

**An Chúirt Uachtarach****The Supreme Court**

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

Supreme Court appeal number: S:AP:IE:2021:000111  
[2022] IESC NN  
Court of Appeal record number: 2021/30  
[2021] IECA 238  
Central Criminal Court record number CC0072/2020

**Between**

**The People (at the suit of the Director of Public Prosecutions)  
Prosecutor/Respondent**

**- and -**

**FN (a minor)  
Accused/Appellant**

**Judgment of Mr Justice Peter Charleton delivered on Monday 23 May 2022**

1. The jury's verdict was that the accused, aged 14 years at the time of the offence, was guilty of sexual assault on the 6-year-old victim on 13 April 2019 (count 2); but the jury disagreed on a charge of s 4 rape of his younger brother on the same occasion (count 1). Since the trial in the Central Criminal Court in December 2020, concern for the witnesses has led to the prosecution discontinuing count 1. A jury verdict in its essence simply states that, exercising shrewdness and commonsense, either the charge has been found proven beyond reasonable doubt (guilty) or that there is some want in the prosecution proofs that would cause reasonable people to doubt the proof offered (not guilty). Hence, where there is evidence upon which a jury could act reasonably in convicting the accused, barring legal error in the trial, a verdict should be secure. If that evidence is missing, then a jury should not be asked to speculate. The issue here is whether the facts sufficed to support a verdict of guilty on the sexual assault charge since on behalf of the accused it is argued that not only must there be an assault in circumstances of indecency but that, in certain cases of which this is contended to be one, a sexual motive in the assault must also be proven.

### **Basic facts**

2. On this appeal, as is legitimate, both sides have sought to interpret the evidence at trial in pursuit of their argument in the case. Hence, it is appropriate to take the victim's evidence and to set out the essentials as to what his video-recorded testimony was. That recording was played as the victim's evidence in chief. There was no cross-examination and the accused did not give evidence as to any alternative narrative. Those facts are simple. In the context of playacting in a field near his family home, which may have involved, either on that day or the previous day, play fighting of a very mild kind with sticks, and out of sight of the victim's father, the accused pulled down the victim's pants and underpants. While the victim was pushed down and was prone on the ground, the accused hit the victim on his bare buttocks "a few times", clarified after counting by the victim on his fingers as "nine times" and that this was like "a big smack" so that "it was sore."

3. The issue of law of general public importance enabling an appeal from the upholding of the trial verdict by the Court of Appeal, [2021] IESCDET 138, is stated in the Court's determination to be "where there is ambiguity in the circumstances of an alleged sexual assault, must the prosecution prove an intention not just to commit an assault, but also an intention to commit an indecent one?" On the helpful written and oral submissions, concepts such as purpose, intention, motive and ambiguity of circumstance have surfaced with a degree of flexibility such as to prompt as helpful a restatement of some fundamental concepts in criminal law as a foundation for any analysis as to what the prosecution must prove on this regrettably all too frequently and necessarily brought charge of sexual assault.

### **Intention to commit a crime**

4. In every prosecution for a crime, the prosecution must prove that the accused brought about the external elements of the crime. What those external elements are will depend on the definitions inherent in the prohibition, the breach of which makes bringing these about an offence. As an offence, assault requires that the prosecution prove that the accused touched the victim. This action may range widely from the accused nudging or hitting or slashing with a knife or attacking with a blunt weapon; the circumstances being outside the trivial interactions of accidental jostling in a crowd or of attracting someone's attention with a polite touch to their back or shoulder or arm. To be guilty of a non-regulatory offence, the accused must have intended to so act, or must have acted recklessly or with knowledge or gross negligence; depending on how the offence is defined as to the mental element. Here, the mental element is intention. As to that the question may sometimes be asked: how is the jury to look into the accused's mind? The answer is that people may be inferred to have intended what they have done where the circumstances so suggest; in other words, to have as their purpose what naturally flows from what they have done. A person who on all the available evidence goes up to someone and hits them may be inferred to have intended this action. But this is not in any way an inflexible legal rule: it is simply a commonsense way whereby intention may be inferred: there is no rule requiring any jury to make that inference since interpreting the facts are for them. The facts within the province of a jury include both the external elements of the offence (what happened and did that fit the definition of the offence) and the mental element (with what state of mind did the accused bring about the external facts).

5. Most of the case law on intention derives from murder prosecutions. Here is not the place to go through a comparative and historical analysis as to the turns which the law has taken in other jurisdictions, often puzzlingly; see *Charleton & McDermott's Criminal Law and Evidence* (2<sup>nd</sup> edition, Dublin, 2020) 1.59-1.67. The reason why murder prosecutions have led appellate courts to treat this concept in detail is that an unlawful killing, in other words one not in the heat of battle during a war or in proportionate self-defence responding to a deadly attack, is not murder unless the accused in doing what is proven against him or her intended to kill or to cause serious injury to the victim or to some other person killed; s 4 of the Criminal Justice Act 1964. While the theory of specific intent (having an intent not just to do the act but in doing so to intend a result), in contrast to basic intent (simply doing the actions that constitute the crime), has been disputed, the concept is nonetheless of assistance in elucidating the nature of intent and of confining the defence of intoxication within proper limits; *The People (DPP) v Eadon* [2019] 2019 IESC 98. Here, we are not dealing with a specific intent; an intent beyond bringing about the external elements of the offence. A specific intent may be part of the definition of an offence, as in murder or assault with intent to wound, but such complex offences are rare. The purpose of the accused, the issue will be in a murder case, was it to bring death or serious injury to the victim; or in the case of attempted murder, did the accused intend to kill? But that is murder, where the accused must be proven to have intentionally done the act which kills, the stabbing or the administration of strychnine for instance, and to have done so intending to kill or cause serious injury. Offences of specific intent, however, are exceptional. Assault requires only an intent to do the action that comprises the assault; the touching, the punch, the tripping up. In this context, it must be remembered that intent is an ordinary word and may readily be understood to be the purpose of the accused: that the accused intended to hit, strike or touch the victim, that the accused intended to do so in indecent circumstances.

6. In this context, intent means nothing more complex than that the purpose of the accused was to bring about the criminal wrong; that he or she acted purposely, and not, as might happen in the context of an apparent assault, accidentally. Leaving aside such rare defences as automatism, where only the body acts while the mind does not direct its actions, or insanity, where the person did not know the nature and quality of his or her action or did not know it was wrong or was acting under an uncontrollable compulsion in consequence of mental illness (statutorily defined in s 5 of the Criminal Law (Insanity) Act 2006), or where mental illness substantially diminishes culpability outside of substance abuse (the defence of diminished responsibility under s 6 of the Act of 2006), intent is a simple concept. It should be kept as such. A criminal trial is not an intellectual event, such as a university seminar, but is, instead, the finding, or rejection, of fact by a jury and the jury's application of defined law to such facts as they find in order to decide if the building blocks of the prosecution case are accepted beyond reasonable doubt in proof of the charge. A jury is never compelled to make a finding of fact nor required in law to accept or reject evidence: further, a jury is never compelled, and should not be coerced, to make an inference from such facts as the jury finds proven.

7. Intent means: was it the purpose of the accused to bring about the event on which the charge is founded? Only in cases where a defence argument is put forward on a sufficient basis could it ever be necessary to mention oblique intention; relevant really only to specific intent crimes such as murder. In such, vanishingly rare, cases, the accused may argue that, for instance, a bomb on a plane was intended to divert the aircraft away from a scheduled destination as opposed to killing the passengers and crew in consequence of it crashing. Any approach to such a case must, as always, be founded on good sense. From the circumstances, the more likely death is to result from the actions of the accused, the more

readily may intent to kill be inferred: but such an inference is for the jury and does not follow as a matter of law because death is highly probable or even practically inevitable; *Clifford v DPP* [2008] IEHC 322. An inference means the deduction of a fact from such other facts as are proven. Inferences are made by way of ordinary sense. An inference should only be made in a criminal trial, since it is a finding of fact, where that fact emerges as proven beyond reasonable doubt from the consideration of such other evidence as is accepted.

### **Motive for committing a crime**

8. Analysis of cases may be complicated by the introduction of motive or, through the introduction of legal error, motive can be equated with intention. In effect, that is what the argument on behalf of the accused seeks to do here. This adds an unnecessary and entirely novel concept that complicates and diverts the simplicity inherent in the criminal law. Motive and intention are completely separate concepts. As Dixon J stated in *R v Lewis* [1979] 2 SCR 821, p 831, 833: “Motive is no part of the crime and is legally irrelevant to criminal responsibility. It is not an essential element of the prosecution’s case as a matter of law.” By way of illustration: a man shoots his uncle dead; the issue at the murder trial might be was it him that shot the uncle; and if so, did he purposely bring about the shooting and, in doing that, did he intend to kill or cause serious injury to the victim? On finding facts, intent is always an issue for the jury: was there a purposeful discharge of the gun by the nephew at the uncle and was that done in order to kill or to cause serious injury? Intention, or purpose, can only ever be the legal issue as to the mental element in the charge: and that alone. Motive has nothing to do with the elements of any offence. It may be, however, that the prosecution prove that the nephew had arranged life insurance for his dead uncle and that this inheritance was his motivation in his actions. It may be that the nephew stood to inherit the farm on his uncle’s will and knew this. As evidence, motive may properly be introduced by the prosecution as a means of proving the facts of the crime, including the intent to commit the crime. As evidence, lack of motive may also properly be raised by the defence, by defence evidence or on the prosecution case, and may be a legitimate argument to support a case, either that it was not the nephew who killed the uncle, or that whatever happened with the gun was accidental, or that his uncle had mounted a deadly attack; *The People (DPP) v Nevin* [2003] 3 IR 321. All of this depends on the evidential building blocks of the prosecution case and such answer as the accused may legitimately make upon the testimony and evidence as a whole presented at the trial, including if offered the accused’s own. This brief illustration becomes necessary since the argument on behalf of the accused on this appeal has been that a sexual assault is not proven unless the prosecution demonstrate that the accused, in bringing about the external elements of an assault in indecent circumstances, also had a sexual motive; which is understood as a motive to sexually arouse the assailant or somehow gain sexual satisfaction or a sexual thrill from what was done. That is not, and has never been, the law.

### **Sexual assault**

9. Leaving aside where consent may not validly be given by reason of the age of the victim: a sexual assault comprises touching the victim without consent in an indecent manner or in indecent circumstances. This can be shortened to an assault in indecent circumstances. Such an assault is committed where it is the purpose of the accused to touch the victim without consent and that purpose includes the indecent nature of the touching (for instance grabbing a man or woman by the crotch) or bringing about through the assault the indecent circumstances (stripping a man or a woman of their lower clothing or

stripping off a woman's upper clothing). No element of hostility or aggression is required. Nor must the prosecution prove a sexual desire by the assailant. The accused must purposely assault the victim in an indecent manner or in indecent circumstances. Thus defined, the elements may be set out:

- That the accused intentionally assaulted the victim: meaning that the accused touched the victim purposely.
- That the assault, or the assault and the circumstances accompanying the assault, are proved to be indecent; which is an objective finding according to the contemporary standards of right-thinking people.
- That the accused's purpose was to assault in these indecent circumstances.

10. Outside politely touching a person, in accordance with prevailing social norms, to attract their attention, any touch is an assault where there is no consent. Touch encompasses everything from stroking to punching to hitting with a weapon. Within social norms there is may be implied consent to touch; just as it is not a trespass to land, because there is implied consent, to walk up to someone's house and knock on the door for a lawful purpose, such as delivering something. Hence an assault may be defined as any intentional touching of another person without the consent of that person and without lawful excuse. It is not required that an assault be always be hostile or rude or aggressive; see Lord Lane LJ in *Faulkner v Talbot* [1981] 3 All ER 468, 471. Where the accused invites a child, legally a person who cannot consent, to touch the accused in indecent circumstances, any touching of the child by that accused constitutes an indecent assault. Since the offence of indecent assault has been renamed sexual assault, the words indecent and sexual are here used interchangeably. That renaming has not altered the elements of the offence.

11. The validity of the definition of a sexual assault being an intentional touching in circumstances of indecency may be illustrated by examples. Regrettably, the most common example in the experience of the courts is where a person is touched without consent on their sexual organs, or in the case of a woman, her breasts. What place does intention have here? What it means is simply that the accused intended to bring that assault about in those circumstances. Just as an assault is not an offence if occurring by reason of accident, as where a woman trips on the pavement and collides forcibly with a pedestrian beside her: similarly if a man standing on a busy commuter train is jolted by a sudden stop and in falling unintentionally puts a hand on a woman's breast, intending only to not fall heavily to the ground, that is not an assault because it is not an intended touching and not an indecent assault because the indecency within the touching is not his purpose.

12. Bringing about the circumstances of indecency must be intentional. While some illustrative scenarios lack credibility, it will be for a jury to assess if the circumstances are sufficient to prove that the accused brought about the circumstances of indecency inherent in a charge of sexual assault. Hence, if a man is running to get on a commuter train and boorishly pulls someone out of the way so that he can get through a crowd on an elevator, that is an assault. In the same panicked circumstances, if the man grabs unheedingly at a woman and in so doing rips her clothing to an indecent degree, there may be no intention to bring about that indecent circumstance; but that is still an assault. Sexual assault extends not only to an intentional touching of the private areas of the human body but to the purposeful bringing about of indecent circumstances. Again, to illustrate: an adolescent boy is being bullied in school and other teenage boys decide to humiliate him by tying him to a tree; an assault is the means by which that nasty degradation is brought about. The confinement is also false imprisonment. The motivation is simple spitefulness (legally

irrelevant but this may be an item furthering or, if absent from some particular boy who claimed not to take part, undermining proof). The external element of the offence is grabbing the boy, manhandling him to the tree and tying him to it; the intention is simply the purpose of carrying out those actions. None of those actions, of grabbing the boy, of dragging him along and of tying him up is indecent: furthermore, if this feeling of power over another gives any of the assailants any kind of a private sexual thrill or experience, that does not convert the offence into an indecent assault. The external circumstances are not indecent and therefore this cannot be an indecent assault. It is still, of course, a nasty assault. It would be even nastier if the boys ripped off the victim's shirt but stopped there.

13. Were the teenage boys to decide on the extra humiliation of stripping the victim naked or of pulling down his trousers and underwear or of handling his genitals, the circumstances become indecent. The motivation of the boys is the same, that of humiliating the victim, but here they decided to add in an extra element to the assault. Because the boys intended an assault in indecent circumstances, the assault is an indecent assault. Their purpose was not only to assault the victim but to do so in indecent circumstances. Were none of the assailants to drift mentally into any feeling of sexual titillation makes not the slightest difference to the elements of the offence; all of which are established by the intentional manhandling in indecent circumstances. In argument on the appeal a scenario whereby a mother pulls down her small child's lower clothing and administers a spanking. On behalf of the accused, this asserted to be demonstrative of the need for a motive of a sexual kind, without which, so it is argued, the elements of the law as defined at paragraph 9 are claimed to be contrary to good sense. In so far, firstly, as reasonable chastisement survives as an entitlement of parents, and no argument has been addressed on this, an assault must be committed for a sexual assault to occur. Secondly, the relationship between a parent and a child in terms of intimate care would tend to out rule an indecent circumstance. But a deliberate public humiliation by severe chastisement and stripping, such as in the bullying example, might, depending on precise circumstances, enable a judge to rule that an assault had occurred and that it was in intentionally indecent circumstances.

### **Sexual purpose unnecessary**

14. It would be both unhelpful and confusing to change the definition of sexual assault by the addition of some extra element of a sexual purpose. That is not the offence. With the crystallisation of the definition at common law, as to what proof is needed, the mental element and the adjudication by contemporary and commonsense standards as to what is indecent and the inference possible from external circumstances, it is not possible to alter the parameters of the offence. This is not the same situation as emerged in *The People (DPP) v McNamara* [2020] IESC 34 where an earlier judicial interpretation as to the parameters of provocation as a defence to murder introduced elements removing any objectivity and where the nature of the defence required correction to conform with experience and the approach as to other and parallel answers to culpability by way of common law defences such as duress; see [23] – [30]. That correction and clarification is not legislating, nor is it a usurpation of the exclusive law-making power of the Oireachtas reserved to the political sphere by Article 15.1 of the Constitution.

15. Confusion would arise from the development for which the accused has contended. This would be through the blurring of lines as to law-making in an area which every standard textbook illustrates has been altered piecemeal by multiple pieces of legislation. Nor would such a development be consistent with how the common law works. Rather it

would demonstrate not that the law is evolving and may adapt to new situations, as does the common law where there has been no statutory intervention. Here, the law is an amalgam of common law definitions and legislative change. Furthermore, as a matter of statutory interpretation, the legislature in intervening through the Criminal Law (Rape) (Amendment) Act 1990, s 2 by changing the former name of this offence, which was indecent assault, to sexual assault, must be taken to have been conscious of, and intent in keeping in place as legislatively satisfactory, the former definition. That definition was given by *Archbold's Criminal Pleading, Evidence and Practice in Criminal Cases* (26<sup>th</sup> edition, London, 1922, Roome and Ross editors) at p 1033 as requiring the prosecution to “prove an assault, accompanied with circumstances of indecency.” That definition had not changed from the 15<sup>th</sup> edition of that work in 1862. Penalties were altered by legislation subsequent to 1922 as was the application of the offence to both men and women as victims; s 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended by s 37(1) of the Sex Offenders Act 2001, and s 14 of the Criminal Law Amendment Act 1935 in relation to victims under the age of 15. This change, however from sexual assault from indecent assault, was solely a renaming exercise. There are very clear statements in precedent that s 2 changed the name but not the definitional elements of the offence; *DPP v EF* (unreported, Supreme Court 24 February 1994, 12, *SOC v Governor Curragh Prison* [2001] IESC 68, [2002] 2 IR 66, 69. It may reasonably be concluded that these must be wrongly decided if the name had such a significant effect as is contended for on behalf of the accused. That point is further illustrated by the aggravated penalties for sexual assault forms which were especially degrading, and which are newly defined in the 1990 Act, which became aggravated sexual assault, and by the creation of a newly defined offence of rape by penetration of either men and women by the penis or by an object manipulated by the accused; through s 4 of the 1990 Act. As in the use of language encompassing more than vaginal rape by the male penis, the new offence acknowledged the hurt to victims through the legislative separation from sexual or indecent assault of forms of degradation that ordinary language had evolved into naming as rape. These changes were deliberately made: but equally considered was leaving the elements of indecent assault as it stood but altering the language to reflect the gravity of such an offence. Thus indecent assault was left definitionally as it was but renamed sexual assault and by additional definitions some forms also became s 4 rape and some forms might be found to be aggravated sexual assault. Underlying all these as the basic offence is sexual or indecent assault. This is a lesser included offence; a concept to which this judgment returns.

16. The defence argument that the definitional elements should be added to by requiring a sexual purpose, synonymous with intention, would, furthermore, result in confusion as to what such an element might mean and how it might be proven. More than ever, how could juries be expected to look into the mind of an accused to ascertain an intent of self-arousal or private sexual titillation or akin feelings? Additionally, since offences have been defined by the common law to outlaw and to punish a range of situations, through these elements as they now are set, while sexual motivations may be behind the huge territory covered by an offence that may vary markedly as to gravity and cover a wide range of indecent situations, by introducing a new element, the ground covered by the offence would be reduced markedly. This kind of alteration is not possible save through legislative intervention. The development argued for on behalf of the accused would leave the law in a state of potential turmoil requiring legislative intervention. In fact, there has already been a legislative decision to leave matters as the common law defined the offence.

17. To return to the illustrations given above: what emerges from them is that a purpose of sexual self-excitement is not part of the offence of sexual assault. In the illustration as

to the adolescent bullies tying a boy naked to a tree, the motive is humiliation. That would also be the situation where a man, disappointed that his girlfriend had broken off the relationship decided to wait until she had come out from bathing in the sea, tie her to a nearby lamppost and cut off her bikini. Sexual assault comes within that situation because the intention in the non-consensual handling is to put that unfortunate woman into a situation of embarrassment. And it is embarrassing not just because of being manhandled and tied up (an assault) because it is indecent due being rendered naked (an indecent assault): any motive as to humiliation or as to sexual titillation or as to revenge for imagined insult consequent on the exercise of freedom of choice as to with whom the girl might wish to do a line is outside the definition of the offence. The refinement for which the accused argues, as a kind of alternative to motive, of requiring an express sexual purpose in addition to the assault in circumstances of indecency, confuses and conflates motive and intention. Nor is there room for the addition of any specific intent. Here what is argued for by the accused is: that the accused assault; do so purposely; do so in circumstances of indecency; and do so for a sexual purpose. That kind of specific intent is confined to such rare crimes as murder. Nor is motivation to be enabled as part of the elements of an offence. The reason the crime is defined as it is defined above at paragraph 9 demonstrates that it excludes unnecessary and close-to-impossible enquiries and, furthermore, that it sensibly exists to protect not only against sexual violence but also against affronts to the dignity of victims through the deliberate creation by the perpetrators of circumstances of indecency to the prejudice of those victims.

### **The case law**

18. In the context of the vagaries of human behaviour, individual case decisions will tend to demonstrate equally ample variation. Statements by judges may discursively rake through precedent but are not necessarily a precise guide to how an offence is defined. That is what matters. Juries must be instructed in clear terms and not by way of discursive analysis. Since the only cases likely to attract written decisions on appeal tend to be at the extremes of conduct, often little in the way of illumination may result. Some of the judicial statements, which are recorded here but not approved since the test is set out above at paragraph 9, include: “the offence is concerned with contravention of standards of decent behaviour in regard to sexual modesty or privacy” (per Gibson LJ in *R v Court* [1987] 1 QB 156, 163); “conduct that right thinking people will consider an affront to ... sexual modesty” (per Lord Griffiths *R v Court* at 34); “sexually indecent” (same at 35); “so offensive to contemporary standards of modesty and privacy as to be indecent” (per Lord Ackner *R v Court* at 44); “the sexual undertones ... give the assault its true cachet” (same at 45); “there must be some indecent handling of the complainant” (*R v Abrahams* [1918] CPD 590); “if there is to be an indecent assault, it is necessary that the assault have a sexual connotation” (*R v Harkin* (1989) 38 A Crim R. 296). But, the offence is characterised by the indecency or sexual undertone (or in the vast bulk of cases, sexual overtone) whereby the accused commits an assault in indecent or sexual circumstances. What needs to be born in mind is not the individual exegesis of judicial minds but the principle constituting the common law definition as set out above at paragraph 9.

### **Objective indecency required**

19. The circumstances of the external commission of the offence, looked at objectively, must be an affront to ordinary modesty. Hence, touching the hem of a girl’s dress is not, despite any fetishist motive, indecent. It may be an assault, but not an indecent one; *R v Thomas* (1985) Cr App R 331. Similarly, having a shoe obsession and removing a shoe for



similar motives does not constitute in those external circumstances anything remotely indecent or immodest; *R v George* [1956] Crim LR 52.

20. Examples of what is objectively indecent in terms of an assault include: kissing the victim on her lips against her will and suggesting sexual intercourse (*R v Leeson* (1968) 52 Cr App R 185); a man exposing himself to a child and pulling the victim towards him (*Beal v Kelley* [1951] 2 All ER 763); grabbing by a father of his son in the genital area (*R v V (KB)* [1993] 2 RCS 857) and there it did not matter that a plausible excuse was that the father had claimed to be concerned about his son doing this to other people and so motivated to correct that behaviour; clothed grinding of genital areas together (*R v Ewanbuck*) [1999] 1 SCR 330; and grabbing a clothed teenage girl by the breasts and attempting to grab her crotch while making a lewd suggestion (*R v Chase* [1987] 2 RCS 293).

21. The case which has generated the most academic commentary arises from the discursive nature of the response of the House of Lords to an instance where a man, working as a shop assistant, grabbed a 12-year-old girl, put her across his knee and spanked her on her buttocks; *R v Court* [1989] AC 28. Apart from the accused admitting to police that what he did was probably out of “buttock fetish” the charge may in fact have been proffered as simple assault. This individual case has, however, led to some commentary to the effect that there are a class of cases which are ambiguous and that these can be clarified as to their objective circumstances from a simple assault into an indecent assault by reason of the accused, as in *Court*, admitting to an indecent motive. A close reading of the case indicates that the focus of the appeal was on the admissibility of evidence of motive. Nowhere does the court suggest that there was not a case that could go to the jury based solely on the acts admittedly committed by the appellant since the conduct of the appellant was capable of constituting a sexual assault. The prosecution wanted to add to the proven circumstances of the assault the admission of the accused, while the defence wanted this excluded. Hence, *Court* decides that in a case where the acts are capable of constituting a sexual assault but do not give rise to the irresistible inference that the defendant intended to assault the complainant in an indecent manner, either party could validly adduce evidence supporting such an inference on the facts. That is not at all the same as citing this as authority, as has been done on behalf of the accused, that a person assaulting another in indecent circumstances should also have, as an ingredient of the offence, a sexual motivation.

22. That should not be accepted. The nature of an indecent assault requires non-consensual touching of a sexual nature or an assault which creates indecent circumstances. That test is completely objective. But the accused must have intended that kind of assault. It does not require a resort to motive to remove some uncertainty as to whether an assault occurs in circumstances of ambiguity or not. Grabbing a young girl, putting her across a man’s lap and repeatedly striking her buttocks is an affront to that child’s sexual integrity and is objectively an indecent assault. Nor should a case such as *R v Sutton (Terence)* [1977] 3 All ER 476 be accepted as authoritative; since it involved a man photographing boys stripped in order to be presented as images to paedophiles while the man apparently only touched them to indicate the crude positions he wanted to capture. This was a touching of children legally incapable of consenting in circumstances of indecency: the definition of the offence does not require a victim to be touched on their sexual organs provided there is an assault in circumstances of immodesty or indecency.

### Lesser included offence

23. It might also be asserted that there are cases where the accused has succeeded through his or her evidence in raising a doubt through a discussion of what was behind an assault whereby the result is that what is objectively indecent has resulted in an acquittal by the jury. This does not mean that assaults which are objectively indecent somehow become ambiguous, or that motivation can turn what is a sexual affront into an exercise in decency. Juries listen and juries decide: what has happened as a matter of fact and the purpose of the accused as proven by inference or admission is entirely within their competence. While some discussion on this appeal revolved around such commonplace events as giving children a bath or a fit of temper resulting in chastisement on the bare buttocks by a parent, these matters should be approached sensibly. Relationship and the implication of consent as between parent and child may extend what is lawful in terms of touching but not to the degree where commonsense is abandoned

24. The doctrine of lesser included offence recognises that within serious crimes there are building blocks which, if proven, will result in a conviction for that offence; for instance in murder the elements are an unlawful killing and an intent to kill or cause serious injury. If the intention to cause serious injury or kill is uncertain, then within the charge of murder is the possibility of a jury returning a verdict of manslaughter. In sexual assault the elements are an intentional assault in objectively indecent circumstances. In rape, penetration is required as well as a lack of consent and knowledge or recklessness by the accused that the victim is not consenting. In extradition law, this concept is familiar in finding correspondence as between the crime charged in the requesting state and Irish law. Most recently, s 5 of the European Arrest Warrant Act 2003 defines a corresponding offence, with surrender prohibited under s 38(a) of the 2003 Act where the offence is not a corresponding one, as discussed in *Minister for Justice v Szall* [2013] [2013] IESC 7, 1 IR 470 and *Minister for Justice, Equality and Law Reform v Desjatnikovs* [2009] IESC 53, 1 IR 618. If there are three elements to the requested offence but only two in Irish law, there is correspondence; if there are three in Irish law but only two in the foreign law, there is no correspondence. A general example is robbery, which requires violence or a threat but where, if that is not proven, a jury may convict of theft. If a jury has a doubt about an intent to kill or cause serious injury by reason of the assault or poisoning which unlawfully killed the deceased, manslaughter may be the verdict. Similarly, if penetration is not proven, the definitional elements of rape cover a sexual assault. And if the intention to assault in an indecent manner or assault in circumstances of indecency is not proven, a jury remains entitled to convict of assault, provided that is proven. This doctrine works sensibly and requires no special procedure. Prudence, however, does indicate that juries are unlikely to know unless there is argument addressed to the point and that is confirmed in simple terms by the judge. That happens in the majority of murder cases and often happens in other cases as well.

25. This, however, was never a case where a lesser offence might be found. Stripping a young boy of all of his lower clothing, here pulling his pants and trousers down to his knees, manoeuvring him to the ground and then hitting him on his bare buttocks is a sexual assault. The motivation may have been play acting or the motivation may have been otherwise, but the nature of the offence protects against affronts to intimate integrity. As to what might motivate such an assault may be relevant to sentence once the jury have delivered their verdict. Similarly, the degree of impact on the victim, once the minimum standard is met for the offence, impacts on sentence. Sexual assaults range widely and classifications such as that set out in O'Malley, *Sexual Offences* (2<sup>nd</sup> edition, Dublin, 2013) at

p 661 are useful in assisting judicial consistency as to the degree and impact of offending in individual cases. There can be a very low level sexual assault or there can be utterly degrading forms at the other end of the spectrum.

### **Role of the judge**

26. In *R v Chase* [1987] 2 SCR 293 the Supreme Court of Canada construed sections 244 and 246 of the Criminal Code, which proscribed assault in the context of a new and detailed definition of assault. While finding that the provisions, through an extended and detailed new definition, created a new offence, unlike here, the analysis was that an assault which objectively was committed in circumstances of a sexual nature, such that the sexual integrity of the victim was violated, comprised the offence together with a mental element of intending that form of assault. Motivation, or any form of mental process as to humiliating the victim or self-gratification is, on all of the correctly decided cases, irrelevant. An indecent assault, of its nature, cannot be committed by recklessness, culpably proceeding despite advertent to consequence of an action, while a simple assault can. What is required in indecent assault is that the accused brought about intentionally, as opposed to accidentally, the touching within its indecent or sexual context. As to that, there is no scope for ambiguity. Nor is there any room for a category of cases where internal thoughts of a sexual nature may move what is objectively not indecent into what is. The external circumstances must be indecent and by the assault the accused must intend to bring that kind of assault about.

27. Since the definition is clear, that the accused intentionally brings about an assault in indecent circumstances, it is a matter of law as to whether the external facts proven by the prosecution meet the definition. A case should not be left by the trial judge to the jury unless that objective external element of the case is capable as a matter of law of present on the facts and thus capable of being accepted by a jury properly instructed as to the elements of the offence.

28. The task of the jury is to assess the entirety of the evidence, what is proven by the prosecution and what may be offered by the accused, with a view to finding if the facts are proven and whether the actions of the accused were intended or were accidental. There is no need for any explanation beyond intention to assault indecently or intention to assault in indecent circumstances, meaning purpose. In the cases which are all too familiar, where the essential issue is whether the victim is to be believed, with the circumstances of the assault being obviously indecent, it is unnecessary do more than give the definition of the offence as set out above and to leave it to the good sense of a jury to assess if the standard of proof is met: in other words, whether the testimony is reliable enough to found a conviction, the correctness of which would not reasonably be doubted.

### **Remedying confusion**

29. For the purposes of clarity, in this the judgment of the Court by a majority, it must be recorded that the definition of sexual assault was not changed by renaming indecent assault as sexual assault. Nor does the consequence introduced by the Sex Offenders Act 2001, whereby a person guilty of this offence must be entered on a register, change the definition of the offence; as has been argued on behalf of the accused. As to the automatic nature of this registration, its duration and its applicability to those offenders under 18, no argument has been addressed on this appeal as to compatibility with the Constitution or as to what might be argued for as any infringement on the judicial sphere in sentencing; on this see

*Enright v Ireland* [2003] 2 IR 321 and *Ellis v Ireland* [2019] IESC 30. There is no issue raised here about that. There is, however, and to address the argument advanced by the accused on this issue, a presumption against accidental amendment by legislation. A legislative measure addresses what it is targeted at and unintended alterations to the law do not occur where the sphere of the legislation clearly addresses a particular issue. Here, that issue was the renaming in modern language of an offence in the context of the gradual undermining of the prior name of the offence in terms of its seriousness. Radical and far-reaching changes to the law cannot occur through ambiguous language within legislation; *O'Connell v Governor and Company of the Bank of Ireland* [1998] 2 IR 596. No ambiguity is to be found in this legislation. To which might be added that precisely targeted alterations in the name of an existing common law offence do not achieve anything in the way of an ambiguous status. Nor is it possible that by adding through the later 2001 Act a requirement to register means that the Oireachtas could possibly have intended to thereby alter the nature of an offence to which that legislation applied. In *Maxwell on the Interpretation of Statutes* (11<sup>th</sup> edition, London, 1962) at 78 it is correctly stated that alterations to the law occur by deliberation. Hence there is a presumption against any alteration of law through accidental or coincidental legislative action:

One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law, without expressing its intentions with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual or other natural sense, would be to give them a meaning other than that which was actually intended.

30. It may usefully be commented, however, that the multiple changes to both statutory provisions and the common law and procedure have left a mosaic of disparate provisions that increasingly challenge understanding and accuracy in the much litigated area of sexual violence and criminal procedure. In contrast to the Criminal Justice (Fraud and Theft Offences) Act 2001, where the entire corpus of dishonesty offences were codified and brought together under one cover, sexual offences law and procedure, which even more seriously impact on victims, is left to be assembled by legal experts from disparate sources: and, even then, with possible doubt haunting the mind as to the accuracy of the result. Furthermore, it is clear that this area is the subject of continuing and obviously necessary and thought-through legislative activity that introduces further change within an existing mosaic. A code would assist since thereby the potential for serious error would be considerably lessened.

## **Conclusion**

31. Juries might usefully be instructed that a sexual assault comprises touching the victim without consent in an indecent manner or in indecent circumstances. Touching someone without their consent is an assault where that touching occurs outside socially acceptable norms, such as gently attracting attention. Some people, such as the young and those with disabilities may not be capable of giving consent. Sexual assault is committed where it is the purpose of the accused to touch the victim without consent and the purpose of that touching includes the indecent nature of the touching or includes bringing about through

that assault of the indecent circumstances. No element of hostility or aggression is required and nor need the prosecution prove any sexual desire motivating the assailant. Rather, what the prosecution must prove is that the accused purposely assaulted the victim in an indecent manner or in indecent circumstances. Only if there is a contest as to whether the accused intended the indecent nature or circumstances of the assault might it be useful to refer the jury to an alternative verdict of simple assault as a lesser included offence. A trial judge should not leave a case to the jury to try an indecent assault charge unless the circumstances in which the assault is committed are, on the prosecution case, objectively indecent. As to whether, in such rare circumstances, a judge would rule out indecent assault and leave only a charge of assault to a jury is a matter for assessment in the light of all of the evidence.

32. Regrettably, persons in adolescence may all too easily cross boundaries in matters of this kind. This was a case where the accused, a young teenage boy, stripped a 6-year-old boy by pulling his lower clothing down to his knees and hitting him on his bare buttocks when he was on the ground. Such facts enabled the jury to return a verdict of guilty of sexual assault. This conviction was humanely dealt with by supervision orders by the trial judge in a manner which reflected the youth of the accused and the other surrounding circumstances, detailed in the dissenting judgments of Hogan J and Woulfe, that have been most unfortunate for both families involved.

33. The order of the Court of Appeal will be affirmed.