Capacity (section 29)

Legislation

29 Immature age

(1) A person under the age of 10 years is not criminally responsible for any act or omission.

(2) A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission.

Commentary

Section 29(1) absolutely precludes children aged under 10 from criminal responsibility. Section 29(2) presumes children aged under 14 are not criminally responsible "unless it is proved" that at the time of the act or omission allegedly attracting liability the child "had capacity to know that the [child] ought not to do the act or make the omission".

The standard of proof is necessarily proof beyond reasonable doubt, in order to displace the presumption against criminal responsibility.

Because the existence of a capacity for knowledge will be assessed by inference from proved facts the direction to the jury should include a direction on circumstantial evidence.

The trial judge is positively obliged to direct the jury in terms of section 29(2) because proof of the capacity is a pre-requisite of assigning criminal responsibility. Thus, in *R v LAH* [2016] QCA 82, a failure to direct the jury in terms of section 29(2) was characterised as a denial of procedural fairness which could not be remedied by the application of the proviso in section 66E(1A).

If it is in issue whether the defendant had turned 14 by the offence date it will logically be necessary to instruct the jury that the prosecution must prove beyond reasonable doubt that the defendant was 14 or, failing that, that the defendant had the relevant capacity. Where the issue only arises after the close of the prosecution case, see *R v CDR* [1996] 1 Qd R 183.

Note section 29(2)'s focus is not on actual knowledge but capacity to know, as was emphasised by Pincus JA in *R v B* [1997] QCA 486.

Evidence that a defendant was close to age 14 cannot of itself rebut section 29(2)'s presumption, though it may aid in doing so when considered with other relevant evidence such as evidence of the defendant's education, speech and demeanour and of the surrounding circumstances of the offence – per *R v F ex parte A-G* [1999] 2 Qd R 157, 162.

Any relevant evidence necessary to prove capacity can be called, although it may be prejudicial – see *R v B and A* (1979) 69 Cr App R 362; *R v F ex parte A-G* [1999] 2 Qd R 157, 163-165.

In *R v F ex parte A-G* [1999] 2 Qd R 157 Davies JA doubted the phrase "that the person ought not to do the act" needed to be paraphrased, but if it did the preferable expression was that the act was "wrong according to the ordinary principles of reasonable [people]" citing *R v M* (1977) 16 SASR 589. In *R v BDO* [2021] QCA 220 where the trial judge redirected, in response to a jury question, it was not held erroneous to have directed that the question for the jury was, "has the prosecution proven beyond reasonable doubt at the time the defendant did the act he had capacity to know the act was seriously wrong according to the ordinary principles of reasonable people?". The redirection was characterized at [137] as reinforcing the direction earlier given that the jury must be satisfied beyond reasonable doubt the appellant had the capacity to know he ought not do the act in question.

Suggested Direction

> **I now turn to direct you on the topic of the age of criminal responsibility for children.**
>
> **A child under 10 cannot be held criminally responsible under our law. Our law also presumes a child under the age of 14 years is not criminally responsible for an act or omission, <u>unless</u> it is proved that at the time of doing the act or making the omission the child had the capacity to know that the child ought not to do the act or make the omission. This law acknowledges that a child's capacity for understanding the limits of acceptable human behaviour develops gradually and that it is not appropriate to expose a child to punishment under the criminal law for conduct which the child did not have the capacity to know the child ought not engage in.**
>
> **In the present case the defendant was aged 10/11/12/13 years at the time of the alleged offence(s).** [If it is issue whether the defendant had turned 14 by the date of the alleged offence(s): **In the present case it is in dispute whether the defendant was under the age of 14 years. If the prosecution satisfy you beyond reasonable doubt that the defendant was 14 as at the date of the alleged offence(s) then there is no need to consider the present topic further because the defendant will have reached the age of criminal responsibility. If you are not so satisfied then** …] **It is for the prosecution**

to prove beyond reasonable doubt that at the time of the act(s) [or omission(s)] **attracting the charge(s) the defendant had the capacity to know that the defendant ought not to do the act(s)** [or make the omission(s)]**.** [Here identify the relevant alleged act(s) or omission(s)]

In considering the question of whether the defendant actually had the capacity to know the defendant ought not behave as alleged, you will be drawing an inference from facts which you find established by the evidence. Such facts, which we refer to as circumstantial evidence, would include the evidence of the defendant's age, the alleged offending behaviour and circumstances surrounding it and any other evidence about the defendant, which may logically assist in considering whether the defendant had the capacity to know the defendant ought not behave as alleged. The circumstantial evidence which may be relevant in this case is [here identify the circumstances which appear relevant to whether the defendant did or did not have the requisite capacity].

Bear in mind that while one circumstance may be insufficient to prove the defendant had the capacity to know the defendant ought not behave as alleged, it may be that a number of pieces of evidence considered collectively are sufficient.

There are two competing inferences urged by the parties on this issue. One inference – the guilty inference – is that the defendant did have the capacity to know the defendant ought not behave as alleged. The other inference – the innocent inference – is that the defendant did not have the capacity to know the defendant ought not behave as alleged. In such a situation it is essential not only that the evidence is strong enough to sustain the guilty inference, but that the inference consistent with innocence has been excluded beyond a reasonable doubt. This reflects the prosecution's obligation to prove capacity beyond a reasonable doubt.

The time under consideration is the point in time when the defendant allegedly committed the act(s) [or omission(s)] **attracting the charge(s). If you are not satisfied beyond reasonable doubt that, at that time, the defendant**

had the capacity to know that the defendant ought not do the act(s) [or make the omission(s)]**, then the defendant cannot be held criminally responsible and you must return a verdict of not guilty. If you are so satisfied beyond reasonable doubt, then you may hold the defendant criminally responsible for the alleged offence(s) but only if the prosecution has <u>also</u> proved the elements of the offence(s) beyond a reasonable doubt.**