entice or recruit for the purposes of sexual exploitation."

#### **The Crown case**

- [4] The evidence against the appellant was that he entered an on-line chat room and communicated with a person identified as "Kathy\_volleyball" on four occasions between 5 and 12 January 2004. Kathy\_volleyball was in fact Constable Kenneth King. Constable King, with other police officers, intercepted the appellant on 13 January 2004 in the foyer of the Southbank Cinema Complex where the appellant had arranged to meet Kathy\_volleyball.
- [5] In that regard, Constable Erin Cash gave evidence that she dressed in a manner described by Kathy\_volleyball in an exchange with the appellant, and waited at the front entrance of the cinema complex in the foyer. The appellant walked towards her and was intercepted. The appellant admitted in a recorded interview with the police that he was the correspondent "gentleman\_jack2001" who had been engaged in the conversations with Kathy\_volleyball.
- [6] It was an essential element of the Crown case (and it is the only point which is in issue in this appeal) that the appellant believed that Kathy\_volleyball was under the age of 16 years. In this regard the Crown relied upon the provisions of s 218A(8) of the *Criminal Code* to facilitate proof of the relevant belief by the representations in the messages sent by Kathy\_volleyball to the appellant that she was 14, went to high school, did not want to tell her Mum, had never engaged in oral sex before, was a virgin and would tell her Mum that she was out with a friend.
- [7] The appellant gave evidence. He said that he did not believe the representations made in the communications from Kathy\_volleyball. His testimony was that he held no belief as to the age of Kathy\_volleyball.

#### **The issue**

- [8] The learned trial judge directed the jury that the appellant was "deemed to believe that the person was of that age unless he satisfies you by evidence that he believed the person was 16 years or over". His Honour said that "telling you that he didn't

have any belief one way or the other is not sufficient". Accordingly, his Honour directed the jury:

"... that on the evidence here, you proceed on the basis that he believed the person he was chatting to was under the age of 16 years

...

That he believed she was under 16 is not controversial according to the directions I have given you."

- [9] The sole ground of appeal pressed by the appellant is that the learned trial judge erred in law by giving these directions to the jury, and in thus taking away from the jury's consideration the question of whether the appellant believed the person he allegedly intended to procure was under the age of 16 years.
- [10] For the appellant it is submitted that to say that he had no belief as to the age of Kathy\_volleyball is necessarily to deny that he believed Kathy\_volleyball was less than 16 years of age. Evidence that he had no belief at all about that matter is, it is submitted, contrary to the belief which the statute attributes (in the absence of evidence to the contrary) to the adult by reason of the circumstance that the person "was represented to the adult" as being under the age of 16 years. That submission draws support from the observations of Jerrard JA, with whom McPherson JA and Helman J agreed, in *R v SAO*.<sup>1</sup>
- [11] The Crown, in response, submitted that the word "evidence" where it is used for the second time in s 218A(8) must be read exegetically as "evidence that it was represented to the adult". This submission can be properly considered only in the context of a discussion of s 218A considered as a whole.
- [12] The Crown also submits that if the adult, to whom the representations are made, knew or believed on reasonable grounds that Kathy\_volleyball was not a person under 16 years of age, then the adult may rely upon the defence provided in subsection (9) of s 218A, so that, unless the Crown submission in relation to subsection (8) is accepted, the provisions of subsection (9) would be otiose. As I will explain, that submission does not accord with the logical structure of s 218A.

### **Discussion**

- [13] Section 218A(8) and (9) are to be understood in terms of their association with the operative part of s 218A, which is to be found in s 218A(1). An analysis of s 218A(1) shows that the section creates an offence where:
- (a) an adult;
  - (b) uses electronic communication;
  - (c) with intent to do an act in relation to a person:
    - (i) who is in fact under the age of 16 years or 12 years, as the case may be ("the age element"); or
    - (ii) who the adult believes is under the age of 16 years or 12 years, as the case may be ("the belief element").
- [14] Where the Crown fails to prove either the factual element or the belief element, a prima facie contravention of s 218A(1) is not made out. Where a prima facie case is not made out there is no need to resort to the defence provided by s 218A(9). Where the belief element is not established by the Crown, the Crown will not have proved a prima facie case of a contravention of s 218A(1) unless the Crown

<sup>1</sup> [2005] QCA 115; CA No 8 of 2005, 14 April 2005 at [3] - [8].

establishes the factual element. Therefore, the only occasion for s 218A(9) to operate "as a defence" is where a prima facie case of a contravention of s 218A is made out, ie where the factual element is proved by evidence that the person is in fact under 16 years or 12 years of age.

- [15] It is to be emphasized that the two subsections serve quite different purposes. In this regard, s 218A(8) facilitates proof of the belief element of a charge under s 218A(1). It operates to overcome difficulties involved in proving the belief element so as to enable a prima facie case of contravention to be made out in a case where the person is, in fact, over the age of 16 years or 12 years. Section 218A(9), on the other hand, affords a defence to a prima facie case of a contravention of s 218A(1) where the person was, in fact, under the age of 16 years or 12 years, but the adult believed on reasonable grounds that the person was at least 16 years or 12 years of age.
- [16] Accordingly, the Crown's submission that the appellant's construction of s 218A(8) renders s 218A(9) otiose must be rejected.
- [17] This leaves the Crown's principal submission that s 218A(8) is fundamentally concerned with evidence about what representations have been made rather than with what belief is held. A discussion of the Crown's principal submission may begin by noting that s 218A(1) creates two categories of offence. In one of those categories proof of the factual element is essential. In the other category, proof of the belief element is essential. Section 218A(8) facilitates proof of the belief element, which would otherwise be difficult to prove, ie, the adult's state of mind. That much is clear. What is at issue on the Crown's principal submission is whether s 218A(8) is intended to make it impossible for the adult to avoid contravening s 218A(1), even where the adult did not in fact believe that the person was under the age of 16 years or 12 years, unless the adult adduces evidence to show, either that no representations as to the person's age being less than 16 years or 12 years were, in fact, made to the adult, or that additional representations were made which were to the effect that the person's age was not under 16 years or 12 years.
- [18] In addressing this issue, it may be said, at the outset, that it is possible to read s 218A(8) as the appellant would read it so that the reference to "evidence to the contrary" is understood as referring to evidence contrary to the fact of which proof is facilitated by the subsection, ie the state of the adult's belief. Such a reading of the provision has much to commend it. First, it recognizes that the provision is concerned with proof of a fact to be proved, namely the belief element of the charge. It makes good sense, in terms of the section as a whole, to regard a reference to "evidence to the contrary" as being concerned with evidence to the contrary of the fact to be proved, viz, the belief of the adult that the person is under the age of 16 years or 12 years.
- [19] Secondly, the appellant's reading better conforms to the established approach to the interpretation of a penal statute. In this regard in *Hardman v Minehan*,<sup>2</sup> McColl JA, with whose judgment Tobias JA agreed, summarized the current state of authority:
- "In the case of penal statutes it is a fundamental principle that if the language of a statute remains ambiguous or doubtful, that ambiguity or doubt must

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<sup>2</sup> [2003] NSWCA 130 at [72]; (2003) 57 NSWLR 390 at 401 - 402.

be resolved in favour of the subject by refusing to extend the category of criminal offences. (*Halsbury's Law of Australia*, vols 24-27, pars 385-420; see also *Scott v Cawsey* (1907) 5 CLR 132 at 141, per Griffiths CJ (at 144-145), per Barton J and (at 154-157), per Isaacs J; *R v Adams* (1935) 53 CLR 563 at 567-568, per Rich J, Dixon J, Evatt J and McTiernan J; *Smith v Corrective Services Commission (NSW)* (1980) 147 CLR 134 at 139; *Murphy v Farmer* (1988) 165 CLR 19 at 28-29)."

- [20] Similarly, in *DPP v Hore*; *DPP v Askwith*,<sup>3</sup> Hansen AJA, with whom Ormiston and Charles JJA agreed, noted that:

"There are also general principles of statutory interpretation to consider, namely that any ambiguity in a penal statute is to be resolved in favour of the subject. That principle is applicable if, after applying the ordinary rules of construction, there remains a relevant ambiguity. Ambiguity can arise in the case of a penal statute, as to which Gibbs J in *Beckwith v R* stated that:

"The rule formerly accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences ... The rule is perhaps one of last resort."

- [21] The adoption of the interpretation urged on this Court by the Crown would mean that, so long as the representation about age can be proved, then whatever the adult might have actually believed becomes immaterial to establishing a prima facie contravention of s 218A(1), an offence meant to be founded on the existence of the relevant belief. The category of criminal offences would thereby be extended to adults to whom a representation about the age of the person had been made. If that had been the intention of the legislature, it would have been a simple matter to say so, and the circumlocutions of s 218A(8) could have been avoided. The interpretation of s 218A(8) to be preferred, in light of the authorities concerning the proper approach to the interpretation of penal statutes, is that if the accused does advance some explanation as to what belief was actually held then it is for the jury to assess the credibility of that explanation. If that explanation is accepted, or, more precisely, if it is not excluded by the prosecution beyond reasonable doubt, the charge will fail because the Crown will have failed to prove a necessary element of the charge.

<sup>3</sup> [2004] VSCA 192 at [64]; (2004) 10 V.R. 179 at 194-195 (citations omitted).

- [22] Thirdly, the preferred interpretation of s 218A(8) gives effect to the legislative intent as required by s 14(1)(a) of the *Acts Interpretation Act 1954* (Qld). Section 218A was inserted into the *Criminal Code* by s 17 of the *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld). That the section provided for a reversal of the usual onus of proof was recognised by the Explanatory Memorandum to the Bill, which said:<sup>4</sup>

*"Does the legislation reverse the onus of proof in criminal proceedings without adequate justification?"*

New section 218A of the Criminal Code (Using internet etc. to procure children under 16) creates a rebuttable presumption that if a person is represented to be under the age of 16 years (or 12 years) then in the absence of evidence to the contrary this is proof that the adult believed the person to be under that age.

This provision addresses the situation where a child (or a person represented to be a child) informs the alleged offender of their age. Should the alleged offender reasonably not believe this assertion such reasons would be peculiarly within the knowledge of the accused person, and the accused would be in a position to provide evidence to rebut the presumption. In these circumstances, it is submitted that this reversal of onus is justified."

- [23] This excerpt from the Explanatory Memorandum does not explain the relationship between subsections 8 and 9 of s 218A, but it does make it clear that the reason for reversing the onus of proof is to deal with the issue whether the necessary belief was held by the adult. The first paragraph of the excerpt affords confirmation of the view that s 218A(8) is concerned to create a rebuttable presumption as to the belief element of a charge under s 218A(1). The second paragraph of the excerpt confirms that s 218A "addresses the situation where a child (or a person represented to be a child) informs the alleged offender of their age". There is no mention of the understanding, urged by the Crown here, that s 218A(8) was intended by the legislature to deal with a situation where there is conflicting evidence as to whether or not a representation regarding a person's age was made to the adult. Rather, as the second paragraph of the excerpt explains, the purpose of the presumption contained in s 218A(8) is to force the adult into evidence, if the adult wishes to argue that there were reasons why the adult did not believe the representation that was made regarding age, because "such reasons would be peculiarly within the knowledge of the accused person". It must be acknowledged that the second paragraph could, because of the parenthetical reference to "a person represented to be a child" in the first sentence and the words "reasonably not believe" in the second sentence, be taken to provide some support for the Crown's submission, but it is hardly conceivable that, if the legislative intention was that the rebuttable presumption created by s 218A(8) could only be rebutted by evidence to the contrary of the representations made to the adult, this would not have been mentioned in the Explanatory Memorandum.
- [24] Fourthly, acceptance of the view of s 218A(8) advanced by the Crown would do some significant violence to the language of the provision. If the phrase "in the absence of evidence to the contrary" is removed from s 218A(8) then what remains is:

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<sup>4</sup> See Explanatory Memorandum to the Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld) at 6.

"Evidence that the person was represented to the adult as being under the age of 16 years, or 12 years, as the case may be, is proof that the adult believed the person was under that age."

- [25] This makes it clear that the intent of the subsection is that evidence of a representation being made to an adult that a person is under 12 or 16 years of age will constitute proof that the adult believed that the person was under the relevant age. The legislative focus is on proving that an adult entertained a particular belief not upon whether or not a particular representation was made to the adult. It is the proof of the belief element, not the mode of proof of that element, that is qualified by the phrase "in the absence of evidence to the contrary". To reflect the position advocated by the Crown, it would be necessary to redraft s 218A(8) as follows:

"Evidence, in the absence of evidence to the contrary, that the person was represented to the adult as being under the age of 16 years, or 12 years, as the case may be, is proof that the adult believed the person was under that age."

- [26] To summarize, in my opinion, s 218A(8) does not alter the position that the jury must be satisfied that the accused had the belief essential to establish a contravention of s 218A(1). The legislature has determined that the jury must be so satisfied if they conclude that it was represented to the adult that a person was under a certain age and the adult does not adduce evidence that the representation did not induce in him the belief which that representation was apt to induce. If the adult does adduce evidence as to what he or she actually believed, then it is a matter for the jury whether or not this evidence should be accepted.
- [27] For these reasons, in my respectful opinion, the submissions of the Crown should be rejected and the submissions of the appellant must be accepted.

### **Conclusion**

- [28] The appeal should be allowed. The conviction should be quashed and there should be an order for a retrial. Whether the retrial should proceed is a matter for decision by the prosecuting authority.
- [29] **McMURDO J:** I agree with the orders proposed by Keane JA and with his reasons.
- [30] As Keane JA has explained, when the charge involves an intent to procure a person who was not in fact under 16 years, the prosecution must prove that the defendant believed the person to be under 16. Such a belief is a fact, which as an element of the offence, must be established by the prosecution and beyond reasonable doubt. That remains the case notwithstanding subsections (8) and (9).
- [31] Subsection (8) facilitates the proof of that element. It does not require the defendant to disprove it. Absent "evidence to the contrary", the element of belief is established if the jury accepts that the person was represented to the defendant as being under 16. Where there is evidence to the contrary, ie evidence that the defendant did not have the alleged belief, the prosecution proves the defendant's belief by the proof of the representation if it persuades the jury to reject that evidence as evidence to the contrary. And, of course, the evidence to the contrary need not be evidence adduced by the defendant: it may be evidence in the prosecution case.

- [32] The respondent's submissions start with an argument that "evidence to the contrary" does not mean evidence to the contrary of the defendant having that belief. In the respondent's submission, "evidence to the contrary" means evidence of the fact of another and contrary representation. So upon this argument, as Mr Meredith explained, "if there is an inconsistency so that if there were inconsistent representations, the prosecution would fail the evidentiary aid provided by subsection (8)". I cannot see that this interpretation is open upon the words of the subsection. There could be cases where there are inconsistent representations in that sense. But in many cases, of which the present is an example, there will not be a contrary representation. The effect of the respondent's submission is that in cases where there is no contrary representation, an offence is committed by an adult who acts with intent to procure a person who is represented as being under 16, unless, in terms of subsection (9), he proves that not only did he believe the person to be 16 or more, but he did so on reasonable grounds. The end point of the argument is that a defendant could be convicted, although the relevant person is at least 16 as the defendant believed, if, as it happened, the defendant did not have reasonable grounds for believing what was in fact the case. Had that been the legislative intention, the terms of subsection (1), which define what constitutes the offending conduct, would have been quite different.
- [33] In my view, it is unnecessary to use extrinsic material in the interpretation of this section. Specifically, the section is not ambiguous or obscure and, upon what I see as its ordinary meaning, it has no absurd or unreasonable result. But two things should be said of the Explanatory Memorandum for this section.<sup>5</sup> The first is that it offers no support to the respondent's fundamental submission that in subsection (8) "evidence to the contrary" means evidence of another representation of contrary effect. Secondly, the Explanatory Memorandum in this case is misleading, because it is in an important respect inconsistent with the unambiguous meaning of the section. The relevant passage is set out in the judgment of Keane JA. In that passage, whilst there is no support for the respondent's argument of inconsistent representations, it is said that there is a reversal of the onus of proof. Subsection (8) does not reverse the onus of proof; it facilitates the discharge of the prosecution's onus. Nor does subsection (9) reverse the onus of proof. It provides for a defence, so that it operates only where the prosecution has discharged its onus. It operates where the prosecution alleges and proves that the person was in fact under 16. That defence does not apply where the prosecution case is that the defendant believed the person to be under that age.
- [34] In the present case, the jury should have been directed that if the appellant had no belief one way or the other, then he did not have a belief that the person was under the age of 16 years. The absence of a certain belief is contrary to the holding of that belief. The jury should have been told that unless they could reject, upon the criminal standard, that evidence of the appellant, they were obliged to acquit.

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<sup>5</sup> Explanatory Memorandum to the Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld).