AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2021:000111

Charleton J
O'Malley J
Woulfe J
Hogan J
Murray J

Between/

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

AND

FN

APPELLANT

JUDGMENT of Mr. Justice Gerard Hogan delivered the 23rd day of May 2022

Introduction

1. Where a 14 year-old boy pulls down the trousers and pants of a 6-year-old boy with whom he had been playing in a field in a rural area and then smacks him on the bare bottom some nine times when out of the sight of others does he thereby without more commit the offence of sexual assault? This is the difficult and troubling question presented by this appeal.

2. While both Woulfe J and myself recognise the force of the majority judgment of Charleton J, we nonetheless consider that in the particular circumstances of this case the applicant should simply have been convicted of the offence of assault contrary to s. 2 of the Non-Fatal Offences against the Person Act 1997 and not the offence of sexual assault. I propose to outline my reasons for this conclusion presently but first a short word by way of background is necessary to explain how the issue in this appeal arose.

The prosecution and the trial

3. On 22nd December 2020, the appellant, FN, was convicted in the Central Criminal Court of the offence of sexual assault. FN had stood trial charged with two offences: (i) an allegation of rape contrary to s. 4 of the Criminal Law (Rape) Amendment Act 1990 (as amended) of a four-year old boy ("X") in respect of which the jury disagreed, and (ii) a count of sexual assault in respect of a six year old boy ("Y"), in respect of which the jury returned a guilty verdict. Y is the older brother of X.

4. The rape charge consisted of the allegation that FN had inserted his finger in the anus of X. The jury disagreed on this charge and the Director of Public Prosecutions ultimately entered a *nolle prosequi* in respect of it. Save by way of general background to the present case, it has no direct relevance to the issue now before the Court.

5. The gist of the allegation of sexual assault concerned an allegation that the appellant, a 14-year old boy at the time of the alleged incident, was guilty of sexual assault when he had slapped Y on his bare bottom up to nine times with his open hand. The three boys are neighbours who live in a rural community and it seems that they all frequently played together. The two families lived side by side and, indeed, the father of X and Y ("the father") testified that the families all got on well together and that he considered that the FN's family were "great neighbours." The father also gave evidence that the boys had played together quite happily in the days leading up to these events. The

mother of the complainant ('Ms. Z') also gave evidence that all three boys frequently played together. She also described FN as younger and immature for his age and that he came across more like a 9 or 10 year old.

6. While the precise facts of this case are somewhat sketchy – caused in part by the (hugely understandable) difficulties involved in the giving of evidence by young children – it seems clear that the children were playing together in the open fields near their respective houses. They were accompanied by three other children, one of whom was a sister of FN and two who were cousins of FN. While the precise ages of these other children does not seem to have been formally established, it would appear that they were slightly younger than FN.

7. In the early evening of 13th April 2019 it appears that the children wanted to take a child's tricycle and a go-kart to a field ("field A") behind the house of X and Y. The father gave evidence that he looks after these fields on behalf of a neighbour. Field A is steep and the children presumably wanted to have fun cycling the tricycle or driving the go-kart down the hill. The father stated that he could see the children in field A, but that at one stage they had moved into the neighbouring field B which was obscured from the house by gorse and vegetation. It seems from the father's evidence that the boys said that they had moved into field B because there was less of a hill there and they found it easier to pedal the tricycle in that field.

8. As I have already indicated, we know relatively little about the incident itself. It seems, however, that at one point FN was running down the hill in field A in the direction of a lake. Y chased him and called upon him to stop, but FN continued until Y caught up with him. At this point FN directed Y to go in one particular direction and then in another way. When Y was confused about this, FN pushed him to the ground so that he was lying on his stomach. FN then pulled down his trousers and pants and smacked

him nine times on his bottom. FN called Y "an idiot" and then pulled up his trousers and pants. Then Y said that he "went the right way" and "it got all right." Y told the specialist Garda interviewer that he had felt "sore" and "sad" after the smacking incident. The incident appears to have taken place in field B and thus out of the father's line of sight.

9. After this incident FN and Y walked back to the bridge on field A and they then both went home. Y confirmed that the other children were not present when he had been smacked.

10. There is no doubt but that the incident in question was very unpleasant and deeply unsettling for Y and his family. Ms. Z gave evidence at trial that on 14th April 2019, her son had disclosed to her that the appellant had "hurt" him the previous evening. Ms. Z contacted An Garda Síochána on 15th April 2019, and on the following day, the complainant attended a Sexual Assault Treatment Unit with his mother, but he refused to be fully medically examined. On 24th April 2019, specialist child interviewers conducted what was described as a clarification meeting with Y and his parents at their home. Then, on 1st May 2019, Y was interviewed in a specialist interview suite. In the course of the interview, Y provided a narrative that the accused was directing him to go, first, one way, and then another way, and that he (the complainant) was confused. He told of how the accused pulled down the complainant's trousers and pants and smacked him on the bottom with his open hand nine times. Y also made reference to an occasion when he and the appellant were engaged in play fighting. It appears that having viewed the interview, the investigating member, Detective Garda Carol Quinn, felt that a further interview should be conducted, but the mother of Y was not agreeable to this suggestion.

11. At the trial, the statement made to Garda Quinn was shown to the jury and both of the parents of X and Y gave evidence. FN did not give evidence. The trial judge, Coffey J (who, it is proper to record, handled this difficult case with great care and sensitivity) rejected an application which had been brought on behalf of the accused pursuant to s. 4E of the Criminal Procedure Act 1967 (as amended) to the effect that there was insufficient evidence to put the accused on trial for the offence. Coffey J also rejected the submission made on behalf of the accused that he should direct an acquittal. In his charge to the jury Coffey J. directed them that there was "no requirement to prove that the assault had a sexual purpose or the presence of sexual desire or sexual gratification."

12. The jury ultimately delivered a guilty verdict in respect of the charge of sexual assault. It is perhaps important, however, to record that the prosecution accepted that ultimately it was a matter for the jury to decide whether this was an assault accompanied by circumstances of indecency and thus convict the applicant of sexual assault.

13. This was also noted by Coffey J when passing sentence on 29th January 2021. He observed that:

> "the offending is extenuated by the fact that there is no evidence that the offence was committed for a sexual motive or for the purposes of sexual gratification."

14. Coffey J. further held that this was a case of sexual assault that "is to be placed at the lower end of the scale of gravity such that it does not warrant a detention and supervision order." The judge accordingly applied the Probation of Offenders Act 1907 to the present case, subject to certain conditions regarding supervision and lack of contact with the victims with which FN was required to comply.

The appeal to the Court of Appeal and to this Court

15. Following his conviction, FN's appeal was rejected by the Court of Appeal in a judgment delivered by Birmingham P on 25th August 2021: see [2021] IECA 238. The essence of the Court of Appeal's judgment is to be found at paragraph 21:

> "In this Court's view, the trial judge was correct in taking the view that the appropriate legal test to be applied was whether or not the circumstances of the assault, when objectively viewed, were indecent. If the situation were otherwise, the stripping of a woman by way of revenge or to embarrass would not be an indecent assault. That is not to say that motive is irrelevant, but in most cases - and this was one - there will be no direct evidence of motive. Insofar as motive is a consideration, it is a matter to be inferred from the state of the evidence. It seems to us that factors which have to be considered include the fact that physical chastisement (the alternative explanation offered) is not a normal and accepted part of life in Ireland in 2020/2021. Insofar as it was an issue that was canvassed, the appellant was never in *loco parentis* and never someone who could have lawfully administered chastisement, even when the concept of lawful chastisement formed part of our law. Furthermore, the complainant had never done anything which could ever have merited chastisement. We do accept that the appellant's youth at the time was relevant, as was the history of sham-fighting, but it seems to us that, in the round, these were all matters to be considered by a jury and were not such as to demand the withdrawal of the case from the jury, either by way of a s. 4E application or by way of a directed acquittal. In the circumstances, we will dismiss this ground of appeal."

16. This Court granted leave to appeal pursuant to Article 34.5.3 of the Constitution on the single ground as to whether having regard to the admitted nature of the facts, the offence of sexual assault was disclosed.

The nature of the offence of sexual assault

17. The offence of indecent assault was an offence at common law which has been carried over as part of our law by Article 50.1 of the Constitution: see *Doolan v. Director of Public Prosecutions* [1992] 2 IR 399; *Douglas v. Director of Public Prosecutions (No.2)* [2017] IEHC 248. The offence admittedly does not lend itself to precise definition and, as McDermott J remarked (at paragraph 74) in *Douglas (No.2)*, this is one of these cases where "because of the wide-ranging nature of human behaviour" the offence is defined "with a lesser degree of certainty than might be appropriate in other types of behaviour." The contours of the offence were nonetheless described as "reasonably well settled" by O'Malley, *Sexual Offences* (Dublin, 2013) at paragraph 4-06. He continued by saying:

> "…an indecent assault was an assault accompanied by circumstances of indecency on the part of the defendant, and that remains the definition of sexual assault. An assault at common law did not involve the direct application of force: it consisted of a movement or gesture which attempted or threatened the unlawful application of force to another; and it must have intentionally or recklessly caused another to apprehend the application of unlawful force or, at least, a physical touching…What mattered was that the touching occurred without excuse or justification and, where relevant, without the consent of the other party."

18. While it would be difficult to improve upon this definition, the difficulty arises in respect of the critical words "circumstances of indecency." I think it is quite clear from

the case-law that at its core the offence includes the unlawful touching of the sexual organs of either a male (i.e., penis and scrotum) or a female (vagina/vulva and breasts): see, e.g., *Faulkner v. Talbot* [1981] 1 WLR 1528 (unlawful touching of penis by a female); *R. v. Chase* [1987] 2 RCS 293 at 303 per McIntyre J. (unlawful touching of female breasts by a male); *R. v. BZ* [2017] NICA 2 (unlawful touching of a boy's penis by an adult male).

19. These, however, are simply instances which unquestionably involve an assault in circumstances of indecency. In O'Malley's words (at paragraph 4-16):

> "Some assaults are so obviously indecent because of their overtly sexual nature or connotations that no ambiguity arises. A person who deliberately touches the sexual organs of another without that other's consent clearly commits a sexual assault. At the other end of the spectrum a person who commits an assault with no obvious sexual connotation is not guilty of indecent assault even if the act was performed for the purpose of sexual gratification."

The ambiguous cases

20. The more difficult question is presented by cases – such as the present one – where the matter is less clear cut or, if you will, ambiguous. Aside from constitutional or similar challenges regarding the very existence of this (or similar offences) in cases such as *Doolan v. Director of Public Prosecution*s [1992] 2 IR 399; *The People (Director of Public Prosecutions) v. EF,* Supreme Court, 24th February 1994; *SOC v. Governor of Curragh Priso*n [2001] IESC 68, [2002] 2 IR 66; *Douglas v. Director of Public Prosecutions (No.1)* [2013] IEHC 343, [2014] 1 IR 510; *McInerney v. Director of Public Prosecutions* [2014] IEHC 181, [2014] 1 IR 536; *Cox v. Director of Public Prosecutions* [2015] IEHC 642, [2015] 3 IR 601; *Douglas v. Director of Public Prosecutions (No.2)* [2017] IEHC 248; *PP v. Judges of the Dublin Circuit Court* [2019]

IESC 26, [2020] 1 IR 123 and *Bita v. Director of Public Prosecutions* [2020] IECA 69, [2020] 3 IR 742, it does not appear that there are any reported cases where the precise contours of this offence have been explored by courts in this jurisdiction since 1922. There are, however, a range of such cases in other common law jurisdictions. Some examples can be briefly mentioned at this stage in order to illustrate these difficulties.

21. In *R. v. George* [1956] Crim LR 52 the accused had removed a girl's shoe on a number of occasions. He admitted to police that he derived sexual gratification from this. It was nonetheless held that there was no indecent assault, as the circumstances were not indecent, the motive notwithstanding. The decision of the Court of Appeal of England and Wales (Criminal Division) in *R v. Thomas* (1985) 81 Cr App Rep 331 is in a similar vein. Here, the accused, a school caretaker, had simply touched the hem of a girl's dress. Stressing that this was not a case, for example, of "a man putting his hand up the skirt of a girl", Ackner L.J. held (at 334) that "no one would suggest that on those bare facts it was an indecent assault, although no doubt it was an assault."

22. The decision of the House of Lords in *R v. Court* [1989] AC 28 is perhaps the leading contemporary decision on this point in the common law world. I propose presently to return to this case in more detail.

Relevant statutory developments

23. At this juncture, however, it is next necessary to mention two other important statutory developments. First, s. 2(1) of the Criminal Law (Rape) (Amendment) Act 1990 ("the 1990 Act") provided that the common law offence of indecent assault shall "be known as sexual assault" and s. 2(2) provided for a maximum penalty of five years' imprisonment upon conviction on indictment. Second, s. 3(1) of the Sex Offenders Act 2001 ("the 2001 Act") states that (with certain minor exceptions not relevant to this

case) any person convicted of the offence of sexual assault becomes subject to the special regime of post-conviction control provided for in that Act.

24. It seems to me that these statutory developments do have a bearing on the fundamental question posed in the course of this appeal, namely, whether in an ambiguous case such as the present one, it is also necessary for the prosecution to establish that there was a sexual element to the crime. It is true, of course, that as Egan J observed in *EF,* s. 2(1) of the 1990 Act had merely re-named the offence of indecent assault and provided for a new statutory penalty:

> "It is clear from the foregoing that the offence of indecent assault remains but as and from the 21st January, 1991 it became known as sexual assault. It still remains a common law offence for which punishment is provided by statute. In regard to indecent assaults which occurred prior to the 21st January 1991 I see no possible objection to them being referred to in indictments as 'indecent assaults'."

25. In *SOC* Hardiman J spoke to the same effect. He rejected the argument that the abolition of the common law offence of common assault by the Non-Fatal Offences against the Person Act 1997 also had the effect of abolishing the common law offence of indecent assault/sexual assault. He continued ([2002] 1 IR 66 at 69):

> "Accordingly, it seems clear that the effect of s. 2 of the 1990 Act was simply to change the name of the offence while leaving its nature and constituents unaltered. Obviously the legislature might have approached this matter otherwise by constituting a new offence but it has chosen simply to alter the name. There is no reason not to follow the decision in *EF* and accordingly I would hold that the offence was not misdescribed either in the summons or in the form of conviction."

26. Both *EF* and *SOC* were, of course, concerned with the argument that the common law offence of indecent/sexual assault had not survived the enactment of, respectively, the 1990 Act and the 1997 Act. In neither case was this Court required to consider the possible implications of the name change effected by the 1990 Act to a case such as the present one where the offence did not necessarily have a sexual element. Insofar as there was any suggestion that this change of name had no possible implications for the ambit and scope of the underlying offence in a borderline case of this nature, any such comments would necessarily have been *obiter*, as that issue was simply not before this Court in either of these cases. To that extent, therefore, I respectfully disagree with Charleton J insofar he suggests that this interpretation necessarily presupposes that both *EF* and *SOC* were wrongly decided.

27. I cannot help thinking that part of the difficulty here may have been an assumption on the part of the Oireachtas when effecting the statutory name-change in the 1990 Act that indecency offences and sexual offences are necessarily one and the same thing. While this is most often the case, it is not always so. The offence of indecent assault was essentially an assault upon the modesty of the victim. With the exception of some unusual or borderline cases, it generally had an obvious sexual element. But this is not always so.

28. Take the everyday example of where a couple kiss each other on the lips in public. This act in itself is not regarded – even by the most prudish and straight-laced – as in any sense indecent. There is, however, recent English authority for the proposition that such conduct can amount to a sexual assault if there is no consent: see *Attorney General's Reference (No. 1 of 2020)* [2020] EWCA Crim 665, [2021] QB 441. Yet I cannot think that such non-consensual conduct could amount to an *indecent assault* as distinct from a sexual assault. A non-consensual kiss of this kind might well amount to an unlawful

assault or, for that matter, a sexual assault but it is hard to say that, absent other relevant facts, it would *in itself* be attended by the circumstances of indecency such as would have been necessary to ground a conviction for indecent assault at common law.

29. In truth, therefore, the name change effected by the 1990 Act is not just simply a matter of nomenclature to which the substantive law is quite indifferent or which has no implications for that substantive law. Given the horrible stigma which attaches to the very idea of a sexual offence, 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 could irresistibly be inferred. The offence of sexual assault is such a deeply repugnant one that society will close its doors to those convicted of this offence and there will be but few who would otherwise be prepared to listen to FN's entreaty by way of explanation for his conviction that after all the trial judge had accepted that there was no evidence of any sexual motive or sexual element to his offending.

30. The decisions in *EF* and *SOC* pre-date moreover the enactment of the 2001 Act and the application of the sex offenders regime to persons convicted of sexual assault. The 2001 Act is, of course, entirely premised on the assumption that the offender has been convicted of a sexual crime. If there was no sexual element to the crime, this could lead to rather strange consequences.

31. Consider the following example. Suppose that a mother is walking along the street with her six year old boy when, in response to some act of naughtiness on the part of the boy, she quickly pulls down his trousers and pants in public and slaps him on his bare bottom. If the arguments of the Director of Public Prosecutions in the present case are correct – *i.e.*, that the offence of sexual assault is one of general intent and there is no need to establish even in cases of ambiguity that there has been some sexual element to

the crime – then it follows that, in the example I have posited, the mother could indeed be convicted of sexual assault. In those circumstances she would also be automatically made subject to the sex offender's regime as provided for by the 2001 Act. When this example was put to counsel for the Director, Mr. McGinn SC, in the course of oral argument, he accepted that this would be so.

32. There is, of course, a further consideration to this issue. The entire premise of the 2001 Act is that it only applies to sexual offending. While I accept that the Long Title of any Act cannot in itself qualify the substantive provision of the legislation (see, e.g., the recent comments of Baker J. to this effect in *ELG v. Health Service Executive* [2022] IESC 14) it is nonetheless surely relevant that the Long Title of the 2001 Act declares that it applies to "persons who have committed certain sexual offences." In any event, the constitutionality of this measure was upheld by Finlay Geoghegan J. in *Enright v. Ireland* [2003] 2 IR 321 on the basis that, first, the registration requirements did not constitute a primary punishment for constitutional purposes (in the sense analysed by Walsh J in *Conroy v. Attorney General* [1965] IR 411) and, second, that these measures represented a proportionate response by the Oireachtas to the particular problems posed by sexual offenders.

33. It is, perhaps, significant that in her judgment Finlay Geoghegan J placed particular emphasis on the expert evidence led by the State parties as to the particular problems which sex offenders posed. Thus, for example, Finlay Geoghegan J said (at 338) that the evidence of the defendants "establishes that all sex offenders are considered to present a risk at the time of their release such as to justify the blanket imposition of the notification requirements." Likewise, when applying the proportionality test in respect of the fair procedures question, the judge stated that (at 342) it was necessary "to refer to the expert and other evidence given on behalf of the defendants in relation to sexual

offenders, their treatment and tendency to relapse. The undisputed evidence was that sexual offenders present a significant risk to society by reason of their tendency to relapse."

34. While it is true that these comments were made in the context of a challenge to the constitutionality of the *retrospective* application of the 2001 Act to pre-existing sexual offenders, the broader principle nonetheless holds true: the entire operation of the 2001 Act necessarily presupposes that the offender is in fact a sexual offender. The justification for the registration and notification requirements provided for in the 2001 Act is that the convicted person has engaged in sexual offending. If, however, these obligations were to be applied to a person – such as in the present case – where there was no clear evidence of sexual offending, then this would have wider implications for the criminal justice system.

35. It is true, of course, that, generally speaking, the scope of the substantive criminal law cannot be determined by the consequences of conviction. Yet so pervasive is the effect of the 2001 Act that its shadow hangs over all offences for sexual offending. It would, I think, be quite unrealistic to interpret the scope of the common law offence of sexual assault so as to bring non-sexual offending within its ambit.

36. The decision of the Court of Appeal in *The People (Director of Public Prosecutions) v. Sweeney* [2014] IECA 5 is perhaps a case which is on point. Here the question was whether the (in this particular instance, permissive) statutory power to disqualify a motorist from driving could properly be applied by the Circuit Court to a person convicted of the offence of deception in respect of a stolen motor vehicle. The Court held in the circumstances that it could not as there was no evidence that the accused had abused his licence to drive by exercising that right in furtherance of his criminal activities. If I may venture to repeat what I said (at paragraph 13 of the judgment):

> "If the power to disqualify could be exercised in any wider fashion, then it would cease to retain the essential quality of a determination of fitness to drive. Such a broader interpretation would alter the general character of the disqualification power so that it would thereby evolve from a regulation of the fitness to drive into a form of primary punishment. This would have significant implications throughout the wider criminal justice system and would once again call into question the constitutionality of legislation providing for the summary disposition of drunk driving offences."

37. The same is, I think, true in the present case as well, if only by way of analogy. The whole basis of the 2001 Act – which is mandatory upon those convicted of a sexual offence (save for exceptions not here material) – is that it applies only to persons who have engaged in sexual offending. If it applied more broadly, then the entire rationale for the legislation as analysed in cases such as *Enright* would be compromised. This, surely, cannot have been the intention of the Oireachtas when it enacted either the 1990 Act or, for that matter, the 2001 Act.

Application of these principles to the facts of the present case

38. And so one comes back to the question posed at the start of this judgment: does the smacking of a 6 year old boy by a 14 year old boy on his bare bottom in a rural field *in itself and without more* constitute the offence of sexual assault? Here the particular context of the offence is everything. In this case we had children playing together in the fields and the smacking appears to have occurred after some form of childish altercation or misunderstanding. This conduct on the part of FN was, manifestly, quite inappropriate and it amounted to the offence of assault for the purposes of s. 2(1) of the Non Fatal Offences against the Person Act 1997. Yet, given the particular factual

context of this offence I struggle to see how, *on these facts alone*, one can say that the offence of sexual assault has been committed.

39. It is important to stress that this observation should not be misunderstood: quite obviously there could well be circumstances where such conduct *in another context* would clearly be capable of amounting to sexual assault. If, for example, an adult male were forcibly to remove the pants and underclothing of an adult female and smack her nine times on the bare bottom this would be an entirely different matter: *those* circumstances are, to adopt O'Malley's words, "so obviously indecent because of their overtly sexual nature or connotations that no ambiguity arises."

40. The decision of the Northern Irish Court of Appeal in *BZ* fits squarely into this latter category. This was a case where one of the allegations was that an adult volunteer leader in a charitable organization had intentionally touched the penis of a boy at a swimming pool, in one case over his swimming togs and that on the other occasion he had actually touched his penis under his togs. Delivering the judgment of the Court, Stephens J held (with respect, correctly) that there was no need for the prosecution to demonstrate that the accused had a sexual motive.

41. Here I think that the decision of the House of Lords in *Court* is of assistance. In this case an adult male shop assistant spanked a 12 year old girl some 12 times on her covered bottom. When questioned to explain the reason why he had done such a thing the accused told the police that he supposed that he had some sort of fetish in this regard for the female bottom. The House of Lords held that such an admission was admissible in evidence in order to support a conviction for indecent assault.

42. The reasoning of the majority judgments is, I think, very helpful. Lord Griffiths observed ([1989] AC 28 at 35) that:

"[…] in the context of indecent assault, the necessary intent is to commit an assault which the jury as right-thinking people consider to be sexually indecent….Whether or not right-thinking people will consider an action indecent will sometimes depend upon the purpose with which the action is carried out…..The fact is that right-thinking people do take into account the purpose or intent with which an act is performed in judging whether or not it is indecent. If evidence of motive is available that throws light on the intent it should be before the jury to assist them in their decision. Suppose, in the present case, the appellant had said to the police, 'I thought the girl had been stealing and I beat her to stop her doing it again.' Such evidence would surely have been admissible to attempt to persuade the jury that this was an act of chastisement and therefore they should not regard it as indecent. If, on the other hand, evidence is available that shows the spanking was not an act of chastisement but carried out with the intention of obtaining perverted sexual gratification, it would, in my view, be an affront to common sense to withhold that evidence from the jury when asking them to decide if this man had behaved indecently."

43. Lord Ackner spoke in similar terms ([1989] AC 28 at 42):

"The assault which the prosecution seek to establish may be of a kind which is inherently indecent. The defendant removes against her will, a woman's clothing. Such a case, to my mind, raises no problem. Those very facts, *devoid of any explanation*, would give rise to the irresistible inference that the defendant intended to assault his victim in a manner which right-minded persons would clearly think was indecent. Whether he did so for his own personal sexual gratification or because, being a misogynist or for some other reason, he wished to embarrass or humiliate his victim, seems to me to be

irrelevant. He has failed, *ex hypothesi*, to show any lawful justification for his indecent conduct. This, of course, was not such a case. The conduct of the appellant in assaulting the girl by spanking her was only *capable* of being an indecent assault. To decide whether or not right-minded persons might think that assault was indecent, the following factors were clearly relevant—the relationship of the defendant to his victim—were they relatives, friends or virtually complete strangers? How had the defendant come to embark on this conduct and *why* was he behaving in this way? *Aided by such material, a jury would be helped to determine the quality of the act, the true nature of the assault and to answer the vital question— were they sure that the defendant not only intended to commit an assault upon the girl, but an assault which was indecent—was such an inference irresistible? For the defendant to be liable to be convicted of the offence of indecent assault, where the circumstances of the alleged offence can be given an innocent as well as an indecent interpretation, without the prosecution being obliged to establish that the defendant intended to commit both an assault and an indecent one, seems to me quite unacceptable and not what Parliament intended.*" (emphasis supplied)

44. These comments – and perhaps especially the passage from Lord Ackner's judgment which I have taken the liberty of underlining – are very much on point. If one applies this analysis to the example of the mother smacking her 6 year son on the bare bottom in public, it would, I suggest, be necessary for the prosecution in that case to go beyond these facts and point to other circumstances from which the inference of an intention on the part of the mother to commit a sexual assault was irresistible.

45. The same is also true of the present case. Unlike, for example, cases such as *Chase* or *BZ*, 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." On one view the act of smacking amounted to manifestly inappropriate conduct on the part of an immature youth prompted, perhaps, by anger and frustration following a misunderstanding of some kind with a much younger child with whom he had been friendly: these facts in themselves do not, however, lend themselves to the same type of irresistible inference that the accused intended to commit a sexual assault in the same manner as if, for instance, an adult male had forcibly removed the underclothing of an adult female in public and had spanked her nine times on the bottom. Unlike the present case, viewed objectively, those particular facts admit *only* of an interpretation consistent with an intention to commit a sexual assault. But since this is *not* true so far as this appeal is concerned, I return to the point that on the facts of this particular case there was insufficient evidence to allow the jury properly to convict the applicant of the offence of sexual assault, precisely because these particular facts can be given an innocent (in the sense of non-sexual) interpretation as well as a sexual interpretation.

46. In this regard I am not unmindful of the fact that *Court* was concerned with the *admissibility* of evidence to support a conviction: the House of Lords did not at any point address the proofs required of a prosecution. The essential *ratio* of that decision was that in a case where the acts in question are *capable* of constituting a sexual assault but do not in themselves give rise to an irresistible inference that the defendant intended to assault the accused in an indecent manner, further evidence to support such an inference could be adduced.

47. The facts of *Court* are, however, quite different from the present case. The accused was an adult and he had previously asked the young girl on another occasion whether she enjoyed being spanked. There was already evidence which could have gone to the jury from which the irresistible inference could have been inferred. The present case is again

different because - as the trial judge agreed - the case contained no sexual element or conduct from which such could necessarily have been inferred.

Conclusions

48. For all the reasons just stated, I consider that in the particular context of this particular case, the evidence did not disclose circumstances in which, adopting the words of Lord Ackner in *Court*, the prosecution had demonstrated that FN had intended to commit not simply an assault, but a sexual assault. Nor could it be said that the circumstances of the offence were such that it gave rise to the "irresistible inference" that the accused intended to commit not simply an assault, but a sexual assault.

49. In these circumstances, I would allow the appeal and set aside the conviction of FN for sexual assault. I consider that there should be substituted instead for that conviction a conviction for assault for the purposes of s 2(1) of the Non Fatal Offences against the Person Act 1997.