



## HIGH COURT OF AUSTRALIA

17 May 2023

BDO v THE QUEEN  
[2023] HCA 16

Today, the High Court unanimously allowed an appeal in part from the Court of Appeal of the Supreme Court of Queensland. The appeal concerned the appellant's criminal responsibility for acts which took place when he was over ten years of age but under 14 years of age, and whether what is required by s 29(2) of the *Criminal Code* (Qld) ("the Code") to rebut the presumption of incapacity can be equated with what is required by the common law. At common law the presumption may be rebutted by evidence that the child "knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence". The Code states that the presumption may be rebutted by evidence of the child's "capacity to know that [they] ought not to do the act or make the omission".

The appellant was charged with 15 counts of rape and one count of indecent treatment of a child under 16. After a trial before a jury in the District Court of Queensland, he was convicted of 11 counts of rape. The trial judge directed the jury according to the terms of s 29. His Honour explained that a child who is over ten but not yet 14 years of age can be criminally responsible, but only if the prosecution prove that, at the time of doing the act, the child had capacity to know they ought not to do the act. What was in question was the capacity of the appellant as distinct from his actual knowledge.

The appellant's appeal from his conviction was dismissed by the Court of Appeal. The Court held that it was a sufficient direction to the jury that it was for the jury to decide, in relation to each count, whether the appellant was 14 years of age when the act in question occurred and, if he was not, if he had the capacity to know that he ought not do the act. The Court concluded that it was open to the jury, on the evidence before it, to conclude beyond reasonable doubt that each time the appellant did an act the subject of a count for which he was convicted, he knew that the act was wrong according to the ordinary principles of reasonable people.

The High Court allowed the appeal on five of the counts. For each of those counts, it set aside the decision of the Court of Appeal, and entered a judgment and verdict of acquittal. The High Court held that the trial judge and the Court of Appeal were not in error in their approach as to the knowledge requirements of s 29(2) of the Code. It does not require that the prosecution prove actual knowledge of the moral wrongness of the act in question on the part of the child, but rather the capacity to know or understand that to be the case. The capacity of a child to know that conduct is morally wrong will usually depend on an inference to be drawn from evidence as to the child's intellectual and moral development. A close review of the evidence showed five counts where there was a reasonable doubt that the appellant was over 14 years of age at the time of the conduct. The High Court held there was insufficient evidence tendered by the prosecution to rebut the presumption of incapacity beyond reasonable doubt in respect of those counts, and even if such evidence could be adduced, a retrial was not appropriate as the prosecution should not be given an opportunity to supplement its case.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*