

## **R. v Hess, R. v Nguyen [1990] 2 S.C.R. 906**

### **1) Reference Details**

Jurisdiction: Supreme Court of Canada

Date of Decision: 4 October 1990

Case Status: Concluded

Link to Full Case: <http://scc.lexum.umontreal.ca/en/1990/1990rcs2-906/1990rcs2-906.html>

### **2) Facts**

In two separate hearings, the unrelated appellants, Hess (H) and Nguyen (N), were both charged under s. 146(1) of the Criminal Code (the Code) for having had sexual intercourse with a female under the age of 14. H's indictment was quashed on the basis that s. 146(1) infringed his right to equality under s. 15 of the Canadian Charter of Rights and Freedoms (the Charter). However, the Ontario Court of Appeal reversed the decision and ordered a new trial. N's conviction was upheld by the Manitoba Court of Appeal which found that there had been no violation of s. 15 of the Charter. However, it considered that N's guarantee of fundamental justice under s. 7 of the Charter had been infringed by s. 146(1) of the Code but that breach was justifiable under s. 1 of the Charter.

### **3) Law**

- Section 146(1) of the Criminal Code;
- Section 1 (rights and freedoms in Canada), s. 7 (right to life, liberty and security of the person) and s. 15 (equality rights) of the Canadian Charter of Rights and Freedoms.

### **4) Legal Arguments**

The issues to be determined on appeal were whether s. 7 or s. 15 of the Canadian Charter of Rights and Freedoms were infringed by s. 146(1) of the Criminal Code and, if so, whether s. 1 of the Charter justified such an infringement.

### **5) Decision**

The Court allowed the appeals, opining that s. 146(1) of the Code infringed s. 7 of the Charter and could not be justified under s. 1 of the Charter. Further they held that s. 146(1) of the Code did not infringe s. 15 of the Charter.

#### *The majority*

For the majority (5:2), Lamer C.J., and Wilson, La Forest, L'Heureux-Dube JJ. set out that the offence under s. 146(1) of the Code was an absolute liability offence which expressly removed the due diligence defence that the accused *bona fide* believed the female to be 14 years old or older. As the offence did not require the accused to have any *mens rea* and was punishable by a maximum term of life imprisonment, the accused's right to liberty enshrined in s. 7 of the Charter had been infringed. They held that s. 146(1) could not be justified under s. 1 as a reasonable limit on an accused's rights.

Also it was held that s. 15 was not infringed by s. 146(1) which provides that only men can be charged under the section as the offence involves an act that as a biological fact only men are able to commit.

In a concurring decision but on an alternative rationale Sponika J. opined that s. 146(1) of the Code infringed s. 15 of the Charter but could be justified under s. 1 of the Charter.

*Dissenting (McLauchlin and Gonthier JJ.)*

McLauchlin J. and Gonthier J. concluded that the appeal should be allowed. However, they set out that to establish a violation of s. 15 of the Charter, inequality or a distinction in the treatment of members of a group must be established. That distinction must amount to discrimination. Section 146 satisfied that test as it distinguished on the basis of sex. It burdened men not women and protected young females and not young males. However, s. 146 was justified by s. 1 as it protected females from harm which might result from premature sexual activity and protected young females from pregnancy. It protected society from the impact of social problems arising thereof. As such it was a legislative objective of sufficient importance to justify overriding a constitutionally protected right. Additionally, the means chosen to effect the objective were reasonable and justified. There was a rational connection between the imposition of absolute liability and its objective and that infringement did not extend beyond what was reasonably necessary to achieve the objective.