THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

62/12
63/12

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Conan Murphy and Philip McKevitt

Appellants

Judgment of the Court (ex tempore) delivered on the 6th day of November 2015 by Mr. Justice Birmingham

1. Following a trial in the Special Criminal Court the appellants were convicted of possession of an explosive substance contrary to s. 4 of the Explosives Substance Act 1883, as amended by s. 15(4) of the Offences Against the State Act 1998. The trial took place between the 29th November, 2011 and the 24th February, 2012. On the 9th March, 2012, each appellant was sentenced to eight and a half years imprisonment. Later, on the 27th July, 2012, both appellants were admitted to bail.
2. A very large number of grounds of appeal have been identified. In summary these raise issues as to the decision of the Special Criminal Court to admit into evidence material seized on foot of a s. 29 Offences Against the State Act warrant.
3. There is a stand alone ground in that respect arising from the refusal of the Special Criminal Court to allow defence counsel to address the court on the significance of the *Damache* case which had recently been delivered. The court will turn to that issue momentarily.
4. There were also challenges to the entry onto the premises pursuant to s. 6 of the Criminal Law Act 1997. A number of arguments are addressed to that issue and in essence the case made was:

> (i) That the court erred in holding that it was open to the gardaí to arrest for a scheduled offence under s. 30 of the Offences Against the State Act, when initial entry was purportedly affected under s. 6 of the Criminal Law Act 1997.
> (ii) There were issues raised in relation to arrest and detention. The position of the appellant Mr. McKevitt is differentiated somewhat in that he claimed to have been assaulted by gardaí during the course of the operation.
> (iii) There are issues as to whether the items that the appellants were found to be in possession of were in fact an explosive substance within the term of the Explosives Substance Act 1883.
> (iv) There were issues arising out of the fact that in the indictment, neither in the statement of offence nor in the particulars of offence was it alleged that the appellants had knowingly in their possession, the items referred.
> (v) It is contended that what the appellants were charged was therefore, not an offence known to the law and it is contended that what they were charged with was not a scheduled offence.
> (vi) It is contended that that point went beyond any technical argument as to the form of indictment, but that there was a real evidential deficiency as to this essential ingredient of the offence.
> (vii) There was an issue as to how the explosive substances that were in issue in the trial were dealt with on the indictment. There was a contention that there was insufficient evidence that both appellants were knowingly in possession. The arguments of each appellant in regard to that issue was specific to their own situation and to the specific evidence that was adduced in respect of each one of them.

5. Despite the multiplicity of grounds, grounds that are common to both appellants and grounds that are specific to one or other and the list just quoted may not be fully comprehensive.
6. In the view of the court there is one issue of overwhelming transcendent significance and the court feels that it must address this issue at this stage and that relates to events in the Special Criminal Court, on the 24th February, 2012, the date on which the appellants were convicted.
7. During the trial both appellants raised issues as to the validity of the s. 29 Offences Against Act warrant. Obviously the circumstances of both appellants were not identical. It was Mr. McKevitt's property that was entered, not the property of Mr. Murphy, so the arguments that were available to each of them diverge and equally the arguments that were available to the State by way of response diverged. But nonetheless each raised issues in this regard. In summary the argument was that the warrant was not issued by an independent authority and that instead Superintendent Keane who issued the warrant was acting as judge in his own cause. The arguments that were raised at trial failed to carry the day.

8. On the 23rd February, 2012, the Supreme Court delivered its decision in the *Damache* case. The appellants' legal team were quick to respond. A letter was sent to the Special Criminal Court copied to the DPP asking the court which had been deliberating to suspend deliberations so that counsel could address the changed legal landscape.

9. When the Special Criminal Court sat on the 24th February, which was the day on which the judgment was scheduled to be delivered, the court indicated with some firmness that it did not propose to permit the case to be re-opened and instead was intent on delivering the judgment that had been prepared and the court then proceeded to do so.
10. The court has a degree of sympathy with the Special Criminal Court that dealt with an extraordinary lengthy case which had spilled over three months, but nonetheless the court cannot agree with the approach taken. The decision in *Damache* changed the landscape in a really fundamental way. The basis on which the court had been approaching the case that there had been a search conducted on foot of a valid s. 29 warrant was no more. In these circumstances there was clearly a need to permit and indeed require the parties to address the changed circumstances. The parties ought to have been given an opportunity to make submissions and indeed in all likelihood following the submissions the evidence should have been re-opened. That would of course have been very inconvenient, but a trial in due course of law required no less. In these circumstances this Court feels that it must quash the convictions.

11. The decision in *Damache* was a highly significant development and it was not to be the last. On the 15th April, 2015, the Supreme Court delivered its judgment in the *J.C.* case overturning the decision in *DPP v. Kenny* and ending the automatic exclusionary rule. The effect of *J.C.* is that a court considering the question of whether to admit the evidence arising from the shed search would be far

more likely to admit the evidence than would have been the situation heretofore.
12. Counsel for both appellants in the course of the argument seeking to have the convictions set aside, addressed the question of whether in the event of the convictions being set aside, a re-trial should be ordered and each pressed very strongly that that should not happen. They say that their trial should have concluded in late February 2012, on the basis of the law as it stood post delivery of the *Damache* decision on the 23rd February, 2012 and that it is unfair that having been denied an opportunity to make arguments and having been convicted on foot of a ruling which was based on the law as it was believed to be prior to the 23rd February, that they should now face a re-trail on playing field that had been changed so significantly as a result of the *J.C.* decision.
13. Each counsel draws comfort and support from passages that they identify in the different judgments of the Supreme Court in *J.C. (2)* where the Supreme Court was unanimous in refusing to order a re-trial of Mr. J.C. They say that the position of their clients is analogous. This Court cannot agree. Mr. J.C. had been acquitted. Mr. McKevitt and Mr. Murphy were convicted. It is to use the language of counsel for one appellant, a case of apples and oranges.
14. The court is of the view that the case for a re-trial is overwhelming. The events which were the subject of trial in substance bomb making were matters of extreme seriousness. The interests of justice require that guilt or otherwise should be determined in a trial conducted to conclusion in due course of law. There is a clear and obvious public interest in a re-trial.
15. The court has considered the question as to whether any of the other grounds argued could affect that issue and has done so in a situation where counsel for the State has not yet been called on to deal with them.
16. The court is satisfied that none of those arguments whether it as to the form of the indictment, whether it as to the ingredients of the offence, whether the items seized came within the terms of the legislation, the submissions of the lack of evidence, the challenge to entry, arrest and detention could otherwise could have had that effect.
17. In a situation where there is to be a re-trial and where the evidence that will be before the court on the next occasion will diverge from the February 2012 trial, as all sides address the changed legal landscape, the court is of the view that it is not appropriate to say more in relation to other grounds. The court will merely observe that in its view there was more than ample evidence against each appellant for the case to go before a jury in a case before the ordinary courts or to be considered by the judges of fact in the Special Criminal Court. Accordingly the court will quash the conviction, but will order a re-trial.