

Appendix FF

Order 58, rule 15

No. 1

SUPREME COURT**Application for Leave and Notice of Appeal****For Office use**

Supreme Court record number of this appeal	
Subject matter for indexing	

Leave is sought to appeal from	
<input checked="" type="checkbox"/> The Court of Appeal	<input type="checkbox"/> The High Court

[Title and record number as per the High Court proceedings]

		V		
High Court Record Nr		Court of Appeal Record Nr	273/15	
Date of filing		23 rd March, 2017		
Name(s) of Applicant(s)/Appellant(s)		Gerard Brown		
Solicitors for Applicant(s)/Appellant(s)		Philip Meagher Midland Legal Solicitors		
Name of Respondent(s)		Director of Public Prosecutions		
Respondent's solicitors		Chief Prosecution Solicitor		
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?				
<input type="checkbox"/> Yes		<input checked="" type="checkbox"/> No		
If yes, give [Supreme Court] record number(s)				

Are you applying for an extension of time to apply for leave to appeal?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If Yes, please explain why		

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Sheehan, Mahon, Edwards
Date of order/ Judgment	9 th March, 2017

2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	Gerard Brown
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Original status

<input type="checkbox"/>	Plaintiff
<input type="checkbox"/>	Applicant
<input type="checkbox"/>	Prosecutor
<input type="checkbox"/>	Petitioner

<input checked="" type="checkbox"/>	Defendant
<input type="checkbox"/>	Respondent
<input type="checkbox"/>	Notice Party

Solicitor			
Name of firm	Midland Legal Solicitors		
Email	pmeagher@midlandlegal.ie		
Address	Fitzmaurice House Bank Place Portlaoise	Telephone no.	0578661050
		Document Exchange no.	DX47025
Postcode		Ref.	

How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input checked="" type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	Conor Devally SC		
Email	cdevally@eircom.net		
Address	Distillery Building 145-151 Church Street Dublin 7	Telephone no.	01-8174510
		Document Exchange no.	DX812002
Postcode	D7		

Counsel			
Name	Colm Hennessy BL		
Email	colm55@gmail.com		
Address	Distillery Building 145-151 Church Street Dublin 7	Telephone no.	0868852420
		Document Exchange no.	DX818094
Postcode	D7		

If the Applicant / Appellant is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	The Director of Public Prosecutions
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Original status	<input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant	Is this party being served with this Notice of Application for leave?	
	<input type="checkbox"/> Applicant	<input type="checkbox"/> Respondent		
	<input checked="" type="checkbox"/> Prosecutor	<input type="checkbox"/> Notice Party		
	<input type="checkbox"/> Petitioner			
Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>	

Solicitor			
Name of firm	Chief Prosecution Solicitors		
Email	patrick.geraghty@dppireland.ie;margaret.moran@dppireland.ie		
Address	90 North King Street Smithfield Dublin 7	Telephone no.	018588500
		Document	DX38
		Exchange no.	
		Ref.	
Postcode	D7		

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/> Document Exchange	<input type="checkbox"/> E-mail
<input type="checkbox"/> Post	<input checked="" type="checkbox"/> Other (please specify) Not as of yet

Counsel			
Name	William Fennelly BL		
Email	jwfennelly@lawlibrary.ie		
Address	Law Library, Four Courts, Dublin 7. Clonminch Tullamore Co. Offaly R35 RT47	Telephone no.	0579352301
		Document	DX43011 Tullamore
		Exchange no.	
Postcode	Offaly R35 RT47		

Counsel			
Name			
Email			
Address		Telephone no.	
		Document	
		Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/> Document Exchange	<input type="checkbox"/> E-mail
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Post

Other (please specify)

4. Information about the decision that it is sought to appeal

Please set out below:

Whether it is sought to appeal from (a) the entire decision or (b) a part or parts of the decision and if (b) the specific part or parts of the decision concerned

(a) -It is sought to appeal from the entire decision.

(b) In the case where it is sought to appeal in criminal proceedings please provide a concise statement of the facts that are not in dispute

(b) -a concise statement of the facts that are not in dispute:-

- a) The appellant having been arraigned and pleaded not guilty before His Honour Judge Keenan Johnson at Portlaoise Circuit Criminal Court on the 28th October, 2015 to Count one, on Bill Number LSDP/0014/2015 of the indictment the particulars being; ["That on the 20/05/2014 at Midlands Prison, Dublin Road Portlaoise in the County of Laois, in the said District of Portlaoise he did assault one Stephen Cooper causing him harm, contrary to section 3 of the Non Fatal Offences against the Person Act 1997"- and following a trial and having been found guilty by unanimous verdict on the 6th of November, 2015 of the offence of assault causing harm the Appellant was sentenced to 3 years imprisonment consecutive to his current sentence with a release date therein of January 2023.
- b) Stephen Cooper (the injured party) previously a member of An Garda Siochana gave evidence that he was a prisoner in the Midlands prison on the 20th May, 2014 having been convicted of offences contrary to section 15 of the Misuse of Drugs Act, 1977 (as amended) fraud, and perverting the course of justice.
- c) The injured party (who was on protection in prison) gave evidence that on the morning of the 20th May, 2015 he was being escorted to the prison gym by prison officer Brian Lonergan at approximately 10am. The injured party gave evidence that he was attacked by the applicant on the 20th May, 2015 in the Midlands Prison whereby the applicant (having placed a mug inside a sock) struck him two- three times on the top of the head causing him an injury.
- d) The injured party formally identified the accused from a photograph during the trial process. No issue was taken with the arrest, detention, or identity of the Applicant. During cross examination it was put to the injured party that he asked the applicant to attack him in order to facilitate a transfer to another prison, and furthermore that he contrived this (attack) in order to facilitate a transfer to different prison. It was put to the applicant that he was aware from his cleaning duties that a gate was left open and this would enable the applicant to access a secure area and therein attack the injured party.

3. The learned trial Judge erred in law; in holding that an agreement or consent to the physical application of force, was vitiated or removed as an element of the offence to be established by the prosecution, for reasons that it was contrary to public policy, for a dishonest purpose, tainted by unlawfulness and incapable of enforcement, whilst expressly acknowledging its applicability or the existence of the defence in other circumstances;
4. The learned trial Judge erred in law in refusing an application on behalf of the applicant/applicant for an accomplice warning to be given to the Jury;

THE RELEVANT ORDERS AND FINDINGS MADE IN THE COURT OF APPEAL

- a) The Court of Appeal dismissed the applicants appeal.
- b) The Court ruled that proof of an absence of consent was not a necessary ingredient in a section 3 assault. The Court ruled that consensual violence was permissible in certain limited circumstances.
- c) The Court ruled that section 2 and 3 of the Non Fatal Offences against the Persons Act 1997 should be treated as separate and distinct offences.
- d) The Court ruled that an assault causing harm committed in circumstances where the purpose and/or intention of the assault is itself unlawful and/or contrary to public policy can never be rendered lawful on the basis that the victim invited the assault or consented to being assaulted.
- e) The Court ruled that the learned trial judge in this case was correct, as was his charge to the jury to the effect that the very serious attack on Mr. Cooper by the appellant was not excusable on the basis that it had been consented to, if indeed there was any such consent.
- f) The Applicant subsequently appealed against the severity of his sentence and this appeal was also dismissed.

5. Reasons why the Supreme Court should grant leave to appeal

In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)—

Please list (as 1, 2, 3, etc) concisely the reasons in law why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court

1. This appeal concerns an issue of general public importance as it concerns the statutory interpretation of section 2 & 3 of the Non Fatal Offences Against the Persons Act 1997, and the offences of “assault” and “assault causing harm”, and whether the concept of consent as provided for in section 2(1)(a) (b) of the aforementioned Act is removed from section 3(1) of same Act;
2. This appeal concerns an issue of general public importance regarding the interpretation and extent of “public policy” as an aid in the interpretation of a penal statute. The learned appellate Court excluded the element of consent in its interpretation of the necessary ingredient for an assault within section 3 of the said Act notwithstanding that “assault” for the purpose of section 2 of the Non Fatal Offences against the Persons Act 1997 requires proof that consent was not present. In this regard the public policy said to inform the legislation was viewed by the learned court as necessitating or calling for such an interpretation;
3. This appeal concerns the issue of the appropriate use of parliamentary debate in the interpretation of statutes, in particular in light of exceptions (rare as they may be) suggested as possible in the existing jurisprudence of *Crilly v T & J Farrington Ltd 2001 3 IR 251*. Further, the public policy formulated or discussed as intended to be expressed through the statute was explicitly and unambiguously declared in the legislative assembly as diametrically opposite that which was assumed to pertain by both the learned trial court and the court of appeal; The Court of Appeal was invited by the Appellant to seek submission on the issue of parliamentary debate, in the event that its view of Public Policy might inform its judgment. This was declined despite reliance upon a judicial assumption of the said Policy.
4. The offences of section 2 and 3 of the 1997 Act are among the most frequent violent criminal events prosecuted within the state. The parameters of the said offences and the ingredients required to be established in such prosecutions is of the utmost public importance.

5. This appeal addresses competing tools of interpretation of an important criminal provision namely its strict interpretation and resolving an ambiguity in favour of an accused as against a public policy aim discerned by the Judiciary;
6. This appeal further examines the meaning attributable to "assault" within section 3 of the Non Fatal Offences against the Persons Act 1997 in light of the same act repealing the existing common law offence of assault and where the only enacted definition of assault is that under section 2 of the same Act.
7. This appeal raises issues of public importance regarding the interpretation of s.2 and 3 of the Non Fatal Offences Against the Persons Act 1997 and the extent to which the Courts are entitled to interpret a penal statute to such a degree that it is the respective trial Judge's subjective view of what is contrary to public policy in a modern society;
8. This appeal also raises an issue of public importance to the extent that the Court of Appeal has commented on the confusion created by the drafting of the relevant sections when it stated:- *"the drafting of these related sections (to the extent that they both refer to assault) creates confusion as is evident from this and other cases and might have been the subject of more careful drafting. It is nevertheless appropriate that the offences described in ss.2 and 3, respectfully should be treated as separate and distinct offences as indeed should the offence described in section 4"*.
9. This appeal raises points of importance in the interpretation of penal statutes generally.
10. Absent clarification, the Judgment under appeal leaves utterly uncertain the requisite intention necessary to establish in the prosecution of an offence under Section 3 of the Non-Fatal Offences against the Person Act 1997. The said Judgment decrees that "assault causing harm" is a stand-alone offence, the meaning of which is divorced entirely from the meaning of "assault" defined in the Act under Section 2 thereof. There is thus no intention specified as attaching to the commission of a Section 3 offence, as presumably the intent specified under Section 2, as attaching to the crime of assault, is likewise NOT imported into Section 3.

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

Please list (as 1, 2, 3, etc) concisely:

the specific ground(s) of appeal and the error(s) of law related to each numbered ground

1. The Court of Appeal erred in its interpretation of section 2 & 3 of the Non-Fatal Offences Against the Persons Act 1997, in reaching the conclusion that the concept of consent as provided for in section 2(1)(a) (b) of the aforementioned Act is removed from section 3(1) of same Act;
2. The Court of appeal erred in holding that proof of consent was not a necessary ingredient in a section 3 assault;
3. The Court of appeal erred when it ruled the learned trial judge's ruling and charge to the jury was correct on the issue of consent and public policy;
4. The Court of Appeal erred in its approach to the appeal insofar as it attempted to distinguish section 2 and section 3 of the 1997 Act by the respective penalties available for a conviction under section 2 and section 3 rather than focusing on the clear and unambiguous wording of each respective section;
5. The Court of Appeal erred and acted ultra vires insofar as it has exceeded its jurisdiction when it ruled on matters of public policy in particular what is, and what is not, acceptable as a matter of public policy in a modern society;
6. The Court of appeal erred in failing to advert to parliamentary debate when considering the public policy in forming sections 2 & 3 of the Non Fatal Offences Against the Persons Act 1997, notwithstanding an invitation to do so on behalf of the appellant;
7. The learned Court of Appeal arrogated to itself a view of public policy contrary to that expressed by the legislature in its passing of the relevant provision;
8. The learned Court of appeal allowed its view of policy to trump the natural meaning of the section in question and/or a strict interpretation favourable to the accused as required of a penal statute.

the legal principles related to each numbered ground and confirmation as to how that/those legal principle(s) apply to the facts or to the relevant inference(s) drawn therefrom

In respect of grounds 1, 2 & 3:-

It is submitted that the phrase “without the consent of another” in section 2 of the Non Fatal Offences Against the Persons Act 1997; is unequivocal and governs both section 2(1) (a) & (b) of that section. By using the term “assault” section 3 must be read as “assault” as defined within the same legislation – i.e. section 2. Where section 2(1) (a) & (b) of the 1997 Act expressly provides that the assault must take place “without the consent of the other”, the absence of consent is stated to be an essential element of the offence of “assault causing harm” as defined in section 3 of the 1997 Act.

Consequently, lack of consent is an essential proof in order to make out a charge of assault causing harm and as a consequence the learned trial Judge and the appellate Court erred in law in the interpretation of section 2 and 3 of the Non Fatal Offences Against the Persons Act 1997 Act and in his charge to the Jury where he stated that consent was not a defence to assault.

In respect of grounds 4, 5, 6, 7 & 8:-

The interpretation of penal statutes generally and of subsections section 2(1) (a) & (b) of the Non Fatal Offences Against the Persons Act 1997 in particular brings into play a variety of canons of construction. Grounds [4-8] inclusive seek review of the denial to this accused of the defence of an alleged injured party’s consent (or alternatively the removal of an ingredient of assault in the proof of the alleged offending) by interpretation of the Non Fatal Offences Against the Persons Act 1997 under; (a) the plain meaning of the words, (b) the mischief sought to be eradicated, (c) a teleological reading of the Act, and (d) a refusal to enquire into overt statements of policy in forming the legislation, together with (e) a rule of strict interpretation of a statutory provision.

3. The specific provisions of the Constitution, Act(s) of the Oireachtas, Statutory Instrument(s) and any other legal instruments on which you rely

- a) Non Fatal Offences Against the Persons Act 1997;
- b) Section 2 & 3 of the Non Fatal Offences Against the Persons Act 1997;

4. The issue(s) of law before the Court appealed from to the extent that they are relevant to the issue(s) on appeal

- a) The interpretation of s.2 & 3 of the Non Fatal Offences Against the Persons Act 1997;
- b) Whether the concept of consent as provided for in section 2(1)(a) (b) of the Non-Fatal Offences Against the Persons Act 1997 is removed from section 3(1) of the same Act;
- c) The interpretation and scope of "assault" as defined in section 2 of the Non Fatal Offences Against the Persons Act;
- d) Whether section 2 and 3 of the Non Fatal Offences Against the Persons Act 1997 are separate at distinct offences;
- e) To what extent can the courts dictate public policy contrary to the express intentions of the legislator;

Name of solicitor or (if counsel retained) counsel or applicant/appellant in person:

Philip Meagher Solicitor Midland Legal Solicitors instructing
Conor Devally SC and Colm Hennessy BL

7. Other relevant information

Neutral citation of the judgment appealed against *e.g.* Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

Court of Appeal DPP v Brown 2016 IECA 405 & Court of Appeal DPP v Brown (No. 2) 2017 IECA 28

(Original Court of Trial) Portlaoise Circuit Criminal Court Bill No:- LSDP0014/2015

References to Law Report in which any relevant judgment is reported

N/A

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

An order quashing the conviction of the Appellant for the offence of assault causing harm.

What order are you seeking if successful?

Order being appealed:

set aside ☒

vary/substitute ☐

Original order:

set aside ☒

restore ☐

vary/substitute ☐

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?

☒ Yes

☐ No

If Yes, please give details below:

1. Minister for Justice v Dolny 2008 High Court IEHC 326 Peart J
2. Minister for Justice v Dolny 2009 Supreme Court IESC 48 Denham J
3. Crilly v T & J Farrington Ltd 2001 3 IR 251

make a reference to the Court of Justice of the European Union?

☐ Yes

☒ No

If Yes, please give details below:

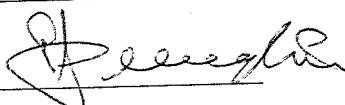
Will you request a priority hearing?

☐ Yes

☒ No

If Yes, please give reasons below:

Signed:

 (PHILIP MEAGHER)

(Solicitor for) the applicant/appellant

Please submit your completed form to:

The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.