THE SUPREME COURT

Supreme Court Record No. 2021/111

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-

F.N.

Appellant

JUDGMENT of Mr. Justice Woulfe delivered on the 23rd day of May, 2022

1. I have had the benefit of reading a draft of the judgment which Hogan J. proposes to deliver herein, and I am happy to gratefully adopt the account of the issue in the trial and of the Court of Appeal judgment contained in his judgment. Hogan J. has come to a conclusion that in the particular context of this particular case, the evidence did not disclose circumstances in

which, adopting the words of Lord Ackner in *R. v. Court* [1989] 1 A.C. 28, the prosecution had demonstrated that F.N. had intended to commit not simply an assault, but a sexual assault. He goes on to conclude that 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.

2. I have also had the benefit of reading a draft of the judgment which Charleton J. proposes to deliver for the majority herein, for which I am also grateful, which judgment arrives at different conclusions to those arrived at by Hogan J..

3. I regret that I cannot agree as to the conclusions in the majority judgment, and I prefer the alternative conclusions arrived at in the judgment of Hogan J., for the reasons set out therein. I might just add the following comments.

4. Like Hogan J., I think the reasoning of the majority judgments in *Court* is very helpful. I share the view of Lord Ackner (at 43) that: "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".

5. As regards the present case, I agree with Hogan J. 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". As stated by Hogan J., the particular context of the conduct in question and the circumstances are absolutely crucial, and, as he notes, 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 my 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. For my part, I cannot see how these circumstances could possibly lead to the type of "irresistible inference" referred to by Lord Ackner (at 43), *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.

6. I also agree with Hogan J. that the statutory developments in this jurisdiction do have a bearing on the issue arising. As regards the intention of the Oireachtas when it enacted either the Criminal Law (Rape) (Amendment) Act 1990 ("the 1990 Act") or the Sex Offenders Act 2001("the 2001 Act"), I would just mention also two points. Firstly, the principle that the legislature's intention is to be derived first and foremost from the words chosen by the legislature itself to express its intention. Secondly, the principle set out in *Cork County Council v Whillock* [1993] 1 IR 231 that "words are not used in a statute without a meaning and are not tautologous or superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain". In my opinion these principles 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.

7. It seems to me, with respect, that the above two principles do not support the view expressed by Charleton J., at para. 15 of his judgment, that as a matter of statutory interpretation, the legislature in intervening through s.2 of the 1990 Act, 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, a former common law definition of indecent assault as set out in *Archbold*. The former common law definition does not appear to me to have been authoritatively decided upon, if as Hogan J. states it does not

appear that there any reported cases where the precise contours of this offence have been explored by the Courts in this jurisdiction since 1922, at least as regards the precise point the subject of this appeal.

8. The contours of the offence of indecent assault were, however, explored by the House of Lords in *Court*, and I find the reasoning of the majority judgments in that case to be persuasive. I note that in his judgment Lord Griffiths stated (at 34) that there was agreement that the offence could not be committed accidentally, and that once this concession was made it was apparent that some extra mental element was required than that necessary for common assault. He later added the following comment:

> "Indecent assault is after all a sexual offence appearing in the Sexual Offences Act 1956, and one should on general principle look for a sexual element as an ingredient of the offence."

9. As regards the 2001 Act, I agree 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 seems to me 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.

10. I note the reliance by Charleton J., at para. 29 of his judgment, on the principle that radical and far-reaching changes to the law cannot occur through ambiguous language within legislation: per *O'Connell v. Governor and Company of the Bank of Ireland* [1998] 2 I.R. 596. I would, however, with respect make two points in response. Firstly, I am not sure that the pre-existing common law was in fact well-settled, at least as regards the point now arising, as mentioned above. Secondly, I do not think that the language used by the Oireachtas in referring to "sexual" assault and "sexual" offences is in any way ambiguous; to my mind the language

clearly supports the view of Hogan J. 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.

11. For my part, I would also allow the appeal and set aside the conviction of F.N. for sexual assault. Like Hogan J., I consider that there should be substituted instead for that conviction a conviction for assault pursuant to s.2(1) of the Non-Fatal Offences against the Person Act, 1997.