THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

38/15

39/15

In the matter Section 23 of the Criminal Procedure Act 2010

The People at the Suit of the Director of Public Prosecutions

Applicant

V

C.C. and M.F.

Respondents

JUDGMENT of the Court (ex tempore) delivered on the 21st day of July 2016 by

Mr. Justice Birmingham

1. Earlier this term this Court delivered judgment in relation to an application by the DPP pursuant to s. 23 of the Criminal Procedure Act 2010. The respondents to that application had indicated that if the court was concluding that the evidence had been wrongly excluded and so was quashing the acquittals that they would wish to present arguments as to why a re-trial should not be ordered. The court indicated that it would facilitate that request and that argument has taken place this morning.

2. In the course of the earlier judgment, the court referred to the facts surrounding the underlying offences, doing so by quoting from the judgment of Charleton J. in the case of *Byrne and Byrne v. The judges of the Dublin Circuit Court and DPP*, a related or linked case. The court also in that judgment referred to the procedural history in some detail and that history is undoubtedly an elaborate and convoluted one. Suffice to say at this stage that in 2009, five individuals including Mr. CC and Mr. MF went on trial. CC and MF were convicted and were subsequently sentenced to lengthy terms of imprisonment. They appealed and their convictions were quashed in April 2012. Essentially quashed on what has come to be known as *Damache* grounds.

3. A re-trial was ordered and the re-trial proceeded resulting in a disagreement on the 21st December, 2013. Arising from this agreement a re-trial was ordered which took place in January 2015, before Judge Mary Ellen Ring, as she then was. In that case following a *voire dire*, the trial judge excluded telephone evidence on which the prosecution depended. This Court in its earlier judgment has found that she erred in that regard. The issue now is whether the court should order a re-trial.

4. It is appropriate at this stage to quote the terms of s. 23(11) and (12) of the Criminal Procedure Act 2010:-

> "(11) On hearing an appeal under this section the Court may -
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> (a) quash the acquittal or reverse the decision of the Court of Criminal Appeal, as the case may be, and order the person to be re-tried for the offence concerned if it is satisfied
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> (i) that the requirements of subsection (3)(a) or (3)(b), as the case may be, are met, and
>
> (ii) that, having regard to the matters referred to in subsection (12), it is, in all the circumstances, in the interests of justice to do so,
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> or
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> (b) if the court is not so satisfied, affirm the acquittal or the decision of the Court of Criminal Appeal, as the case may be.
>
> (12) In determining whether to make an order under subsection (11)(a), the Court shall have regard to –
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> (a) whether or not it is likely that any re-trial could be conducted fairly,
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> (b) the amount of time that has passed since the act or omission that gave rise to the indictment,
>
> (c) the interest of any victim of the offence concerned, and
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> (d) any other matter which it considers relevant to the appeal."

5. The debate today has largely focused upon the terms of s. 23(12). If we look at the issues which our attention is directed by that subsection, it is the case that the tiger kidnapping occurred as far back as the 13th March, 2005, and a re-trial if one is to be ordered will not take place before 27th January, 2017, which is a significant time-line indeed.

6. The other timescale to be considered is that between the directed acquittal in January 2015, and January 2017, when a re-trial will

take place. Clearly living in a situation where an acquittal is under challenge must be a difficult and stressful situation that is a matter to which the court should have regard. Again focusing on the matters to which s. 23(12) direct attention, this is a case where there is really no dispute, but that the incident has had a profound impact on the members of the family, the family that were the victims of this incident and vindicating their rights militates in favour of ordering a re-trial.

7. This Court pursuant to subs. (12)(d) has regard to the nature of the offence an exceptionally serious one, an offence to use the language of Charleton J. to be ranked as the worst kind of criminal conduct. The crucial issue is whether a re-trial can be conducted fairly.

8. The respondents to this application say no, and they advance a number of arguments in that regard some of which might be called arguments of general application, that memories will fade with the passage of time and that in this case some witnesses will be giving evidence for the sixth or seventh time. In that situation it would be difficult for them to be clear what they are actually remembering of the incident and what they are remembering of giving evidence previously. By extension it would be difficult for those called on to assess the evidence of such witnesses.

9. A point is also made about missing evidence or unavailable evidence. This is a reference to the fact that records are not now available that a cell site in issue might not have been the one first interrogated and that a call might have been directed to that site whether directly or indirectly.

10. In the court's original judgment we commented that the most that can be said of the issues raised by the defence is that it has not been established that there were not unsuccessful attempts to assess one or more other sites and that this was quintessentially a matter that goes to weight rather than admissibility. The court sees no reason to depart from the view it expressed. It must be appreciated that the position in relation to records is no different now to what it was at the time of the trial before Judge Ring or indeed before Judge Nolan who presided at the trial that resulted in the disagreement of Judge Hunt who presided at the 2009 trial which ended in the case of the appellants with conviction.

11. The court is not convinced in relation to the arguments about failing memories. So far as some of the witnesses in this case are concerned, the events of March 2005, will be seared in their memory so traumatic were they. In other cases the evidence is of a technical nature involving consideration of records as is the situation in relation to the telephone evidence, which was the focus of the earlier stage of this application. But really the main focus has been on the fact that, as it has been put, the legal sands have been shifting or the goal posts have been moving, both metaphors have been used. However, whichever metaphor is referred to is a reference to the interaction of the *Damache* case and *J.C. (1).* At the first trial, the Judge Hunt trial, *Damache* style arguments were advanced by the defence, but did not succeed. Thus, the prosecution was able to adduce evidence arising out of s. 29 Offences Against the State Act searches. The Court of Criminal Appeal quashed the conviction, essentially on Damache grounds and at the Judge Nolan trial, the prosecution was not able to rely on s. 29 material. It is accepted that they would not have been in a position to introduce the material in the Judge Ring trial. However, both respondents to the application apprehend that if there is a re-trial that the prosecution will seek to invoke the Supreme Court decision in J.C. in order to have the material admitted.

12. Counsel for CC makes a further point. At the trial before Judge Nolan the prosecution in order to link CC to a particular phone, the so called yellow phone called his partner as a prosecution witness. When called her evidence was favourable to CC in that she says that on the relevant evening she was in the company of her partner driving to St. John of Gods in Stillorgan where she was to start work the following morning. She was in the process of familiarising herself with the route to be taken. If in a future trial the prosecution are able to put the contents of garda interviews that were conducted with CC before the jury the prosecution will be able to discard Mr. C.'s partner as a witness and so would be able to gain a tactical advantage.

13. The court is of the view that a fair trial in January 2017 is indeed possible. While the twists and turns arising from the interaction first of the Supreme Court decisions in *Kenny* and *Damache* and then the decisions in *Damache* and *J.C*. are undoubtedly unusual, the fact that what has happened is unusual does not render it unfair. The court believes that a fair trial is possible and that a consideration of all the factors leads very clearly to the view that the interests of justice are served by a re-trial and the court will so order.