IMMATURE AGE AND CRIMINAL RESPONSIBILITY UNDER THE GRIFFITH CODE

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In the Criminal Code which he drafted for Queensland and which was later adopted in Western Australia and in Papua New Guinea, Sir Samuel Griffith included a provision indicating the effect of immature age upon criminal responsibility. It read as follows:

> A person under the age of seven years is not criminally responsible for any act or omission. A person under the age of fourteen years is not criminally responsible for an act or omission, unless it proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the . . . omission.
>
> A male person under the age of fourteen years is presumed to be incapable of having carnal knowledge.

This provision, which in Sir Smauel's opinion reproduced the common law of England,[1] was enacted in all three antipodean jurisdictions as s. 29 of the relevant Code[2] and it remains in its pristine form in Western Australia and Papua New Guinea. However, the age of criminal responsibility at common law was raised in England by statute in 1933[3] from seven to either and to ten in 1963.[4] The Code in Queensland was amended in 1976 to accomplish the same ultimate result and the legislature by the same enactment raised the age specified in the second paragraph to fifteen years.[5]

It will be noted that these amendments in Queensland have not altered the structure of the provision which remains the same in all three Codes. Thus each paragraph of the section contains a distinct rule. The first two are general in that they apply to all children within the specified categories whether male or female and relate to criminal responsibility for all offences while the third applies to males under a certain age and relates only to certain sexual offences. The purpose of

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1 See his 'Draft of A Code of Criminal Law prepared for the Government of Queensland', Queensland. *Parliamentary Papers* CA—1897, at 15.

2 It was s. 31 in the Draft Code.

3 Children and Young Persons Act 1933, s. 50.

4 Children and Young Persons Act 1963, s. 16.

5 The Criminal Code Amendment Act 1976, s. 19.

this paper is to discuss the three rules embodied in s. 29 and the case law they have generated.

Proceedings in respect of all but the most serious offences alleged against persons of immature age are generally conducted in specialised tribunals called Children's Courts. These operate in a more informal fashion and the penalties they may impose are more diverse and flexible than those available to the courts which traditionally exercise criminal jurisdiction. However, Children's Courts are still obliged to apply the substantive law contained in s. 29 when determining the criminal responsibility of those charged before them.

Immature Age as an Absolute Defence

The first paragraph of s. 29 provides a child under seven, or in Queensland ten years, with a complete defence to any criminal charge. In the traditional language of the common law such a child is *doli incapax*. The reasons for this absolute rule are both ethical and pragmatic. It seems wrong to visit the sanctions of the criminal law upon a child of tender years who has had little or no experience of its meaning and application. Moreover, it might be argued that for such children the discipline of home and school will generally provide the community with sufficient protection against their anti-social behaviour.

Of course, the selection of the relevant age is not the result of any scientific analysis. Under seven years had been the limitation at common law for centuries[6] and Sir Samuel Griffith simply adopted it in his Code without comment. By the time a Commission of Inquiry came to consider the matter in Queensland in 1975 the relevant age in England had been raised to ten years. In its Report the Commission commented as follows:[7]

> There is no scientific way of determining what it ought to be, but the age of ten, as is the case in England, seems to be a proper one. The statistics for the Children's Court over recent years show that there are very few children under the age of ten who are charged with any offences. It would follow then that the community is not exposing itself to any serious risk by increasing the age of criminality to ten years.

The Commission also noted that the community already had the safe-

6 See, e.g., Hale 1 P.C. 27, 28.

7 'Report and Recommendations of the Commission of Inquiry into the Nature and Extent of the Problems Confronting Youth in Queensland', Queensland. *Parliamentary Papers* A85—1975, at 9. The Chairman of the Commission was Demack D.C.J., later a Judge of the Family Court of Australia and now a Judge of the Supreme Court of Queensland.

guard contained in s. 46(1)(n) of the *Children's Services Act* 1965-1974. This provided that a child under the age of ten who had committed an act which would if he were over that age constitute in whole or in part a criminal offence might be admitted to the care and protection of the Director of the Department of Children's Services. In these circumstances, the legislature accepted the recommendation that the age of criminal responsibility be raised to ten and gave effect to it in the 1976 amendment of the Code to which reference has been made.

It is unnecessary to comment further on the effect of the first paragraph of s. 29 except to note that it does not accect the criminal responsibility of a person who engages a child under seven, or in Queensland ten, years as his innocent agent. This is made clear by the final paragraph of s. 7 of the Codes which provides as follows:

> Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with himself doing the act or making the omission.

By virtue of this provision the legal irresponsibility of the child is ignored. He is regarded as the mere instrument of the person who has used him and such person is held directly responsible for the child's act or omission.[8]

Immature Age as a Provisional Defence

The first paragraph of s. 29 sets up an irrebuttable presumption while the second sets up a rebuttable presumption. A child under the age prescribed in the second paragraph is initially presumed not to be criminally responsible but the presumption may be rebutted by proof of capacity to know that he ought not to do the act or make the omission.

Proof that the child knew the act or omission was against the law is not necessary. It suffices if it is shown that he knew it was morally wrong. As Sir Matthew Hale wrote concerning the corresponding common law presumption it must be shown that the child could 'discern between good and evil at the time of the offence committed'[9]. It might be

[8] There is a corresponding rule at common law. See, e.g., Manley (1844) 1 Cox 104 and Walters v. Lunt (1951) 2 All E.R. 645.

[9] 1 P.C. 26. As Professor Glanville Williams has pointed out, the irony of the rule is that the more warped the child's moral values the more he needs control. However the presumption helps him to escape conviction: see *Textbook of Criminal Law* (1978), 589.

argued that this interpretation of the section is inconsistent with s. 22 which provides, *inter alia*, that in general[10] ignorance of the law is no excuse. The argument would be that the second paragraph of s. 29 operates by way of exception to this general rule and provides a defence for a child under the presecribed age who is ignorant of the law. However Sir Samuel Griffith clearly envisaged s. 29 as referring to the wider concept of moral culpability. He explained this in a marginal note to his Code as follows:

> But it is conceived that our law assumes the notion of duty. No one supposes that everyone or anyone knows all the provisions of the criminal law. Yet no one above the age of discretion is excused by ignorance of law. Why is this distinction drawn at a particular age? Not, surely, because at that age knowledge of the law comes to a child, but because he is then supposed to be capable of knowing that some things ought not to be done i.e. of apprehending the idea of duty.[11]

It is interesting to note that the capacity referred to in the second paragraph of s. 29 is the same as one of those referred to in s. 27 which sets out the defence of insanity and indeed it was in the context of the insanity provision that Sir Samuel Griffith made the above comment. However, the two defences are inter-related and in some circumstances the effect of s. 29 is to deny a defence under s. 27 to a person of immature age. Thus if the child is under seven, or in Queensland ten, years he is by that very fact exempted from criminal responsibility. The question of the availability of other defences, whether relating to mental incapacity or not, just does not arise. On the other hand where the child is within the age group specified in the second paragraph of s. 29 the exemption from criminal responsibility is not absolute. It depends not only upon age but also upon failure of the prosecution to prove one form of mental capacity—capacity to know that he ought not to do the act or make the omission. In rebutting proof of such capacity it is submitted that it would be permissible for the defence to elicit in the prosecution case or adduce in the defence case evidence going to show that the child did not have this capacity and that this was the result of a mental disease or natural mental infirmity. Thus a defence of insanity within the meaning of s. 27 would be raised in the course of denying one of the elements of the prosecution case. Furthermore it is possible to envisage another situation in which insanity might be raised in this context. Suppose the defence does not dispute that the child had the mental

[10] There is an exception only where 'knowledge of the law by the offender is expressly declared to be an element of the offence'.

[11] Supra n. 1, at 14.

capacity referred to in s. 29 but contends that he suffered from a mental disease or natural mental infirmity which had destroyed one of the other capacities specified in s. 27—capacity to understand what he was doing or capacity to control his actions. It is submitted that in this situation there is nothing in the Codes to suggest that a defence of insanity would not be available. In summary, therefore, it is submitted that this defence is not available to a child to whom the first paragraph of s. 29 applies but is available to a child within the age group referred to in the second paragraph of that section.

There is no authority in the Code jurisdictions to support the above analysis. Indeed in *Brooks*[12], a decision of the New Zealand Court of Appeal relating to the corresponding provisions of the *Crimes Act* 1908[13] in that country which deny a defence of insanity to a child within either of the immature age categories, it is submitted that in relation to children in the older category this decision is incorrect. The substance of the reasoning of the majority appears in the judgment of Callan J. as follows:

> If a boy between seven and fourteen is mentally diseased, or if there is evidence which suggests that he may be, that is a matter which the jury should consider in deciding how to answer whether in their opinion he knew that he was doing wrong. If in the result they are not satisfied that he knew he was doing wrong, he is entitled to be acquitted, and that is the end of the matter. In my view, the jury should not be required to go further and to say whether the boy would or would not have known his act to be wrong had he, though immature, been free from mental defect, or upon the assumption, in a doubtful case, that he is free from mental defect.[14]

As the dissenting judge, Finlay J., pointed out, this argument quite artificially limits the scope of the jury's inquiry. He said:

> If, therefore, it has appeared in evidence that a person acquitted under s. 42, then the jury is in a position to say whether or not in its opinion he was in fact insane at the time and whether it was by reason of insanity that he was acquitted. In such a case the acquittal would be based not on the mere inability of the jury to form the opinion that the prisoner had the necessary knowledge, but on a positive finding of insanity, with an acknowledgement of its causative effect added.[15]

[12] (1945) N.Z.L.R. 584.

[13] S. 41 and s. 42 of the Act correspond to the first and second paragraphs of the Codes. S. 43 corresponds to s. 27 of the Codes in that it sets out the defence of insanity but in more reetricted form. It does not, for instance, include irresistible impulse.

[14] (1945) N.Z.L.R. 584, at 600, 601.

[15] Id. at 604.

The reference is s. 29 is to chronological, not mental age. In a case in Papua New Guinea, *Womeni-Nanagowa*,[16] Ollerenshaw J. available to a person who had attained the prescribed age to the effect that he did not know that he ought not to do the act or make the omission. Thus he held that the mere unsophistication of the accused, a tribesman of the primitive and savage Kukukuku people, afforded him no defence to a charge of wilful murder as he was not of immature age and his condition was not the result of any mental disease or natural mental infirmity.

Of course, if in Papua New Guinea the accused is under the prescribed age and the defence under s. 29 is therefore potentially available to him the question arises as to the standard to be applied in assessing his knowledge of the moral wrongfulness of his act or omission. In *Womeni-Nanagawo*,[17] Ollerenshaw J. vividly formulated the question in the following way:

> . . . according to what standard should he have been able to judge and should it be judged that he ought not to have done it. Is it such a common law test as whether he had the capacity to know that his act was wrong according to the ordinary principles of reasonable men? In this context would 'reasonable men' mean 'reasonable Kukukukus', if such there be?[18]

Ollerenshaw J. found it unnecessary to answer his own question in that case because he was satisfied on the medical evidence that the accused was over fourteen years. However in a case a few years later, *Iakapo* and *Iapirikila*,[19] Mann C.J. of the same Court expressly decided that the capacity referred to in s. 29 must be assessed by reference to the particular mores of the community in which the accused lived.

The accused in this case were mother and daughter and members of the Tolai people of New Britain. They were charged with the wilful murder of the mother's new-born child. The father of the child belonged to the same moiety, or clan, as the mother and, according to the custom of their community, sexual relationships between them were prohibited. The effect of defying this custom was described by Mann C.J. as follows:

> Such a prohibited relationship brought great shame not only on the parties but upon the entire moiety, for any offspring would be outside the pattern of inheritance, and would be regarded as members of the 'fool's clan'. Relatives would have an obligation to look after

[16] (1963) P. & N.G.L.R. 72.
[17] Id.
[18] Id. at 77.
[19] (1965-66) P. & N.G.L.R. 147.

> them, but would carry the obligation out to the least possible extent, and unwillingly, because the child would be a constant symbol of great shame.[20]

Iakapo ordered her daughter, Iapirikila, a girl of about eleven or twelve years, to bury the baby alive. She protested at first but ultimately complied with her mother's order and the baby apparently suffocated and died. Mann C.J. accepted a submission that Iapirikila had a defence under s. 29. He reasoned as follows:

> . . . In the present case the question is whether, in a complex social situation, well knowing that her mother's authority was not to be challenged by her, and knowing that the action ordered, though most distasteful to her, would be accepted by most of her people as a practical solution to the problem, she would have the capacity to understand that her duty was to deny her mother's authority and run away and disobey. According to my understanding of the position, it would be impossible to convince the child of this without affording her special protection or inducing a greater fear.
>
> Looking at the matter without regard to the circumstances, there are enough indications to show that Iapirikila regarded her mother's proposed course of conduct as wrong, but having regard to the circumstances it seems to me to be clear that the child was not capable of understanding that she should disobey. I would be most reluctant to read s. 29 as requiring me to ignore circumstances so powerful in their effect on a child's mind as those in this case. It would amount to torture.
>
> I find the accused Iapirikila not guilty of wilful murder.[21]

This is a striking example of the effect of interpreting s. 29 by reference to the cultural environment of the child to whom it applies. This approach is less likely to lead to such a spectacular result in the more racially homogeneous jurisdictions of Queensland and Western Australia. However, it is submitted that Mann C.J.'s reasoning might readily be applied to aborigines or perhaps to migrants who have retained and continue to live by the conventions of their native land.[22]

It is trite but necessary to say that in order to rebut the presumption of incapacity set up by the second paragraph of s. 29 the Crown must

20 Id. at 148.

21 Id. at 150, 151.

22 In much the same way as the ordinary man test in provocation has been modified for aborigines and Melanesians· see, e.g., Rankin (1966) Q.W.N. 10; Morris and Howard, *Studies in Criminal Law* (1964), at 93-99 and the writer's 'Provocation and Homicide in Papua and New Guinea' (1971-2) 10 *University of Western Australia Law Review* 1. However there is less justification for modifying the test in its application to migrants. See Parnekar (1971) 5 C.C.C. (2d) 11 and Moffa (1977) 51 A.L.J.R. 403 per Murphy J. at 412.

call evidence. This proposition has recently been spelt out by the Court of Criminal Appeal in Queensland in *B.*[23] The defendant, an eleven-year-old boy, was charged before a Children's Court with three offences of breaking, entering and stealing and one of wilful and unlawful damage to property. All were indictable offences and the Stipendiary Magistrate who constituted the Court accepted the boy's pleas of guilty without first taking an examination of witnesses in relation to the offences charged. The Court of Criminal Appeal held that in so proceeding the primary court had acted in breach of various provisions of the *Children's Services Act* 1965 which indicated that a prior examination of witnesses was necessary. Furthermore the Court of Criminal Appeal held that the presumption of incapacity in s. 29 of the Code applied to the defendant and in the absence of evidence it had not been rebutted. D. M. Campbell J. observed:

> Whether a trial is before a magistrate or jury, there must be evidence on which to base a special finding that the child had capacity to know that he ought not to do the act or make the omission with which he is charged.[24]

W. B. Campbell J. made the point with equal emphasis by stating that the 'rebuttal of the presumption may only be done by the calling of proper and admissible evidence.'[25] He also observed, following English authority, that the cogency of the requisite evidence will depend upon the age of the child. The younger the child within the age range to which the second paragraph of s. 29 applies the more cogent the evidence necessary to displace the presumption.[26] This seems to be a matter of common sense and also a consequence of the fact that the younger the child the closer he is to the category of children who have the benefit of the irrebutable presumption of incapacity set up by the first paragraph of s. 29. Obviously evidence of schooling and family background and circumstances will be relevant to the question of incapacity. So too will be evidence of the child's character including previous convictions. In *B* and *A*[27] the Court of Appeal in England has recently decided that while the trial judge has a discretion to exclude evidence of a child's previous convictions there are circumstances where the admission of such evidence is quite appropriate. In this case two boys aged thirteen had been charged with blackmail. The trial judge ruled that the prosecution was entitled to call evidence of convictions for

[23] (1979) Qd. R. 417.
[24] Id. at 421.
[25] Id. at 425.
[26] Id., citing B (1958) 44 Cr. App. R. 1 per Lord Parker C.J., at 3.
[27] (1979) 1 W.L.R. 1185.

other offences of dishonesty. Lord Widgery C.J. quoting the trial judge said it was 'blindingly obvious'[28] that such evidence was relevant to the issue of incapacity and was admissible.

The only other point of law concerning children under the prescribed age which merits comment is the classification of such children as accomplices. The point is significant where they are called for the Crown to give evidence of sexual offences committed upon them. In the Codes in Queensland and Western Australia it is provided that 'a person cannot be convicted of an offence on the uncorroborated testimony of an accomplice or accomplices'. The same provision has been abolished in Papua New Guinea but the courts in that jurisdiction are extremely cautious before deciding to convict on the uncorroborated evidence of an accomplice.[29]

In *Quy* M,[30] a boy aged twelve who had consented to an attempt by the accused to have carnal knowledge of him against the order of nature, was held not to be an accomplice in that offence. Parker J. who delivered the judgment of the Supreme Court of Western Australia[31] reasoned as follows:[32]

> It seems to me that a boy who is not criminally responsible or proved to be criminally responsible, cannot be an accomplice. It would be strange to hold that a boy who could not commit an offence could be an accomplice in the commission of that offence by another. In order to show that M was a party to this crime it would have been necessary to show that at the time the attempt was made upon him by the accused he had capacity to know that he ought not to submit to that act. There is no evidence to show that the boy thought that he was in any way doing wrong, or that he ought not to submit to the conduct of the accused.[33]

Similarly in *Barker*,[34] an appeal to the High Court from Papua New Guinea, it was held that on a charge of unlawfully and indecently dealing with a boy under the age of fourteen the boy's capacity to know that he ought not to do the act or make the omission constituting complicity

28 Id., per Lord Widgery C.J. at 1187.

29 See State v. Nateumo Wanu (1977) N. N. 96 and State v. Titerea Fineko (1978) N. 155.

30 (1905) 7 W.A.L.R. 268.

31 Which also comprised McMillan and Burnside JJ.

32 (1905) 7 W.A.L.R. 268, at 271.

33 *Cf.* Edwards (1931) 25 Q.J.P.R. 79 where there was evidence to show that the boy knew that he was doing wrong. R. J. Douglas J. ruled that the boy was his accomplice and therefore that his evidence required corroboration.

34 (1967-68) P. & N.G.L.R. 204. The High Court comprised Dixon C.J. and McTiernan and Taylor JJ.

must be positively proved before he could be regarded as an accomplice.[35]

Philp J., in the Queensland case of *Sneesby*,[36] expressed the view that a boy under the age of fourteen could not be charged with the offence of unlawfully and indecently dealing as a principal offender because that offence[37] was created for the purpose of protecting young boys.[38] However, he decided that such a boy could be convicted of another offence (indecent practices between males)[39] arising out of the same facts and accordingly should be regarded as an accomplice.[40] The High Court in *Barker*[41] found it unnecessary to comment on the correctness of Philp J's views[42] and the matter is not yet settled. Nevertheless it seems clear that, however extensive the definition of accomplice,[43] it can in relation to a child under the prescribed age only apply when the requisite capacity under s. 29 has been proved.

Immature Age and Sexual Offences

The final paragraph of s. 29 relates only to the criminal responsibility of male children under fourteen for certain sexual offences. It presumes such children to be incapable of having carnal knowledge. The presumption is not expressed to be a conclusive one but it has never been suggested that it is not. Accordingly a male child under fourteen cannot be convicted, at least as a principal offender, of any offence of which carnal knowledge is an element, such as rape, incest, unlawful carnal knowledge of a female under certain ages, bestiality or sodomy.

The rule has no sound physiological basis and has been justly described by Professor Howard as a 'useless anomaly'.[44] Originally it was confined to rape but in 1897 before the Code was enacted in Queensland the Full Court of that State in *Moody*[45] applied it to sodomy.[46]

35 Id. at 207 in the judgment of the Court.
36 (1951) St. R. Qd. 26.
37 S. 210 of the Queensland Code.
38 (1951) St. R. Qd. 26, at 27, 28. See also Starr (1969) Q.W.N. 23.
39 S. 211 of the Queensland Code.
40 (1951) St. R. Qd. 26, at 28.
41 (1967-68) P. & N.G.L.R. 204.
42 Id. at 207.
43 It is arguable that the definition should be extended 'to include all parties to the transaction in the course of which' the crime is committed. See *Cross on Evidence*, 2nd Aust. ed. (1979), para. 9.19.
44 *Criminal Law*, 3rd ed. (1977), at 356.
45 (1897) 8 Q.L.J. 102.
46 Cf. Packer (1932) V.L.R. 225 in which the Full Court of Victoria declined to apply the rule to this offence.

Griffith C.J. was a member of the Full Court on that occasion and in his Code adopted a few years later he extended it still further.

The Commission of Inquiry which, as indicated earlier in this article, examined s. 29 of the Code made no recommendation for the abolition of the rule in the third paragraph. Nor has any move towards repeal been made in the other Code jurisdictions. It is necessary, therefore, to consider how far this anomalous rule extends. Firstly, it is to be noted that as the rule refers to the child's own presumed incapacity to have carnal knowledge there seems no reason why he would escape liability as a secondary party to an offenoe involving carnal knowledge by an adult. Thus if he aided an adult in the commission of such an offence it might be argued that he does not have the protection of s. 29. There is no Code authority on the point but such common law dicta as there is on the point supports this conclusion.[47] This result is, however, as anomalous as the s. 29 rule itself. There is much to recommend Professor Howard's suggestion that the immunity be extended to cover all degrees of complicity or that it be completely abolished.[48]

Secondly, it appears that a male child under fourteen could not be convicted of attempting an offence of which carnal knowledge is an element. One of the constituents of an attempt is an intention to commit the substantive offence[49] and such an intention would be inconsistent with his presumed knowledge that it was physically impossible for him to commit the offence. Similar reasoning applies where, as in *Moody*,[50] the act of sodomy for which an adult was charged had been perpetrated, if at all, by a boy under fourteen. In such circumstances if the adult knew the age of the boy (and the Court assumed Moody did) he could not be held liable for an attempt because be could not be said to intend what he knew to be factually impossible.

Finally it is to be noted that the immunity extended by the third paragraph of s. 29 does not apply to lesser offences not involving carnal knowledge.[51] Thus a male child under the age of fourteen may be convicted of unlawful assault, indecent assault, indecent dealing or gross indecency.

47 Hale, 1 P.C. 630; Eldershaw (1828) 3 C. & P. 396.
48 Supra n. 44, at 357.
49 See s. 4 of the Codes
50 (1897) 8 Q.L.J. 102.
51 At least where the boy is the active rather than the passive party: see Sneesby (1951) St. R. Qd. 26, at 27.