**THE COURT OF APPEAL**

**Birmingham J.**
**Edwards J.**
**Hedigan J.**

**No. 131/2016**

**IN THE MATTER OF SECTION 34 OF THE CRIMINAL JUSTICE ACT 1967 AS AMENDED BY SECTION 21 OF THE CRIMINAL JUSTICE ACT 2006**

**The People at the Suit of the Director of Public Prosecutions**

**Appellant**

**V**

**D.J.**

**Respondent**

**JUDGMENT of the Court delivered on the 15th day of June 2017 by Mr. Justice Birmingham**

1. This matter is brought before the Court by the Director of Public Prosecutions pursuant to s. 34 of the Criminal Justice Act, 1967 as amended by s. 21 of the Criminal Justice Act, 2006. In effect, it is a without prejudice appeal.

2. This Court is requested to determine the following question of law:

> "Was the learned trial judge correct in excluding any evidence that tended to show the commission of offences which had not been specifically charged on the indictment herein notwithstanding that each of the offences alleged was a sexual assault and occurred at the time that the offence charged on the indictment had occurred?"

3. The background to this issue coming before the Court is to be found in the fact that the respondent, D.J. stood trial on 25th November, 2015 and subsequent days before the Circuit Court in Cavan. The indictment on foot of which he was arraigned was on the following terms:—

> "D.J. is charged with the following offence:
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> **Statement of Offence**
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> Sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990 as amended by s. 37 of the Sexual Offences Act 2001.
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> **Particulars of Offence**
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> D.J., a male person, on 20th February, 2011 at the Radisson Hotel, Farnham, Cavan, in the County of Cavan sexually assaulted M.J. a female person." [The names of the accused and the complainant have been anonymised]

4. The trial was concerned with events alleged to have occurred in a hotel bedroom during the early hours of 20th February, 2011. The bedroom in question was one in which the complainant, her husband, S.J. and their baby were staying. S.J. had a birthday around this time and it was decided that he and his wife would travel to Cavan and meet with two brothers of his and their wives for a meal to mark the occasion. D.J. is a brother of S.J. and so the brother-in-law of the complainant M.J.

5. In fact, the dinner was confined to S.J., M.J., D.J. and his wife as the other couple who had been intended to participate withdrew at a late stage. S.J. and M.J. had arranged for a babysitter to be present in the hotel bedroom while they dined downstairs. After the dinner, at which a significant amount of wine was consumed Ms. M.J. went to the bedroom with a view to relieving the babysitter. D.J. accompanied her there. According to M.J., D.J. initially fell asleep for a period on the bed. He then woke and proceeded to sexually assault her in various ways over a period of 40 to 45 minutes.

6. There was no immediate complaint and indeed Ms. M.J.'s statement to Gardaí was taken on 24th February, 2013, just over 2 years later. A file was submitted to the DPP in the usual way and it appears that when the matter was first considered within the office of the Director of Public Prosecutions that the decision was not to prosecute, however, that decision was reviewed and a direction issued that Mr. D.J. should be charged with a single count of sexual assault. The trial was listed for 25th November, 2015.

7. After the case was opened to the jury by prosecution counsel in a brief manner, counsel for the accused sought a ruling from the judge in relation to the evidence that the prosecution intended to adduce during the trial. The defence sought a ruling that would restrict the evidence that could be given because, as counsel put it:-

> "it's fundamentally unfair, given all of that, for evidence that amounts to something more than sexual assault, be it aggravated sexual assault, rape or rape contrary to section 4 being proffered in evidence by the injured party is prejudicial, it's unfair, and as a matter of principle … would be innately prejudicial."

8. When the judge came to rule on the matter he began by acknowledging that there was no obligation on the DPP to charge the most serious offence possible, referring in that context to the decision of Morris J., as he then was, in *K.M. v. The DPP* [1994] 1 I.R. 514.

9. He then proceeded to analyse the witness statement of the complainant as it appeared in the book of evidence. He first referred to a passage which stated:-

> "D. came over to me, with one hand holding his penis and with the other he grabbed the back of my head. D. then tried to force himself into my mouth, and at this point I managed to roll away and crawl around to my baby."

The judge categorised this as a very specific allegation of attempted s. 4 rape. He then referred to another extract as follows:-

> "I then could feel D. and he tried to penetrate me. D. was telling me to relax as he tried to penetrate me."

The judge interpreted this as an attempted penile penetration of the vagina. A third extract was referred to which stated:-

> "D. then forced open my legs with his legs and then put his hand inside my vagina, I think D. had about four fingers inside me. D. penetrated me very deep, because I could feel it and it was very sore. D. was saying to me I was a fool and I was begging him to stop. I was saying to D. a number of times 'please stop'. D. was putting his finger in and out of me for about four minutes. My head was hitting the headboard during these four minutes and I was crying a lot. I was saying 'D. … stop' all during this and D. knew there was no consent." [First name of accused anonymised.]

10. The judge then ruled on the matter, having heard from counsel, as follows:-

> "… applying the principles to the facts of this case and I think each case has to be dealt with on the basis of its own facts, … the accused is charged with sexual assault and the sexual assault complained of is one whereby the complainant says that she was effectively chased around a hotel room over a period of about 45 minutes, where the accused was trying to remove her underwear, pinning her down onto the bed and behaving in a way where he appeared to be attempting to have sexual intercourse with her, and she constantly fighting him off and resisting. And within that account there are particular extracts which, if allowed, would give rise to allegations in the course of the proposed evidence of more serious offences than sexual assault."

11. The judge then indicated that he regarded the proposed evidence in relation to attempted oral penetration as an attempted s. 4 rape, the second extract to which reference has been made as an attempted vaginal rape and that he regarded the account of digital penetration as amounting to evidence of a s. 4 rape. The judge commented that the paramount consideration was one of ensuring that the accused got a fair trial. He stated that, in order to achieve that while at the same time being fair to the prosecution which he felt would not be materially affected, the complainant should be restrained from dealing with the three specific matters identified by him when giving evidence. Counsel for the prosecution submitted to the judge that the reference to digital penetration did not, in his view, involve an offence other than that charged. When the definition of rape under s. 4 of the Criminal Law (Amendment) Act, 1990 was opened to the judge, he was prepared to resile from the view that he had initially formed that this was a s. 4 rape but, with encouragement from counsel for the accused, took the position that this was an aggravated sexual assault and, as such, his ruling was that it could not be referred to.

12. There is no doubt that counsel for the prosecution was correct when he submitted that the act of digital penetration alleged did not constitute a s. 4 rape. While it is not perhaps the central issue in the appeal, the Court would observe that acts of digital penetration are habitually charged and prosecuted as acts of sexual assault. On that basis, even if the judge was correct in his approach in excluding sections of the statement which alleged offences more serious than the offence actually charged, the prosecution should not have been restricted from adducing this evidence in relation to digital penetration.

13. The issue of wider application is whether the judge was correct in excluding evidence where the activity described amounted to an offence more serious than that actually charged. The starting point for a consideration of this issue is that all the activity in question, the attempted penile oral penetration, the attempted penile penetration of the vagina and the digital penetration of the vagina unquestionably amounted to sexual assault. Insofar as Mr. D.J. was charged with sexual assault and the offence was charged as having occurred in the hotel bedroom and Ms. M.J. was anxious to give a comprehensive account of what occurred on that occasion, the evidence was clearly relevant. Being relevant, it was *prima facie* admissible and should be excluded only if its admission in evidence would breach one of the established rules of evidence. It is well established, as indeed was referred to by the trial judge, that the DPP is not obliged to charge the most serious offence that is open. It is also well established at this stage that if, at trial, the evidence establishes an offence more serious than the one that has been charged, this does not prevent a conviction being recorded in respect of the offence that was actually charged.

14. The issue was considered in a number of cases in the context of the Larceny Act 1916 as it had a particular potential relevance due to the terms of s. 2 of the Larceny Act 1916 as follows:-

> "Stealing for which no special punishment is provided under this or any other Act for the time being in force shall be simple larceny and a felony punishable with penal servitude for any term not exceeding five years."

The issue was considered by the Supreme Court in The People v. Rock [1994] 1 ILRM 66. The case was to a significant extent concerned with the issue of whether simple larceny was a common law offence, the Court concluded it was. However, in the course of his judgment, O'Flaherty J. commented as follows:-

> "Aside from authority, I would conclude in principle as Finlay P. did [in The State (Foley) v. Carroll [1980] I.R. 150], that if the State decides not to prosecute a person for some aggravated form of larceny but decides to prosecute for simple larceny only, thus confining the case to a lower maximum sentence, I cannot see that such a course of action should be condemned as in any way contrary to the statute or, otherwise, bad in law.
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> To condemn this course would produce an anomaly alluded to by Finlay P in the Carroll case that:
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> > 'If such were the case then a person charged with simple larceny could avoid conviction by establishing that the offence was aggravated by being accompanied by force, or carried out by use of a threat or whilst armed with an offensive weapon.'"

15. Having regard to the decision in Rock and the decision in *The State (Foley) v. Carroll* there referred to, the Court is firmly of the view that Ms. J. should not have been prevented from giving a full account of what, according to her, occurred in the bedroom. Accordingly, the Court will answer the question posed by saying that the trial judge was not correct in excluding the evidence in question.