THE COURT OF APPEAL

Record No: 140CJA/2022

Edwards J.
McCarthy J.
Kennedy J.

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 23 OF THE CRIMINAL PROCEDURE ACT 2010
AND
IN THE MATTER OF BILL CCDP0114/19

Between/

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

Applicant

V

F.B.

Respondent

JUDGMENT of the Court delivered by Mr. Justice Edwards on 16th November 2023.

Introduction

1. This is an appeal brought by the Director of Public Prosecutions (i.e., "the appellant") on a point of law pursuant to s. 23 of the Criminal Procedure Act 2010, as amended, against the acquittal of FB (i.e., the respondent) by direction of the trial judge at his trial on

2. indictment, on a count of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990, and seeking an order directing that the respondent be retried on the same charge. The respondent was acquitted of this count following a direction to the jury by trial judge, in the Central Criminal Court, to the effect that the jury should find the respondent not guilty on the basis that the necessary proofs had not been made out in respect of the sexual assault element of rape contrary to s. 4. The appellant contends that the trial judge's said direction to the jury to find the respondent not guilty was wrong in law, and that the evidence adduced in the proceedings was evidence upon which a jury might reasonably be satisfied beyond a reasonable doubt of the respondent's guilt in respect of the offence concerned.

3. The direction to acquit complained of was made by the trial judge of his own motion, and not in response to any application by counsel representing the respondent, in circumstances where the female complainant, who was 6 years old at the time of the alleged offending, had been invited by the male respondent, who was 16 years old at the time, and a cousin of the complainant, to put her mouth on the respondent's penis, with which request the complainant had complied.

4. The net issue on appeal is whether the trial judge erred in law in directing the jury to find the respondent not guilty in such circumstances. This itself turns on whether the necessary proofs had been made out by the applicant in relation to the assault element of the sexual assault component to s. 4 rape, in circumstances where there had been an invitation to the complainant to put her mouth on the respondent's penis; where in response to that invitation the respondent had done so; and where the trial judge's concern had been that it was therefore not clear that there was any act done by the respondent to the complainant, much less any act involving compulsion or force, that could comprise the "touching" that he considered to be necessary for there to have been an assault on the complainant by the respondent.

Background

The relevant count on the indictment

5. The relevant count on the indictment, in respect of which the jury in the trial found the respondent not guilty, was a count of rape contrary the section 4 of the Criminal Law (Rape) (Amendment) Act, 1990. The particulars of the offence alleged in this count were described on the indictment as follows:

> "*[The respondent], on a date unknown between the 1st day of January 2005 and the 30th day of September 2005, both dates inclusive* at *[address redacted] in the County of the City of Dublin, did sexually assault [the complainant], a female, by putting his penis into the mouth of [the complainant].*"

Complainant's evidence in respect of the relevant count

6. On the second day of trial, the 28th of June 2022, the complainant gave evidence in respect of the s. 4 rape count on the indictment. The complainant described how, on a date approximately two months before an incident that she recalled occurring in March 2005, in which she had suffered a laceration to her head when it came into contact with a wall, she had been alone with the respondent in the respondent's upstairs bedroom at her grandmother's house at an address in Dublin, when the incident said to comprise the offence of s.4 rape occurred. The complainant was, at the time of the alleged offending, between 6 and 7 years of age.

7. The transcript reveals that the complainant gave the following evidence as to what occurred:

> *Q. Okay. Could you just then say what happened? What were you doing upstairs, first of all? And who was up there with you?*
>
> *A. At the beginning it was me and my two older brothers and they then went downstairs. And they used to always hate me following them, so, I didn't follow them. And so, I was in the room alone with* [appellant's first name]. *And he then closed over the door and he got me to sit on the bed. And then he asked me did I want to see his penis and he used to refer it as a cannon. Then he asked me would I touch his penis. And I didn't want to but at the age I was, I wasn't -- I didn't know what right and wrong was. So, I done what he asked me to do. And then he asked me could I pull down my pants to*

my hips, below my hips, so, I done that. Then he started to touch my leg and then he started to insert fingers into my vagina. And then he asked me would I put my mouth on his penis and I did. But I don't recall him ejaculating this time.

Q. And when you say put his mouth -- put your mouth on his penis, where exactly was his penis in relation to your mouth?

A. In my mouth.

Q. In your mouth, okay. And I'm sorry to go over these details with you Ms [complainant’s surname] *--*

A. That's okay.

Q. -- but could you explain what happened then?

A. He kind of just stopped but there was I think it must have been that someone was coming up the stairs, so, it was stopped straight away and he --

Q. But can you remember how long this went on for?

A. About 10 minutes.

Q. Okay. And was that the entire incident or was that when his penis was in your mouth or what was 10 minutes?

A. From the beginning when the door was closed and I was sitting on the side of the bed and --

Q. Okay. Okay. And I'm sorry, I interrupted you there, Ms [complainant’s surname]*, you mentioned something about someone coming; is that right?*

A. Yes. I think it was my two brothers coming back up the stairs to come back into the bedroom.

Q. Yes.

A. And then it was stopped and John helped me to tug back up my pants. And I was told to not say anything, to keep it as a secret.

Q. Yes. And I think you had said you didn't want to do any of this; is that right?

A. No.

Q. And he told you afterwards not to tell anyone, it was a secret; is that right?

A. Yes, correct.

Q. And who came into the room then?

A. My two older brothers.

Q. Okay. And did you say anything to them?

A. No…..”

Uncertainty as to the applicable law

8. At the end of the prosecution's case, and in the absence of the jury, the trial judge, Keane J. expressed a concern as to whether the necessary assault element had been made out in evidence. He observed:

> *"I'm thinking here of the issue of the necessary assault element. Whether you're dealing with a section 4 rape, of course, or a sexual assault, one of the ingredients is the use of force or … giving rise to a reasonable apprehension on the part of the person concerned that there would be an assault."*

9. His concern arose because the particulars of the offence in respect of the relevant on the indictment did not coincide with the evidence of the complainant, insofar as those particulars suggested that it was the respondent who placed his penis in the complainant's mouth, whereas the complainant's evidence suggested that she had placed the respondent's penis in her mouth upon invitation to do so by the respondent.

10. The trial judge granted counsel a short adjournment to enable them to consider the issue that he had raised. Upon resuming, and in the continued absence of the jury, an exchange ensued between the trial judge and counsel for the prosecution concerning, in the trial judge's words, *"whether or not there was the use of force or the apprehension of the use of force involved in the conduct complained of."* The trial judge had, during the currency of the adjournment, himself consulted relevant academic materials, namely *Walsh on Criminal Procedure* and O'Malley, *Sexual Offences*. In the light of such research, the learned trial judge queried whether the principle in *Fairclough v. Whipp* (1951) 35 Cr. App. R. 138, that "*an invitation to somebody to touch the inviter can[not] amount to an assault on the invitee*", absent some use of force or the creation of an apprehension of the use of force by the inviter, was law in this jurisdiction.

Fairclough v. Whipp

11. It is appropriate at this point to outline what *Fairclough v. Whipp* was about. Whipp had exposed himself in the presence of a girl aged nine, and invited her to touch his penis, which she did. He was charged with indecent assault before a court of summary jurisdiction on the basis of an information preferred by Fairclough, a police inspector. The justices concerned dismissed the charge on the basis that the facts did not constitute an indecent assault. Fairclough appealed, and the appeal was heard before a Divisional Court in the Queen's Bench Division of the High Court of England and Wales, which dismissed the appeal and upheld the decision of the justices, holding that a person who invites another to touch him commits no assault, either when the invitation is made or when it is accepted. The judgment of the three judge Divisional Court was given by Lord Goddard LCJ, who stated:

> *"It is unnecessary to go into any old learning on what constitutes an assault. An assault can be committed without there being battery, for instance, by a threatening gesture or a threat to use violence made against a person, but I do not know of any authority that says that, where one person invites another person to touch him, that can amount to an assault. The question of consent or non-consent arises only if there is something which, without consent, would be an assault on the latter. If that which was done to the child*

would have been an assault if done against her will, it would also be an assault if it was done with her consent and is of an indecent nature, because she cannot consent to an indecent assault. But before we come to the question whether there was an indecent assault we must consider whether there was an assault, and I cannot hold that an invitation to somebody to touch the invitor can amount to an assault on the invitee. It might be a very good thing if parliament passed an Act providing that any indecent conduct in the presence of a child—or in relation to a child—or in any form of words the draftsman saw fit to use—should be punishable, but at present the law has not gone beyond saying that an indecent assault on a child is punishable whether the child consents or not. It is obvious, therefore, that the offence must be one which can amount to an assault in law.

Mr. Openshaw called our attention to Lock (1872), 2 L. R. C. C. R. 10 , which was a very different case on the facts. It was a case of assault on boys and there is no question there had been an assault because the prisoner had been handling their private parts Kelly, C.B., said (L.R. 2 C.C.R 12):

> *"… the question is, whether such an act as that of the prisoner done to a person who does not actively consent, but merely submits to the act under circumstances in which he cannot exercise his will either one way or the other does not, even in the absence of fraud, amount to an assault".*

It seems to me there must be an act done to a person. In all the circumstances, and with the same regret which I have no doubt the justices felt, I am bound to say that I think they came to a right decision and this appeal must be dismissed."

12. *Fairclough v. Whipp* was followed, or discussed with ostensible approval, many times by the superior courts in England and Wales, notably in in *Beal v Kelley* (1951) 35 Cr App R 128 DC, *R v Burrows* (1951) 35 Cr App R 180 CCA; *DPP v Rogers* (1953) 37 Cr App R 137 DC. However, Lord Goddard LCJ's remark that,*"[i]t might be a very good thing if parliament passed an Act providing that any indecent conduct in the presence of a child—or in relation to a child—or in any form of words the draftsman saw fit to use—should be punishable"*, proved to have been prescient in that in 1960 the UK's parliament enacted the Indecency with Children Act 1960 which effectively did that. Accordingly, the relevance of *Fairclough v Whipp* in the context of prosecutions for sexual offences against children in England has declined, although it still features occasionally.

13. One recent case in which it has featured is *R v Dunn* [2015] EWCA Crim 724 in which the Court of Appeal (Criminal Division), was initially invited to find that drawing a distinction between a defendant touching the complainant and the complainant touching the defendant leads to absurdity and that *Fairclough v Whipp* had wrongly imported into the law relating to sexual offences the common law understanding of an assault as an offence of violence, namely the application of unlawful force. However, that invitation was withdrawn on the eve of the appeal hearing and the appeal proceeded on other grounds. Despite this, the appeal court briefly, and of its own motion, addressed the issue *obiter dictum*, pointing out that parliament in that jurisdiction had enacted the Indecency with Children Act 1960 *"on the very premise that as the law stood before it was passed there was no indecent assault without some form of threat or show of force to the victim."* The appeal court concluded that, *"[i]n short, Parliament proceeded in 1960 on the*

basis that Fairclough v Whipp was correct" and that *"there is nothing to justify our contradicting Parliament's premise in 1960 and overturning what has been settled law since Fairclough was decided in 1951."* However, it seems to us that the appeal court's observations in *Dunn* were, perhaps understandably in circumstances where the point initially raised was no longer being pressed, arguably based more on a desire to show deference to Parliament than on any rigorous engagement with, and analysis of, the notion that *Fairclough v Whipp* might have been wrongly decided for the reasons that had been initially suggested.

Responses to the trial judge's intervention

14. Returning to the circumstances of the present case, in response to the issue raised by the trial judge, prosecuting counsel, Mr. John Fitzgerald S.C., submitted that his understanding was that for there to be an assault there did not need to be force involved. The trial judge agreed that there did not need to be force involved and that the creation of the apprehension of force would be enough. Prosecuting counsel then suggested that any unwanted touching would suffice for the purpose of making out the necessary assault element.

15. The trial judge then queried what the concept of an "unwanted touching" involved, and whether if an objection to the touching was not externalised or made manifest in any way, shape or form, there could be an assault.

16. The case was then adjourned overnight at that point to allow counsel on both sides to further research the issues raised in more detail and with a view to further submissions being made on the following day.

10. On the next morning the parties duly made further submissions in relation to the *Fairclough* principle. Having clarified that it was the issue of force, and not the issue of consent, that was causing difficulty, the learned trial judge remarked:

> "*[...] There is no application of force to the body, nor is there any creation of an apprehension of force may be applied. Although oddly, if anything it comes a little bit closer perhaps on view of the evidence, but not close enough in my view provisionally to a situation where it might be suggested that an apprehension of the application of force might have been created, and that would be enough for an assault. But I don't think it goes quite so far.* ***But it does seem to me that in relation to the incident where [the complainant] took [the respondent's] penis into her mouth on his request, I don't see any evidence of force or the creation of an apprehension of the application of force at all.***" (emphasis added)

11. In response to these remarks, Mr. Fitzgerald S.C. referred the learned trial judge to paras. 9 and 10 of the judgment of Charleton J. in *D.P.P v. F.N.* [2022] IESC 22, in which the learned Supreme Court judge held that

> "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 indecent manner or 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. [...] No element of hostility or aggression is required. [...] 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 without the consent of that person and without lawful excuse. It is not required that an assault always be hostile or rude or aggressive. See Lord Lane L.J in Faulkner v Talbot [1981] 3 All E.R.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, the renaming has not altered the elements of the offence."

12. Mr. Fitzgerald S.C. submitted that in the light of *FN* the indecent assault element in respect of the s. 4 count in this case occurred when the respondent's penis was received in the complainant's mouth. Keane J., however, was not satisfied, in circumstances where the respondent had invited the complainant to place her mouth on his penis, and she had done that, that the respondent had positively acted to touch the complainant: "*I mean I just don't think I can reverse the action in the manner you suggest. That at my request you touch me, it's really me touching you. If at my request you place my penis in your mouth, it's really me placing my penis in your mouth.*"

13. Mr. Fitzgerald S.C. then submitted that "*section 4 rape, if one looks at the statute is a sexual assault that includes penetration of the mouth by the penis. And I say that is what is the assault*." Keane J. was not convinced, however, and in disputation of counsel's assertion said:

"No, it includes. It has to be an assault and we have to therefore look at the assault element. There must be an assault, and assault has a definition in common as between section 4 rape and, for example, assault contrary to section 2 of the Non-Fatal Offences Against the Person Act [1997]".

[…]

"*Each has to include an assault and assault has a definition and that definition we're all familiar with. But it is, "Directly or indirectly applies force to or causes an impact on the*

body of another or causes another to believe on reasonable grounds that he or she is likely immediately to be subject to any such force or impact."

[...]

"And that's in common, because section 4, it isn't the freestanding. Section 4 does not say if in any circumstances the penis penetrates the mouth, there is penetration of the mouth by the penis however slight. It says a sexual assault which includes that circumstance.

[...]

So there must be a sexual assault and that circumstance."

14. Counsel then asserted that he did not believe that there was any authority for the proposition that if a woman -- leaving aside the issue of consent -- is invited to put her mouth around the penis of a man and does so, that there must be a separate touching.

15. The trial judge remained unconvinced and was not satisfied that Charleton J.'s judgment in *F.N.* was authority for the prosecution's proposition that an indecent assault arises in circumstances where a child touches the accused. The trial judge, commenting on that judgment, remarked that it was not clear to him that Charleton J had been saying that when an accused invites a child, who cannot consent, to touch the accused in indecent circumstances, and the child does so, that that constitutes an indecent assault of the child by the accused. What Charlton J had in fact said was, "*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.* The clause *"any touching of the child **by the accused**"* (emphasis added), was the reverse situation to that being contended for by counsel. The trial judge continued:

It's not a restatement of the same proposition. It's a statement of the reverse proposition. So the authority that it seems that does exist and in respect of which there's no contrary authority is Fairclough and Whipp and also it is DPP v. Rogers."

15. The case of *DPP v. Rogers* (1953) 37 Cr. App. R. 137, has been previously alluded to. Once again, this was a decision of a three judge Divisional Court in the Queen's Bench Division of the High Court of England and Wales, presided over by Lord Goddard LCJ in an appeal against an acquittal. In this instance it was an appeal by the Director of Public Prosecutions against the dismissal of charges of indecent assault against the respondent by a court of summary jurisdiction. The evidence had been that on two occasions, when the respondent was alone in the house with his daughter, aged 11, he put his arm around her shoulders, led her upstairs, and there exposed his penis to her and told her to masturbate him. He had used no force of compulsion, and the child made no objection or resistance. On the second of these occasions, knowing the nature of his intention, the respondent's daughter did not wish to accompany him upstairs but she neither objected nor resisted and submitted to his request. The Divisional Court held, applying *Fairclough v Whipp,* that there was no indecent assault.

The Lord Chief Justice, giving judgement for the court, said:

"Before a man can be found guilty of an indecent assault it has to be found that he was guilty of an assault, for an indecent assault is an assault accompanied by indecency, and if

> *one could show here that the respondent had done anything towards his child which by any fair use of language could be called compulsion, or acted, as I have said in other cases, in a hostile manner towards her, that is, with a threat or a gesture which could be taken as a threat, or had pulled a reluctant child towards him, that would undoubtedly be an assault, and if it was accompanied by an act of indecency, it would be an indecent assault."*
>
> *…*
>
> *"I think the justices were right in saying that in principle they could not distinguish the present case from Fairclough v. Whipp. It is quite true that there might be a case in which the evidence showed that what was being done was really done against the will of the child, if the father had used compulsion on the child. Here no force was used and nothing was done except what any father may do, and however much we may regret that we cannot punish the respondent for doing an act which deserves the reprobation of every decent man, we feel that the justices came to a right decision and we reluctantly dismiss this appeal."*

16. Returning to the circumstances of the present case, Keane J. then remarked that he was not aware of any Irish authority endorsing or approving of the *Fairclough* principle. But in circumstances where there was no clear Irish authority to the contrary and where leading academic materials considered *Fairclough* to be persuasive (the trial judge was alluding here to commentary in Thomas O'Malley on *Sexual Offences* (2013) (Dublin: Round Hall), at paras 4.06 to 4.09), the trial judge was not disposed to accept counsel's "*reverse*" proposition based on the dicta of Charleton J. in *F.N.*

17. On the issue of consent, Mr. Fitzgerald S.C. noted that "*This was not a consensual touching nor could it have been by virtue of the [Criminal Law Amendment Act, 1935]. So she did so unwillingly and that must be the starting point of the Court.*" Keane J. was not disposed to accept this as the starting point, the learned trial judge remarking "*Well, you're saying whether she did so willingly or not she couldn't legally consent, which is a different proposition, because she did so willingly, as she describes the position.*" Counsel did not accept that the evidence indicated that the complainant had willingly put her mouth on the a appellant's penis, pointing to the fact that she had said in the course of her evidence that she didn't want to do that. Keane J. was not persuaded by what he understood to be counsel's proposition, namely that "*an undisclosed mental state on the part of the person who is doing something can create a compulsion to do it*." In the judge's view it was not compelled touching. Elaborating on this he stated:

> *"I don't believe it is, Mr Fitzgerald. I don't believe it is. It can't be a consequence of your subjective state of mind. If I say would you get me a cup of coffee and you leave the room … and you come back with a cup of coffee, but you later say 'I didn't want to', did I compel you to get me a cup of coffee or did you have, to borrow the phrase from Canon Law a 'mental reservation' that didn't mean it was entirely voluntary? I mean you can't have a mental reservation that switches everything around. All I say is, 'Get me a cup of coffee' and without another word you leave and you come back with a cup of coffee and you later*

say, 'Well, of course I was compelled to' and I say, 'On what basis did I compel you?' and you say, 'Well, I didn't want to'."

[…]

"Did I know that? Could I have known that? Did I know that or is it all a consequence of your mental -- undisclosed mental state subsequently expressed?"

18. Commenting on *DPP v. Rogers*, the trial judge remarked that in that case there was a "*demonstration of reluctance*" which could be distinguished from the present case insofar as what counsel were arguing was "*an ex post facto assertion that in doing what I did mentally, internally, I didn't want to [...]*". Nevertheless, in *Rogers*, it was held that there was no indecent assault notwithstanding this demonstration of reluctance. The trial judge contrasted this with the circumstances that obtained in *R. v. McCormack* (1969) 53 Cr. App. R. 514 in which the digital penetration of a 16-year-old girl was held to be indecent assault, regardless of how willing or cooperative the complainant was. In that case the Court of Appeal (Criminal Division), had been referred by counsel for the appellant (i.e., the accused) to *Fairclough v Whipp* and *DPP v Rogers* line of authorities and invited to find that his client's conviction for indecent assault could not stand in view of the girl's consent. Responding to this argument, Fenton Atkinson L.J., who gave judgment for the court, stated:

"… in our view, that line of authorities has no application here, and, in the view of the members of this Court, it is plain beyond argument that, if a man inserts a finger into the vagina of a girl under sixteen, that is an indecent assault, in view of her age, and it is an indecent assault however willing and co-operative she may in fact be."

19. Ms. Fiona Murphy S.C., on behalf of the respondent, made a brief submission in relation to these issues. She accepted that somebody of or under the age of 14 years cannot consent to any kind of sexual conduct and accepted what the Mr. Fitzgerald S.C. had outlined in relation to Charleton J.'s dicta in *F.N.* She submitted that the form of touching by the complainant, whether by mouth or by hand, is an immaterial consideration as an either form cannot be deemed a sexual assault. Lastly, Ms. Murphy S.C. furnished the court with a copy of the text of s. 4 of the Criminal Law (Sexual Offences) Act 2017 which she submitted purports to fill the lacuna in the law that the trial judge had identified by providing for the offence of an invitation to sexual touching. Ms. Murphy S.C. submitted that while this provision closed the lacuna in the law, its effect was not retrospective and thus could not be applied in this case.

The Trial Judge's Ruling

20. Keane J. considered *Fairclough* and *Rogers* and concluded that in the present case, Mr. Fitzgerald S.C.'s proposition that the present case was one of "*unwanted touching*" did not stand up in circumstances where the complainant had not, if one examined her oral testimony, expressly objected, or otherwise indicated to the respondent, at the time of the alleged sexual offending, her "*inner feelings*" that she did not want to engage in conduct which the respondent had invited her to do. Keane J. was satisfied that the facts of the present case as established in the complainant's evidence were "*directly on all fours*" with the circumstances in *Fairclough* and *Rogers*.

21. On the suggestion by Mr. Fitzgerald S.C. that *Fairclough* did not represent the law in this jurisdiction, or indeed that if it did it is bad law, Keane J. observed that *Fairclough* had been acknowledged with "*evident approval*" in *P.P. v. The Judges of the Dublin Circuit Court & Ors* [2020] 1 I.R. 123, which had dealt with the issue of standing in respect of a challenge to s.11 of the Criminal Law (Amendment) Act 1885, which prohibited acts of gross indecency between male persons, and in which O'Donnell J., as he then was, wrote at para. 66 of his judgment as reported in the Irish Reports:

> "*[...] As already observed, s. 11 (as maintained in force by s. 27 of the 2005 Act) may now be the only method of prosecution of certain serious offences arising from conduct prior to 1993. It is not sufficient to contend that such cases may be prosecuted as sexual assault: as is observed in the submissions on behalf of the DPP, certain serious sexual conduct may not amount to sexual assault. Thus, in Fairclough v. Whipp [1951] 2 All E.R. 834, an invitation to a person to touch the inviter sexually was held not to amount to a sexual assault on the invitee.*"

Keane J. characterised O'Donnell J's remarks as an acknowledgement of *"the authority represented by Fairclough v Whipp"*.

22. Keane J. would not accept the argument advanced by Mr. Fitzgerald S.C. which amounted in his view to a contention that the law had departed *sub silentio* from *Fairclough* on foot of a single line in the judgment of Charleton J. in *F.N.* The trial judge further did not accept counsel's proposition that in that single line "*Mr Justice Charleton is saying the same thing twice in different ways*". He observed that Charleton J. did not refer to *Fairclough*, English authority which had, *ex ante F.N.*, been acknowledged with "*evident approval*" by O'Donnell J. in *P.P.* In Keane J's view, it was far easier to identify the dicta of Charleton J. in *F.N.,* upon which the DPP was placing reliance:

> *"as a statement entirely compatible with the judgments in Fairclough v. Whipp and the Director of Public Prosecutions v. Rogers, then it is to identify it is a passage silently overruling those authorities and therefore significantly altering the law in this jurisdiction"*

23. Accordingly, Keane J., in dismissing the argument advanced by Mr. Fitzgerald S.C. that there should be no distinction based on who touched whom, held:

> "*So if there had been any restraint, if there was any evidence that [the respondent] had so much as laid a finger, and I mean that in the literal rather than the figurative sense, if he had merely touched [the complainant], and that had been her evidence, in circumstances where he had earlier requested her to take his penis in her mouth and she had done so, that, to my mind, as Lord Goddard Chief Justice describes there, would undoubtedly be an assault and that to my mind is precisely the sort of circumstance that Mr. Justice Charleton is referring in the last sentence of paragraph 10 of his judgment for the Court in FN, "Where the accused invites a child, legally a person who can't consent to touch the accused in indecent circumstances, any touching of the child by that accused constitutes an indecent assault." In using different terms and in making the child the actor in relation*

to the first clause and the accused the actor in relation to the second, I cannot accept, I am afraid, that Mr Justice Charleton is saying there's really no distinction between those two things, but rather I believe he is describing a situation of the sort envisaged by Lord Goddard, where what unhappily is not a sexual assault may become one if, as Mr Justice Charleton says, "There is any touching of the child by the accused." And that is what, unhappily, is absent here. I say unhappily, because it would be entirely inappropriate for me to express any view concerning the guilt or innocence of [the respondent]. But I have a duty to uphold, the one that I identified in relation to the exercise of my jurisdiction, by volitional jurisdiction under the Galbraith principles, to step in where an issue of sufficient case to answer has arisen at the close of the prosecution case, and it seems to me on those authorities, as I have described them for the purpose of this ruling, I am driven to the conclusion that an essential proof is absent in relation to the second count on the indictment, that essential proof being that there must of course be an assault, and it seems to me that an assault is perfectly proper[ly] for these purposes described in the decisions in Fairclough v. Whipp and DPP v. Rogers, as acknowledged by O'Malley in his text and as acknowledged by Mr. Justice O'Donnell in describing what he understands to be the current state of the law in his judgment in PP."

24. Keane J. thus concluded that he could not let the present case go to the jury where "*an essential element of the offence has not been made out on the evidence before me*", and that he was obliged to direct a verdict of not guilty in relation to the count on the indictment charging s.4 rape.. This direction was given on the 30th of June 2022. The consequence of this was that the trial came to an end, the respondent being acquitted by the jury in relation to all counts (the final count being a sexual assault count in respect of which the applicant had entered into a *nolle prosequi*).

Application pursuant to s. 23 of the Criminal Procedure Act 2010, as amended

23. On the 15th of July 2022, the applicant lodged a notice of appeal in which she applied to this Court to appeal the acquittal in respect of count no. 2 on a question of law, pursuant to s. 23 of the Criminal Procedure Act 2010, as amended. In bringing this application, the applicant seeks *inter alia* the following orders:

"*a) An order quashing the acquittal by direction by the Court of Trial.*

b) An order determining that the Court of Trial erred in law in directing the jury in the trial to find the respondent not guilty on count 2 where the direction was wrong in law and where (in accordance with section 23 (3) (b) of the Criminal Procedure Act, 2010) the evidence adduced in the trial was evidence upon which a jury might reasonably be satisfied beyond a reasonable doubt of the Respondent's guilt in respect of the offence concerned.

c) An order directing that the above-named respondent be retired for the offences in respect of which an acquittal by direction was ordered by the Court of Trial."

24. The applicant in her notice of appeal has stated certain grounds all of which relate to what she alleges is an error of law on the part of the trial judge and which in substance reflect the argument advanced by her counsel in the court below. The applicant contends that the trial judge's direction was wrong in law, and that the evidence adduced at the trial was evidence upon which a jury might reasonably be satisfied beyond a reasonable doubt of the respondent's guilt in respect of the count charging s.4 rape.

Parties' Submissions to the Court of Appeal

Appellant's Submissions

25. The appellant submits that it is not clear that the *Fairclough* principle has been adopted in this jurisdiction. There have been occasional references, *obiter dicta*, to the *Fairclough v Whipp* line of jurisprudence in judgments of the Irish Superior Courts (notably by the Court of Appeal in *Minister for Justice and Equality v Adams* [2012] 1 I.R. 140; and by the Supreme Court in *P.P. v The Judges of Dublin Circuit Court* [2020] 1 I.R. 123, and more recently in *DPP v FN* [2022] IESC 22); but up until the present case it has never been adopted as representing Irish law, and the principles stated therein concerning whether an offence of indecent assault can be committed by an accused in circumstances where there has been an invitation by the accused to the child to touch him/her, and there is a touching of the accused by the child in response to that (which may or may not be volitional), have neither been approved nor disapproved of in this jurisdiction. Understandably, in circumstances where the trial judge had raised a concern, *Fairclough v Whipp* was properly considered for its persuasive value but it was not a precedent that bound the trial judge in this case. It may or may not have been correctly decided, and he was presented with arguments both ways. The trial judge was ultimately not persuaded by arguments put forward by the prosecutor suggesting, *inter alia*, that *Fairclough v Whipp* was in effect a decision "of its time" and represented a wrong turn in the common law of England and Wales which should not be adopted here. The issue which now confronts this Court is whether the trial judge was correct in taking that view, or whether this court should take a different approach.

26. The appellant has submitted that even if it was to be accepted that the *Fairclough* principle forms part of the law in this jurisdiction, the *Fairclough* principle is manifestly bad law. Her submission is: "*that whatever logic there was in 1951 to a distinction between a child who openly protests and one who meekly submits, it is an indefensible proposition in 2022.*" The applicant submits that any consideration of "*the will of the child*" in the context of sexual assault is incompatible with the absence of any requirement to prove a lack of consent on the part of the complainant in circumstances where the complainant was under the age of consent at the time of the alleged sexual offending. Whether the complainant consented or not, or, where in circumstances where legal consent is not possible, there was a volitional touching of the accused by the child, is thus an "*immaterial*" consideration, the applicant submits.

27. Finally, the applicant submits that the *Fairclough* principle's reliance on force or coercion cannot be reconciled with the absence of any requirement for actual touching for an assault to be committed (as stated in *D.P.P. v. Babayev* [2019] IECA 247) or indeed the absence of any requirement for aggression or hostility (as stated in *Faulkner v. Talbot* [1981] 3 All ER 468). The

applicant therefore submits that it "*is an artificial and unrealistic distinction*" to suggest that an assault is committed where an accused guides the child complainant's hand to his penis or has placed his hand gently on her head, but an assault is not committed where a complainant, then but six years old, takes the accused's penis into her mouth, the accused having invited her to do so.

Respondent's Submissions

28. The respondent submits that the issue on appeal is more focused than the applicant has set out:

> "*The issue is whether the [applicant] can seek to use the lawful prohibition on relying on consent as a defence in a case involving a child under the age of 15 years as a means to remove the requisite "unwanted" element from the offence of sexual assault."*

29. In respect of the issue of consent, the respondent concedes that an accused cannot rely upon the defence of consent where the offence of sexual assault has been made out by the prosecution and the complainant is under 15 years of age. However, the respondent submits that the difficulty that arose at trial was linked to the shortcomings in the prosecution's case: namely that the prosecution could not, on the strength of the evidence of the complainant, prove the "*unwanted*" element of the assault in the first place as the evidence did not suggest that there was any overt resistance on the part of the complainant in response to the respondent's invitation. The respondent submits that the applicant cannot now on appeal to this Court use the prohibition on the respondent relying on the defence of consent in this case as a means to remove the requisite "*unwanted*" element from the offence of sexual assault.

30. In relation to the applicant's criticisms of *Fairclough* and *Rogers*, the respondent submits that the applicant's proposition that the *Fairclough* principle is grounded in outdated societal views "*does not hold*" as in *Rogers* the evidence was acknowledged as deserving "*the reprobation of every decent man*". The respondent submits that the court in *Rogers* applied the law as it stood on the basis of the evidence before the trial court within the lawful bounds of the offence charged. Moreover, the respondent draws this Court's attention to s. 9 of the Criminal Law (Rape) (Amendment) Act 1990 (as originally enacted and as in force at the time of the alleged sexual offending) as requiring a positive act of touching on the part of an accused towards a complainant.

31. The respondent submits that the fact that the prosecution could not, on the strength of the complainant's evidence, make out the requisite "*unwanted touching*" element of the offence does not mean that the jury should have proceeded to speculate to bridge this gap in the prosecution's case. Accordingly, the learned trial judge was correct in refusing to infer from the limited evidence of the complainant the requisite "*unwanted touching*" element of the offence and was correct in ruling in the manner which he did and in directing the jury the find the respondent not guilty in respect of count no. 2.

The Court's Analysis and Decision

32. The first thing to be said is that *Fairclough v Whipp*, not having been expressly approved to date in this jurisdiction, is not a precedent that binds this court nor did it bind the court below. That having been said, it must be afforded due respect and considered for its persuasive influence in circumstances where it is a judgment of a superior court in a neighbouring jurisdiction with whom we share in common the roots of a common law tradition.

33. The offence at issue here is rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990 (the Act of 1990). It is defined in subsection (1) as:

"a sexual assault that includes –

(a) penetration (however slight) of the anus or mouth by the penis, or

(b) penetration (however slight) of the vagina by any object held or manipulated by another person …"

34. There must therefore be a sexual assault that includes one of the aggravating circumstances specified in (a) or (b). However, there is no statutory definition of what comprises a sexual assault. As is at this stage well established, the offence of sexual assault is simply the old common law offence of indecent assault which has been renamed by statute (specifically s. 2(1) of the Act of 1990) as "sexual assault". See in that regard, *People (DPP) v E.F.* (unreported, Supreme Court, 24th February, 1994) where Egan J stated, *"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."* Also, see *S O'C v Governor of Curragh Prison* [2002] 1 I.R. 66, where it was held that the Act of 1990 had changed the name of the offence while leaving its nature unaltered.

35. However, beyond stating that, *"[t]he offence of indecent assault upon any male person and the offence of indecent assault upon any female person shall be known as sexual assault"*, the Act of 1990 provides no definitional information whatsoever.

32. The common law offence of indecent assault was frequently spoken of as being an assault in circumstances of indecency. For example, it is referred to thus in paragraph 11 of Charleton J's judgment in *DPP v FN* [2022] IESC 22. However, to so define it does not help in terms of what may constitute the assault component. More often than not, any debate has centred around whether the conduct complained had occurred in circumstances of indecency, rather than whether it was an assault.

33. In *Doolan v Director of Public Prosecutions* [1992] 2 I.R. 399, the High Court, in rejecting an argument that the offence of indecent assault was unknown to the law, offered some little assistance in that respect, with O'Hanlon J stating that:

> *"[a]n indecent assault involves the use of unlawful force, threatened or perpetrated against another person, it was an offence at common law, and in my opinion, it was permissible for Parliament to prescribe a special range of penalties for assault, or assault and battery, of this particular kind without having to spell out the creation of a new statutory felony or misdemeanour in the process"* [the allusion is to s.52 of the Offences Against the Person Act 1861]

34. It should be noted that pre the enactment in 1997 of a statutory definition of what constitutes the criminal offence of assault, quotidian usage (even amongst lawyers) of the term 'assault' in the criminal law context covered both the common law concepts of assault and battery.

35. The Law Reform Commission Report on Non-Fatal Offences Against the Person (1994) LRC 45-1994 helpfully summarises what, in Ireland, was the understanding of an assault and battery at common law as of the early 1990's. The report (omitting most footnote references for present purposes) states:

"Assault And Battery At Common Law (Common Assault)

1.20 In the 13th century, when every felony was a trespass and every tort a punishable offence, mere bruises which did not break bone or draw blood were insufficient to ground a charge of felony. Later, by the end of the 17th century, such assaults were offences provided they were done wilfully, in anger or in a hostile manner, such as violently jostling someone out of the way, snatching something from his hand or spitting in his face. Eventually, the slightest 'force' or contact came to constitute an offence if exercised with 'hostile' intention and without the victim's consent. [In footnote no 61, the report references that the development of the law relating to battery was traced by the English Court of Appeal in *Wilson v Pringle* [1986] 2 All ER 440.]

1.21 This gradual trivialisation of the concept of common assault may be seen as a recognition of the fundamental principle that every person's body is inviolate and that '[s]ecurity of the person is one of the first conditions of civilized life'. [The internal quotation is, per footnote 62, from Fawsitt J in *Dullaghan v Hillen and King* [1957] Ir. Jur. Rep. 10.] *As Blackstone wrote in his Commentaries, 'the law cannot draw the line between different degrees of violence and, therefore, totally prohibits the first and lowest stage of it, every man's person being sacred and no other having a right to meddle with it in any the slightest manner.'*

1.22 In this respect, the offence known to the common law as 'common assault' extends beyond the actual infliction of unlawful force on another person (a battery) to any act which causes another person to apprehend the infliction of immediate unlawful force on his person (an assault). Therefore, 'in terms more easily understood by philologists than ordinary citizens', assault and battery are two distinct crimes at common law.

1.23 Although the distinction has frequently passed unnoticed, assault originally represented an entirely different concept in the criminal law, where it was restricted to an attempted battery, than it did in the law of torts. In this respect, it appears that the development of the separate crime of assault is attributable to the gradual recognition of a 'tort theory of assault' in the criminal law.

1.24 However, the term 'assault' is now, in both ordinary legal usage and in statutes, regularly used to cover both assault and battery. Although the offence of assault simpliciter is seldom prosecuted, it is wider than an attempted battery and is therefore itself capable of being attempted.

1.25 It nevertheless remains true that 'assaults are sure to attempts allied, and thin partitions do their bounds divide'." [The internal quotation is, per footnote 69, from *State v Staggs* 544 S.W. 2d 620, 623 (Tenn, 1997).]

36. The position today *qua* an offence under s.4 of the Act of 1990 is somewhat altered by the fact that when the Act of 1990 was enacted, assault was a common law offence. However, the offending conduct we are concerned with in this case occurred in 2005. In the meantime the common law offences of assault and battery were abolished and replaced with a single new statutory offence of assault, contrary to s.2 of the Non-Fatal Offences Against the Person Act 1997 ("the Act of 1997").

37. To the extent relevant, s. 2 of the Act of 1997 provides:

"(1) A person shall be guilty of the offence of assault who, without lawful excuse, intentionally or recklessly—

(a) directly or indirectly applies force to or causes an impact on the body of another, or

(b) causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact,

without the consent of the other.

(2) In subsection (1) (a), "force" includes—

(a) application of heat, light, electric current, noise or any other form of energy, and

(b) application of matter in solid liquid or gaseous form.

(3) No such offence is committed if the force or impact, not being intended or likely to cause injury, is in the circumstances such as is generally acceptable in the ordinary conduct of daily life and the defendant does not know or believe that it is in fact unacceptable to the other person."

38. We do not think that the introduction of the concepts of "force" or "impact" within the statutory definition imply that an assault must be understood as being an offence that always involves actual or threatened physical violence, menace or hostility, although that will often be the case.

39. In so far as sexual assault, formerly indecent assault, is concerned, we consider that the substitution in 1997 of a statutory definition of the assault component of the offence for the previous common law understanding of what might constitute an assault, had few, if any, implications in most cases. While, conceivably, unusual cases might occasionally be encountered that could fall within or without the penumbra of the new statutory definition, it is uncontestable in our view that any intentional touching of another without the consent of that person and without lawful excuse represents an assault. It was an assault at common law, and it remains an assault under the new statutory regime.

40. Indeed, observations to that effect have recently been made in the Supreme Court in in *D.P.P v. F.N.* [2022] IESC 22, where Charleton J said:

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 without the consent of that person and without lawful excuse. It is not required that an assault always be hostile or rude or aggressive. See Lord Lane L.J in Faulkner v Talbot [1981] 3 All E.R.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, the renaming has not altered the elements of the offence."

41. While the passage quoted does contain the sentence, *"[w]here 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",* we do not think that the context fairly admits of an interpretation that Charleton J was seeking to confine the circumstances in which there could be an assault to those of the chosen illustration, and to rule out what the trial judge characterised as the "reverse proposition". On the contrary, Charleton J appears to us to have been saying that if, following an invitation to touch in indecent circumstances, there is contact with the body of the child by the accused, that is an assault. So, where a man invites a child to put her mouth on his penis, and she does so, the result is contact by the man with her body and that is an assault in indecent circumstances..

42. It seems to us that no matter who issues the invitation or initiates the contact, whether it be the adult concerned or the child, once there is contact it is an assault.

43. Notably, neither the word "touch" used as a noun (as in "a touch"), or as a verb (as in "to touch"), nor the adjective "touching", appears anywhere in the statutory definition of assault, notwithstanding the focus in the legal argument before the court below, and indeed in this Court, on whether, in terms of the conduct complained of ,"A" had touched "B", or conversely "B" had touched "A", and whether it really mattered.

44. Nevertheless, the assault component of indecent assault, sexual assault and cognate offences, particularly in instances of child sexual assault where there has been no overt hostility or violence, and perhaps against a background of insidious grooming, is often spoken of as involving a touching, and Charleton J's observations in *DPP v FN*, which we have just recently quoted exemplify this. A touching (in its quotidian usage) connotes contact, and can be understood both in the active sense of the performance, directly or indirectly, of a positive action by someone or something that brings about contact (i.e., through the application of force or the causation of an impact) between that person or thing and another person or thing; or, in the passive sense of someone or something simply coming into or being in contact with another person or thing, e.g., by some accidental or unintended means, possibly giving rise to an impact. However, we think that only a touching (or apprehended touching) in the active sense has the potential to be an assault, due to the necessity for positive action.

45. The word "unwanted" which also featured in the arguments, again does not appear in the s.2 of the Act of 1997. Rather the Act speaks of action done both *"without lawful excuse"* and *"without the consent of the other".* These are conjunctive requirements.

46. We will come back to the issue of lawful excuse. However, apropos the absence of consent we think it is not always helpful to speak in terms of an "unwanted" or unwelcome touching or contact, as it implies that volition is always relevant to the legal concept of consent, which it is not. In certain cases, and the present case is one of them, the giving of legal consent is not possible regardless of the alleged victim's volition. While the circumstances in which an person may legally consent to certain sexual activity is governed today in many respects by s.9 of the Act of 1990 as substituted by s. 48 of the Criminal Law (Sexual Offences) Act 2017 which was not in force (in its present form) at the time of the alleged offending in this case; the statutory position as to the age at which a victim may consent to conduct that could potentially amount to indecent or sexual assault is of long standing. Both at the time of the alleged offence in this case, and still today, the position is governed by s.14 of the Criminal Law Amendment Act 1935, which provides:

> *"It shall not be a defence to a charge of indecent assault upon a person under the age of fifteen years to prove that such person consented to the act alleged to constitute such indecent assault."*

47. Accordingly, regardless of the alleged victim's volition, and whether the touching involved was wanted or unwanted, it is not possible for a victim below the statutory minimum age to legally consent to it.

48. However, quite apart from the consideration just mentioned, if hypothetically a case concerned a victim over the age of consent (admittedly not the situation here), and there was consent to a touching in response to an invitation to provide it, the majority decision of the Supreme Court in *The People (DPP) v Brown* [2018] IESC 67 (Dunne J and O'Malley J; McKechnie J dissenting) could potentially be relevant. This held that a consent to what would otherwise be an assault, in order to be valid, must be freely given for a lawful purpose. Otherwise it is immaterial.

49. Turning then to lawful excuse, there are of course many forms of touching or physical contacts in ordinary life which do not represent potential assaults. This idea is now reflected in s. 2(3) of the Act of 1997. However, it was also long understood as being the position at common law. That understanding is well illustrated in *Collins v Wilcock* [1984] 3 All E.R. 374 where Robert Goff LJ stated (at 378):

> *"… [M]ost of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all in society and so expose themselves to the risk of bodily contact. So nobody can complain the jostling which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street; nor can a person who attends a party complain if his hand is seized in friendship, or even if his back is (within reason) slapped (see Tuberville v Savage (1669) 1 Mod Rep 3, 86 ER 684). Although such cases are regarded as examples of implied consent, it is more common nowadays to treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life."*

50. The observations of Charleton J. at paragraph 10 of his judgment in *D.P.P v. F.N.* [2022] IESC 22 (quoted previously), were to precisely the same effect.

51. Conceivably cases might arise where it could be tenably argued that a touching which is said to constitute an indecent assault occurred by some accidental or unintended means, but there has to be some reality to a claim of lawful excuse. It is difficult, if not impossible, to imagine circumstances that could lawfully excuse the penetration of a six year old girl's mouth by the penis of a much older boy or of a man, regardless of how it occurred.

52. As to the intention required both with respect to the assault component of sexual assault, and the bringing about of circumstances of indecency, and the absence of any requirement that there should be a sexual motive or purpose, the law in those respects is well set out in paragraphs 11 to 14 inclusive of Charleton J's judgment for the Supreme Court in *FN*. As these are not controversial issues in the context of the present appeal we consider it unnecessary to address them.

The Conundrum in the Present Case

53. There is no doubt but that the common law in England and Wales has developed on the basis that where a person merely invites another to touch him he commits no assault either when the invitation is made or when it is accepted. This was the effect of the decision in *Fairclough v Whipp*, which was followed in *R v Burrows*, in *DPP v Rogers* and several other cases (including more recently in *R v Dunn*). While the authors of Rook and Ward on *Sexual Offences* (2nd Edn) (London : Sweet & Maxwell) observed that *"none of these decisions is a model of judicial clarity"* (excluding Dunn which post dated the comment) they were initially rationalised on the basis that every indecent assault was thought to require a hostile act, and a mere invitation, whether accepted or not, was not a hostile act; but this rationale was later abandoned (following clarification in *Faulkner v Talbot*, previously cited, that an assault need not necessarily be hostile, rude or aggressive) in favour of the notion that for there to be an assault there must either be hostility or compulsion. This was on the basis that in *Rogers,* Lord Goddard LCJ had said, at pp 139-140:

> *"Before a man can be found guilty of an indecent assault it has to be found that he was guilty of an assault, for an indecent assault is an assault accompanied by indecency, and if one could show here that the respondent had done anything towards his child which by any fair use of language could be called compulsion, or acted, as I have said in other cases, in a hostile manner towards her, that is, with a threat or a gesture which could be taken as a threat, or had pulled a reluctant child towards him, that would undoubtedly be an assault, and if it was accompanied by an act of indecency, it would be an indecent assault."*

54. Again, so the argument went, a mere invitation does not, without more, involve compulsion and cannot be an assault.

55. Yet another rationale sometimes put forward in justification of the *Fairclough v Whipp* approach is the notion that words, whether they be an invitation or a command, cannot represent an assault. However, there is little agreement on whether this is in fact so.

56. It was strongly argued by the late Prof Glanville Williams, as far back as 1957, that the idea that words cannot represent an assault is not correct. See Williams, Glanville (1957) "Assault and Words" [1957] Crim L.R. 219. However, there is an Irish Circuit Court case from the same year, namely, *Dullaghan v Hillen and King* [1957] Ir. Jur. Rep 10, which suggested that words can

never represent an assault. This was a civil action for damages by a plaintiff whose van had been stopped by two customs officers close to the border with Northern Ireland. Arising from an altercation that ensued from this interception by the customs men, the plaintiff claimed damages against the customs officers concerned for, *inter* alia, alleged assault and battery. His Honour Judge Fawsitt noted, when reviewing the evidence that he had heard, that while the defendant Hillen's approach and address on the occasion was not a polite approach or address, nor was it an approach or address in keeping with his status as a public servant and officer of customs, it was also true that passions were not confined to one side only as, in response to being spoken to by Hillen, the plaintiff had offered filthy and insulting remarks towards Hillen, which still further inflamed Hillen's temper. Judge Fawsitt had then continued:

> *"But for his agitated state of mind Hillen would, no doubt, have recollected the commonplace but trite couplet which runs: 'Sticks and stones may break your bones, but words will never hurt you,' and in which there is a definition of the law of assault namely that mere words no matter how harsh, lying, insulting and provocative they may be, can never amount in law to an assault."*

57. However, a close reading of his judgment, which being that of a court of local and limited jurisdiction would not in any case be binding on this Court, albeit deserving of respect, suggests that the late learned judge did not go so far as to foreclose on the idea that in a particular context, words alone could be an assault if the words induced a reasonable apprehension of an immediate battery. He had earlier said, *"[w]ords cannot* ***of themselves*** *amount to an assault, under any circumstances"* (our emphasis). That formulation admitted of an exception where the words spoken, viewed not by themselves or in isolation, but by virtue of having been uttered in a particular context, could represent an assault if the words induced a reasonable apprehension of an immediate battery. Words in the form of threats or which convey menace can certainly create an apprehension that one may be the recipient of force or impact. Assuming that the immediacy requirement can be satisfied, there is no reason in our view not to regard such threats as assaultive behaviour, although in many cases it may be more convenient nowadays to seek to attribute criminal liability for them on the basis of harassment under s. 10 of the Act of 1997 (if the threats were persistent, and not once off) or perhaps, depending on the nature of the threat, an offence under s.5 of the Act of 1997.

58. It bears remarking upon that even in the neighbouring jurisdiction the *Fairclough v Whipp* line of jurisprudence was not without its critics. In the mid-1950s, A.N. Mackesey in an article entitled *"The Criminal Law and the Woman Seducer"* [1956] Crim L.R 456 and 529, analysed the relevant decisions and concluded that they were in error. More recently, it has been characterised as *"Zombie law – dead but still walking about and causing trouble"* in an article by Catarina Sjölin, a former academic commentator (and now a Crown Court judge in His Majesty's judiciary) writing in the Journal of Criminal Law in 2017. Her article entitled *"The Need to Kill off Zombie Law: Indecent Assault, Where It Went Wrong and How to Put It Right"* (2017) JCL 81(50), to which we were referred by the appellant, argued that the common law in England and Wales had taken a wrong turn with the *Fairclough v Whipp* line of jurisprudence, and offered the observation that, *"[f]or the judiciary to fail to correct errors made by the judiciary is an abdication of judicial responsibility."*

59. As superior court judges in Ireland, we do not enjoy the same freedom as our colleagues in the neighbouring jurisdiction to change the common law. We have to be ever mindful of our constitutional responsibility to respect the separation of powers provided for in the Constitution and not, through judicial activism under the guise of further interpretation of inherited common law principles, to engage in what amounts to judicial legislating. Law reform, if it is required, should be left to the legislators. That having been said, in the present case we are not concerned with interpreting or changing the common law concepts of assault and battery that we inherited at the foundation of the State. We have no need to be concerned with whether we should adopt, or to side-step if it is permissible, the further developments of those concepts to be found in the case law of the neighbouring jurisdiction, either because we think the courts of England and Wales were right in how they have developed the law; alternatively because of concern that they may have taken a wrong turn, or because we find those developments to be inconvenient, or somehow out of date. These things need not concern us because the common law offences of assault and battery have been abolished in Ireland by statute, and *Fairclough v Whipp* which has never been approved in this jurisdiction does not represent the law here.

60. Rather, what we are concerned with in this case is attempting to faithfully interpret and apply the new statutory definition of what constitutes an assault for the purposes of the criminal law, in the context of sexual offence a component of which is an assault committed in circumstances of indecency. While we are not to be taken as accepting that absence of either hostility or compulsion provided a wholly satisfactory rationale for the approach taken by courts in the neighbouring jurisdiction with regard to whether an invited touching can constitute an assault, we are of the belief that, under either regime, a mere invitation to touch another, or to engage in physical contact, without "something more", will not be assaultive; but we think that in many cases there will evidence of coercive attendant circumstances, i.e., the required "something more", such as previous or concurrent grooming, cynical exploitation of a relationship of trust, dominance, or otherwise oppressive circumstances (to name but some possibilities), against the background of which the reality of possible non-acceptance of the invitation proffered needs to be gauged. That which is presented as a mere invitation, to be supposedly accepted or rejected as a matter of choice, may in truth mask what is in reality compulsion where the invited person feels they have no choice but to comply with whatever it is they have been requested to do.

61. These will often be difficult cases, but the situation in the present case is one in which we have been able to arrive at a clear view in relation to.

62. We think that a direction in this case ought not to have been granted. It seems to us that once an accused offers an invitation to a child to touch him/her in circumstances allowing an inference of compulsion as a matter of reality to be drawn, and that invitation is accepted, any touching as a result, or consequential physical contact between the accused and the child, may constitute a sexual assault by the accused if the circumstances are indecent.

63. Although it would ultimately have been a matter for the jury, there were strong grounds here, in the circumstances in which the invitation was proffered and accepted, to conclude that the respondent induced a six year old girl, in circumstances inviting an inference of compulsion as a matter of reality, to place her mouth on his penis, thereby bringing about physical contact between

him and the complainant amounting to a touching, such that his conduct was indecently assaultive of her, regardless of who initially touched whom.

64. We have already referenced the circumstances in which the invitation in this case was proffered and accepted. In our view there was abundant evidence on foot of which a jury could find the existence of compulsion as a matter of reality. There was evidence on foot of which a relationship of trust could be imputed based on familial connection and circumstances (the respondent was an older male cousin of the complainant and a resident in the complainant's grandmother's house in which the complainant was at the time a visitor). There was arguably evidence of the exercise of dominance due to the age differential, with the complainant being, at just 6 years of age, manifestly vulnerable, something that could not but have been apparent to the respondent. Further, what was invited was, on any objective assessment, going to be violatory of the complainant in the event that the invitation was accepted and complied with. There was evident appreciation by the respondent of the "wrongness" and violatory nature of what was invited, in as much as he, after the fact, instructed the complainant that it was to be a secret. Further, the fact that the incident was brought to an abrupt halt by the respondent when he perceived that somebody might be coming up the stairs is yet further evidence of appreciation of wrongdoing. Further, there was arguably evidence, in the complainant's testimony that, *"I didn't want to but at the age I was, I wasn't -- I didn't know what right and wrong was. So, I done what he asked me to do",* that the circumstances were oppressive of the complainant and coercive in terms of negativing as a matter of reality her ability to decline to do that which she was asked to do.

65. It will further be recalled that when the complainant in the course of her evidence described putting her mouth on the appellant's penis she gave the following evidence (*inter alia*):

> *Q. And when you say put his mouth -- put your mouth on his penis, where exactly was his penis in relation to your mouth?*
>
> *A. In my mouth.*
>
> *Q. In your mouth, okay. And I'm sorry to go over these details with you Ms [complainant's surname] --*
>
> *A. That's okay.*
>
> *Q. -- but could you explain what happened then?*
>
> *A. He kind of just stopped but there was I think it must have been that someone was coming up the stairs, so, it was stopped straight away and he --*
>
> *Q. But can you remember how long this went on for?*
>
> *A. About 10 minutes.*

66. In our assessment, this testimony invites as a possible inference to be drawn by a jury, that the complainant's own sense of what was happening was that something active was being done to her. The reference to *"he kind of just stopped"* is arguably contradictory of any suggestion that the appellant had just passively allowed the complainant's mouth to receive his penis without doing anything himself to touch her or violate her. Further, the complainant's evidence to the effect that before she is asked by the appellant to put her mouth on his penis, the appellant had asked her to pull down her pants (which she did) and had then proceeded to touch her leg and

insert his fingers in her vagina, all point to a continuum of offending conduct which was sexually assaultive in character.

67. Turning then to the issue of whether the invitation tendered could have led to or have resulted in, directly or indirectly, the application of force to or the causation of an impact on the body of the complainant, we think that this issue could safely have been left to the jury. While the evidence was that the complainant was asked to put her mouth on the respondent's penis and did so, the penetrative nature of the engagement, the mutuality of the contact itself, and the reality that participation in the incident at the centre of this case required the involvement of both parties (i.e, the respondent allowing his penis to enter the complainant's mouth notwithstanding that the complainant may have opened her mouth and moved towards the respondent to receive it), provided, in our view, a sufficient basis for a jury to have been invited to consider whether there was the application of a force, or the causing of an impact to, the body of the complainant. While it is true that the evidence is not pellucid with respect to whether, when the complainant received the respondent's penis in her mouth, there was actual physical contact or a touching between the complainant's mouth and the respondent's penis, the evidence was that she put her mouth "on" his penis, moreover that the entire incident (admittedly involving more than just the orally penetrative act in isolation) had lasted 10 minutes. There is nothing to suggest that a jury, possessed of the complainant's evidence, and such other evidence as was available to them as to the circumstances in which the alleged offending conduct occurred, could not resolve that issue one way or the other either by making a direct finding or on the basis of inference.

68. As to the causation of an impact, we think a jury would have be entitled to consider whether an invitation by a 16 year old adolescent male, to a 6 year old girl, to receive his penis into her mouth, where that invitation is subsequently accepted, in the circumstances in which it occurred, and regardless of whether concurrent physical or psychological injury was capable of being demonstrated, was violatory of the body of the girl concerned, in circumstances where it was inherently indecent, and was inimical to any sense of respect for her human dignity and/or personal autonomy and/or sexual autonomy; and if satisfied that there was indeed a violation in that sense, to consider if such a violation was an impact on the body of the complainant.

Some additional general observations.

69. In recent decades the Courts have learnt much about child sexual abuse as a form of criminal offending, and now have deeper insight into the power dynamics at work in child sexual abuse than was true in the past. There is a greater understanding now of concepts such as coercion, compulsion and dominance, and how a victim (particularly a child or otherwise vulnerable victim) faced with conduct capable of being so characterised may react to it . We have seen this acknowledged at the highest judicial level. That it has come to be appreciated that a victim may, by virtue of the nature and circumstances of the particular offence, feel inhibited or psychologically incapable of making a complaint before many years have passed, illustrates our point. In *P.O'C. v. Director of Public Prosecutions* [2000] 3 I.R. 87, Murray J (as he then was) said:

> *"Expert evidence in a succession of cases which have come before this Court and the High Court has demonstrated that young or very young victims of sexual abuse are often very reluctant or find it impossible to come forward and disclose the abuse to others or in*

particular complain to the gardai until many years later (if at all). In fact this has been so clearly demonstrated in a succession of cases that the Court would probably be entitled to take judicial notice of the fact that this is an inherent element in the nature of such offences. As the court has observed in a number of cases this is particularly likely to arise in cases where the victim has been abused by a person in position of authority or dominance in relation to the child."

70. Later, in *SH v Director of Public Prosecutions [2006] IESC 55, [2006] 3 IR 575,* Murray CJ quoted the above passage and added*: "The court's judicial knowledge of these issues has been further expanded in the period since that particular case. Consequently there is judicial knowledge of this aspect of offending*".

71. We think that in considering whether there was a sexual assault on a child, there has to be recognition, having regard to what is now known about the unequal power dynamics that are at work in most cases of child sexual abuse, that in terms of the ingredient of the offence that requires an application of force or causation of an impact, or the causation of the apprehension of either of those things, i.e., in colloquial terms "the touching", that it matters little who touched whom first. If there is violatory sexual contact with a child, or the apprehension of such contact, and it was brought about (or facilitated) by actions taken (including words uttered) by a person in a position of authority or dominance in relation to that child, and which may have overborne the will of the child and represented compulsion, then it matters not whether technically the first touching was of that person by the child, or vice versa. If the bringing about of that contact, or of the apprehension of such contact, was done without lawful excuse, intentionally or recklessly, it will be a sexual assault regardless of who touched whom first.

72. While we recognise that certainty in the criminal law is an important value, and that it must be possible to say with clarity whether specific conduct can qualify as a sexual assault within existing definitions; and, if so, why it is that it so qualifies, by the same token common sense need not be left outside the door. In circumstances such as those obtaining in the present case, where an adult male's penis is received in the mouth of a six year female child, then regardless of who may have initiated the incident, it seems to us that it would offend common sense to suggest that a jury, properly charged as to the ingredients of the offence, should not be allowed to consider whether what occurred was a sexual assault. We think that *Fairclough v Whipp* was a decision of its time, and we do not consider that it represents the law in Ireland today.

Conclusion:

73. The direction to the jury to acquit the accused was wrong in law. Further, the evidence adduced in the proceedings was evidence upon which the jury, if the issue had been left to them, might reasonably have been satisfied beyond a reasonable doubt of the respondent's guilt in respect of the offence concerned. The appeal must therefore be allowed.

74. We will hear counsel concerning the form of any consequential orders that may be required.