



# Cúirt Uachtarach na hÉireann Supreme Court of Ireland

**The People (at the suite of the Director of Public Prosecutions) v. FN**

**On appeal from: [\[2021\] IECA 238](#)**

The Supreme Court has today dismissed an appeal brought by FN against a decision of the Court of Appeal which had upheld the conviction of FN for sexual assault. The Supreme Court held that there is no requirement on the prosecution in sexual assault cases to prove a sexual element in the offence on the part of the accused.

## **Composition of Court**

Charleton, O'Malley, Woulfe, Hogan, Murray JJ.

## **Background to the Appeal**

This appeal centres on the nature of the offence of sexual assault, particularly whether there is a requirement not only for the assault to take place in circumstances of indecency but also, for some cases including, on the appellant's submissions, this one, that a sexual motive in or sexual element to the assault must be established. The appellant, aged 14 years at the time of the offence, was found guilty of sexually assaulting the 6-year-old victim. The circumstances arose after the two children were playing in a field near their family homes, during which the accused pulled down the victim's trousers and underpants and hit him on his bare buttocks "nine times", as clarified after counting by the victim on his fingers.

The issue of law of general public importance determined by this Court in its determination is whether the prosecution is required to prove an intention to commit an assault, as well as the intention to commit an indecent one with the included element of sexual motive in circumstances where there is ambiguity in the circumstances of the alleged sexual assault. The Court of Appeal upheld the trial judge's view as to the appropriate legal test for sexual assault.

## **Judgment**

The Supreme Court dismissed the appeal, with Charleton, O'Malley and Murray JJ finding that the Court of Appeal had been correct in holding that the crime of sexual assault is a wholly objective one, and that no evidence of sexual motive is necessary where it is shown that an assault took place in indecent circumstances.

## **Reasons for the Judgment**

Writing for the majority, Charleton J. dismisses the appeal, holding that there is no requirement for the prosecution to establish that there had been a sexual element to an assault committed. In analysing the offence of sexual assault, the judgment sets out three elements to the offence: that the accused intentionally assaulted the victim, that the assault or the circumstances accompanying the assault, are proven to be indecent on an objective standard, and that the accused's purpose was to assault in these indecent circumstances. **[9]**

Considering the additional element of sexual purpose advocated for by the appellant, it is held that the introduction of such an element would constitute an impermissible alteration of the offence and would fundamentally alter criminal law. Motive is not ever a component of crime, but may be evidence which may help prove a crime or undermine proof of that crime. Charleton J. distinguishes this from the case of *The People (DPP) v McNamara* [2020] IESC 34, in which the defence of provocation was corrected and clarified in order to ensure its conformity with other common law defences such as duress. **[14-17]** Charleton J. proceeds to examine the level of objective indecency for the offence in question - that the circumstances of the external commission of the offence "must be an affront to ordinary modesty". Rejecting the submission of the appellant that an additional sexual motivation element is required for an assault to constitute a sexual assault, Charleton J. finds

that the test is entirely objective, requiring only “non-consensual touching of a sexual nature which creates indecent circumstances”. **[19-21]**

Charleton J. further refers to the doctrine of lesser included offence, stating that this “was never a case where a lesser offence might be found”. While the motivation of the assault may be relevant to the sentence following the delivery of the jury verdict, it cannot be relevant in determining the type of assault that took place. As the definition of the offence is clear, requiring that the external circumstances be indecent and that the accused intended to bring about the assault in such circumstances, it is a matter of law as to whether the external facts proven by the prosecution meet the definition. **[23-27]** It is noted by Charleton J. that the definition of sexual assault was not altered upon its change of name from the common law offence of indecent assault. The judgment also states that a codification of sexual offences would assist significantly in reducing the potential for serious error in trials of this kind. **[29-31]**

In his dissenting judgment Hogan J. disagrees with the majority’s view that in the circumstances of this case the prosecution is not required to establish that there is a sexual element to the assault committed by a defendant. Hogan J. considers that, viewed objectively, the circumstances of this case do not give rise to the irresistible inference that the defendant committed an assault in circumstances of indecency and, indeed, Hogan J. notes that as much was noted by the trial judge. Hogan J. holds that where the circumstances of indecency are ambiguous, as in the present case, it is necessary for the prosecution to point to other evidence from which an intention to commit a sexual assault can be inferred. **[44]**

The basis for this conclusion rests in part on an examination of the relevant statutory developments in respect of the offence of sexual assault. **[23-37]** Hogan J. notes that the offence of sexual assault derives from the common law offence of indecent assault which itself was carried over into Irish law by Article 50.1 of the Constitution. Hogan J. observes that since the offence of indecent assault was re-named as the offence of sexual assault following the enactment of s.2(1) the Criminal Law (Rape) (Amendment) Act 1990, the Oireachtas has established a special post-conviction regime that applies automatically to all persons convicted of sexual assault save for certain exceptions not relevant to this case (see s.3(1) of the Sex Offenders Act 2001). In Hogan J.’s view these statutory developments have such a fundamental bearing upon a person convicted of the offence of sexual assault (including the stigma and the consequences under the special post-conviction regime) that the Oireachtas must have intended that where the circumstances of indecency are ambiguous a sexual element must be established. **[24, 32-37]**

Hogan J. also considers that his conclusion is supported by the House of Lords decision in *R v. Court* [1989] AC 28. Hogan J. accepts that this decision concerned the admissibility of evidence and not the proofs required of a prosecution. **[46]** Nevertheless, he holds that there must be a requirement of sexual motive in ambiguous cases particularly in a case such as the present in which it has been accepted that there was no sexual element to the defendant’s conduct. **[47]** Hogan J. thus concludes that since the prosecution did not adduce any evidence in this respect, the defendant’s conviction for sexual assault should be set aside and substituted for a conviction of assault for the purposes of s.2(1) of the Non-Fatal Offences against the Person Act, 1997. **[49]**

In a second dissenting judgment, Woulfe J. disagrees with the conclusions reached in the majority judgment, preferring the alternative conclusions arrived at in the judgment of Hogan J. **[3]** Woulfe J. also thinks the reasoning of the majority judgments in *Court* was very helpful. **[4]** As regards the present case, he agrees that this is a case where, in Lord Ackner’s words “the circumstances of the alleged offence can be given an innocent as well as an indecent interpretation”. For Woulfe J. also the particular context of the conduct in question and the circumstances were absolutely crucial, and, in this case the facts disclose children playing together in the fields, and the smacking appears to have occurred after some form of childish altercation or misunderstanding. In terms of the ages of the children, the older accused boy was still only fourteen years of age and, significantly in Woulfe J.’s opinion, the mother of the complainant described him in her evidence as coming across as younger and as being immature for his age, more like a nine or a ten year old. Woulfe J. cannot see how these circumstances could possibly lead to the type of “irresistible inference” referred to by Lord Ackner in *Court*, i.e. an irresistible inference that the defendant not only intended to commit an assault upon the younger boy, but an assault which was indecent. **[5]**

Woulfe J. also agrees with Hogan J. that the statutory developments in this jurisdiction do have a bearing on the issue arising. Woulfe J. refers to certain principles of statutory interpretation which, in his opinion, support the view of Hogan J. that the name change effected by the 1990 Act is not just simply a matter of nomenclature, which has no implications for the substantive law, and that the Oireachtas must thereby be taken to have intended that the offence of sexual assault must have some clear sexual element to it or, at least, conduct from which such sexual element could irresistibly be inferred. **[6]** As regards the 2001 Act, Woulfe J. agrees with Hogan J. that it is surely relevant that the Long Title of the Act declares that it applies to “persons who have committed certain sexual offences”. It appears to Woulfe J. very harsh and unfair that a young person in the position of F.N. would be automatically made subject to the sex offenders regime as provided for in the 2001 Act, in the absence of the prosecution demonstrating he had intended to commit not simply an assault, but a sexual assault. **[9]**

Woulfe J. agrees with Hogan J. that the conviction for sexual assault should be set aside and substituted by a conviction for assault pursuant to s.2(1) of the Non-Fatal Offences against the Person Act, 1997. **[11]**

### **Note**

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

### **Case history**

10th March 2022

[\[2021\] IESCDT 138](#)

[\[2021\] IECA 238](#)

CCDP0072/2020

Oral submissions made before the Court

Supreme Court Determination granting leave

Judgment of the Court of Appeal, Birmingham P

Central Criminal Court Bill Number