AN CHÚIRT UACHTARACH
THE SUPREME COURT

Supreme Court appeal number: S:AP:IE:2022:000121
Court of Appeal record number: 2021/158
Circuit Criminal Court bill number: TYDP0054/2019

[2023] IESC 38

Dunne J
Charleton J
O'Malley J
Woulfe J
Murray J

IN THE MATTER OF THE CRIMINAL PROCEDURE ACT 2010 S. 23

BETWEEN/

THE PEOPLE

(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

APPELLANT/RESPONDENT

– AND –

B.K.

RESPONDENT/APPELLANT

Judgment of Mr. Justice Brian Murray delivered on the 14th of December 2023

1. Charleton J. in his judgment of 13 October 2023 ([2023] IESC 23) (with which all members of the Court agreed) explained why the trial judge erred in concluding that alleged confessions made by the appellant to a clinical psychologist were inadmissible in evidence at her trial on charges of sexual abuse and neglect of her three children, A, B and C. That trial was heard in July 2021, the ruling in question being delivered on 13 July 2021, and the matter thereafter came before the Court of Appeal on foot of an application by the Director of Public Prosecutions (*'the Director'*) pursuant to s. 23 of the Criminal Procedure Act 2010 as amended. That being so, this Court must now decide whether to quash the conviction and direct a re-trial. For the reasons I outline here, I have concluded that the acquittal should be quashed and such a re-trial should be directed, and that the Court of Appeal ([2022] IECA 248) did not err in so concluding.

2. The facts are recited in detail in the judgments of both Charleton J. and of Birmingham P. in the Court of Appeal. For present purposes, the following are relevant:

(i) The appellant is a mother of three sons (A, B and C) each of whom (now aged 28, 26 and 14) is severely mentally and physically disabled by reason of microcephaly. She was fifty years old at the time the Court of Appeal rendered its decision.

(ii) The offences alleged cover a period starting on 1 January 2005 and ending on 25 March 2015. The five counts on the indictment comprised

four counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended, and one count of causing, procuring or allowing a child in her custody to be assaulted, ill-treated, neglected or exposed in a manner likely to cause unnecessary suffering or injury, contrary to s. 246 of the Children Act 2001.

(iii) On 26 March 2015, the appellant was arrested and detained on suspicion of *inter alia* offences of sexual exploitation of a child and the production of child pornography. While in detention she made no admissions, and was released without charge. Upon her arrest, arrangements were made by the Health Service Executive for the care of A, B and C.

(iv) On 29 July 2015 the appellant was advised orally by a member of an Garda Síochána that the Director of Public Prosecutions had directed that the appellant should not be charged with the offences for which she had been arrested.

(v) The statements in question were allegedly made in the course of interviews with a clinical psychologist, those interviews being carried out as part of a risk and safety assessment extending over the course of five sessions in August and September 2015. The risk assessment related to two of the appellant's adult sons and was made in the context of proceedings before the High Court relating to their care and welfare.

(vi) In November 2015, the appellant was rearrested and interviewed regarding the alleged admissions made to the clinical psychologist. Upon receiving the report of the psychologist following these interviews, the Director of Public Prosecutions reconsidered her decision not to prosecute the appellant and directed that she be charged with the five counts to which I have earlier referred. She was so charged on 9 March 2017.

(vii) The appellant's husband and another male have been prosecuted for various serious child abuse and child pornography offences, to which they pleaded guilty and in respect of which they were sentenced to terms of imprisonment. Many of these offences had occurred in the appellant's family home.

(viii) Following the ruling of the trial judge giving rise to this appeal, the prosecution proceeded to adduce such remaining evidence in its case as was not affected by the ruling. At the close of that case the appellant made a submission of no case to answer and, owing to the exclusion of the evidence of admissions, the prosecution did not oppose the application. The trial judge thereupon directed the jury to find the appellant not guilty on each of those five counts.

3. Section 23(1) of the Criminal Procedure Act 2010 enables the Director of Public Prosecutions to, exceptionally, appeal against an acquittal where a person has been tried on indictment. The effect of s. 23(3) is that the grounds on which

such an appeal can be brought under this provision are confined to circumstances in which '*a ruling was made by a court' inter alia 'during the course of a trial'* which '*erroneously excluded compelling evidence'* or where '*a direction was given by a court during the course of a trial … directing the jury in the trial to find the person not guilty'*, that direction being '*wrong in law'* and where the evidence as might be adduced in the proceedings '*was evidence upon which a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned'*. Compelling evidence means evidence that is reliable, of significant probative value and '*is such that when taken together with all the other evidence adduced in the proceedings concerned, a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned'* (s.23(14)).

4. However, the fact that the Court decides that the evidence excluded by the trial judge was compelling (and, in this appeal, it is correctly accepted by the appellant that it was) and that it finds that the trial judge erred in excluding it, do not in and of themselves resolve the issue of whether there should be a re-trial. Section 23(11) empowers this Court to order a re-trial '*if it is satisfied'* that '*it is, in all the circumstances, in the interests of justice to do so'.* In the exercise of that power, the Court is mandated to have regard to four matters identified in s. 23(12). These are as follows:

(a) whether it is likely that any re-trial could be conducted fairly,

(b) the amount of time that has passed since the act or omission that gave rise to the indictment,

(c) the interests of any victim of the offence concerned, and

(d) any other matter which it considers relevant to the appeal.

5. Counsel for the Director, Mr. Delaney SC, while accepting that the period of time which has elapsed since the date of the alleged offences is significant, submitted that this did not mean that a re-trial would be unfair. He stressed that the prosecution did not depend on direct witness testimony, that there was no complainant evidence in the case and that, therefore, the prosecution did not give rise to the possibility of injustice arising from potentially faulty or unreliable recollections by witnesses of the events concerned. The case, he observed, was based mainly upon admissions made by the appellant to the clinical psychologist, those interviews being recorded and the psychologist being available to give evidence in relation to any issue concerning the conduct of the interviews. He noted that the appellant was aware from November 2015 that what she had said in those interviews might have implications for a criminal prosecution. While observing the difficulties in assessing the impact on A, B and C of the alleged offences, and having regard to their significant level of intellectual disability, counsel emphasised that weight must be given to their interests. He emphasised in his submission that what must also be given weight is the public interest in a prosecution on the merits having regard to the gravity of the allegations in issue. There is, he submitted, a strong public interest in

prosecuting any offence involving sexual abuse or neglect in respect of children. This is particularly the case, he argued, having regard to the particularly vulnerable position of the alleged victims in this case and the potential abuse of trust involved.

6. In her clear, focussed, and able submissions, Ms. O'Dwyer BL for the appellant urged that attention be paid to three particular aspects of the facts. The first was the passage of time. The offences are alleged to have occurred over a period that extended from 2005 and ended in 2015. Given that lapse of time, she said, they should not now be re-tried. Second, she underlined that the appellant had spent eight years in the court process between trials and appeals and this was, as she described it, in itself a significant period of time. She noted that further time is likely to pass before a re-trial can take place, and attached particular importance to the fact that the appellant had been previously advised that there would be no prosecution. Third, she referred to the mental stress caused to the appellant by the fact of the trial, and her relationship with her children. She has had no access, she said, to her younger child since March 2017, and is unlikely to be granted access into the future. She is permitted thirty minutes supervised access to each of her children every three weeks. In itself, she said, this was a very significant penalty for such offences she may have committed. In addition, she also noted the difficulty in this case of assessing where the interests of the victims lie and what the impact upon them of there being no re-trial would be. The victims, she said, are simply unaware of what is going on.

7. As I explained in the course of my judgment in *The Director of Public Prosecutions v. DK and MK* [2021] IECA 32 at para. 58 ('*DK'*) it is clear that a re-trial does not automatically follow from a determination under s. 23 that a directed verdict or ruling resulting in an acquittal is wrong. It is also trite that the application of these considerations will vary from case to case and that the determination of the Court under s. 23(11) will be dependent on the particular circumstances. Nonetheless, the following can be said of the provision having regard, in particular, to the decisions of this Court in *The People (DPP) v. JC* [2015] IESC 50, [2017] 3 IR 417, *The People (DPP) v. A. McD.* [2016] IESC 71, [2016] 3 IR 123 and *The People (DPP) v. TN* [2020] IESC 53 ('*JC'*, '*A. McD.'* and '*TN'* respectively).

8. First, it has been said that it is not correct in the context of s. 23(10) to speak of an '*onus of proof'* (Clarke J. (as he then was) in *JC* at para. 4.2 and para. 131 of the reported judgment). However, and at the same time, nor is the section '*neutral'*, neither favouring on a presumptive basis a re-trial or an affirmation of the acquittal. Clarke J. in the course of his judgment in *JC* put it as follows (at para. 4.4 and para. 133 of the reported judgment):

> '*Given that this court is required to be satisfied as to where the interests of justice lie in order to direct a retrial, I do not think it can be said that the section is entirely neutral. Rather it seems to me that … the absence of adequate materials to enable the court to form an overall judgment on important aspects of the question could only lead to an affirmation of the acquittal.'*

9. MacMenamin J. may have viewed the matter slightly differently. He said (at para. 20, and para. 169 of the reported judgment):

> '*The Director of Public Prosecution brings this appeal. The onus therefore lies on the Director to satisfy the Court in relation to the matters to be satisfied under the section in order for the appeal to be quashed and a retrial ordered. The onus is on the Director, therefore, positively to satisfy the Court that "in all the circumstances" it is in the interests of justice to quash the acquittal'*.

10. Insofar as there are differences between these perspectives, they are largely terminological. While there is no presumption either way, and therefore no *'default position'*, it is the Director who seeks the quashing of the conviction and the re-trial, and it is a matter for her to persuade the Court that this is the order that should be made. That is not to say that there an '*onus'* on her to adduce evidence of any particular kind in order to discharge that burden, but it *is* to say that if any particular ground, which is said to support the exercise of the Court's power to direct a re-trial, requires evidence, it is a matter for the Director to adduce it and proper for the Court to have regard to the absence of such evidence where the Director has not done so.

11. Second, this follows from an important feature of the legislative context. Prior to 2010, the only appeal generally available to the prosecution following a trial on indictment was the '*without prejudice'* appeal enabled by s. 34 of the

Criminal Procedure Act 1967. The 2010 Act posits an exception to the long established principle of double jeopardy, itself having a constitutional aspect: '*[t]he 2010 Act provides for a limited number of circumstances in which a statutory exception is made to the general and longstanding principle against re-trials after, or appeals against, acquittals'* (*TN* at para. 6). It is thus that double jeopardy as '*a fundamental principle … remains a factor in interpreting s. 23 of the 2010 Act'* (per Denham CJ in *JC* at para. 20, and para. 19 of the reported judgment). So, it is to be expected that the Courts will, in giving effect to legislation which carves an exception to that principle, require the Director to affirmatively establish to its satisfaction that it is '*in all the circumstances'* in the '*interests of justice'* to direct a re-trial, and in particular that some or all of the specific factors identified in ss. (12)(a)-(c) and/or other relevant circumstances are consistent with its being in the interests of justice to so direct. The backdrop of double jeopardy and the rationale for that principle is relevant to the exercise of the Court's jurisdiction, as indeed the decision in *JC* itself shows as such (and see also in that regard *DK* in which the Court of Appeal declined to order a re-trial under the section because *inter alia* to do so would have exposed the accused to a *second* re-trial).

12. Third, while the 2010 Act aims to facilitate the public interest in allowing re-trials in certain exceptional circumstances, it is clear that s. 23 should not be considered as a routine vehicle by which the Director, whenever she is dissatisfied with a ruling, can seek the opinion of the Court of Appeal or this Court. Instead, the provision should only be invoked where the prosecutor has considered the alternative routes available and is satisfied from a consideration

of all of the circumstances that it is appropriate to proceed in this way as a recourse to the provision being so appropriate only where it is '*objectively demanded'* (per McKechnie J. in *A. McD* at para. 112 and para. 114 of the reported judgment). There are a range of different factors that may thus properly animate the decision to bring such an appeal in the first place, but the mere fact that there has been an error made by the trial judge in the course of a criminal trial is not, in and of itself, one of them. It may be that the prosecution wishes to obtain clarification of a point of law of general importance, and thus either enable the type of re-orientation of the law that occurred in *JC*, or the correction of a widespread and systemically important misconception of the scope or proper operation of an important rule of law. It may also serve the purpose in a particular case of allowing a particular injustice to individual victims to be reversed or a wrongful impairment of the interest of the public in the due and proper prosecution of very serious criminal wrongdoing to be corrected, even though the error may be very much case specific. It may be important to the decision whether to order a re-trial in an individual case to relate the facts to these various considerations. The relevance of this aspect of the inquiry was stressed by O'Donnell J. (as he then was) in the course of his judgment in *TN* as follows (at para. 10):

> '*In some cases, of which J.C. was an example, the ruling challenged may be of very considerable systemic significance, but the particular trial and ruling which is the vehicle for the appeal may, itself, be quite routine. In such circumstances, it may be considered that justice is served by the correction of the error and that it would be unfair to single*

out the particular acquittal for re-trial. In other circumstances, however, the point alleged to be erroneous may be clear-cut or of extremely limited application, but the case may involve a very serious offence where it is clearly in the public interest that it should proceed to determination. In such a case, an order for a re-trial may be appropriate.'

13. Fourth, the provisions of s. 23(12)(a)-(c) identify the factors that, as a matter of common-sense, are likely in most cases to define the balance between the public interest in the prosecution in all cases of alleged criminal wrongdoing, and the legitimate interests of an accused, not only in the fairness of the procedures attending any re-trial, but also (*via* the reference to the passage of time since the matters alleged to constitute the offence) in the finality of the verdict in the first proceeding, while s. 23(12)(d) allows features particular to the case at hand to be factored into that calculation.

14. Fifth, and finally, while the factors iterated in s. 23(12) will likely operate one way or another on the decision in (and will therefore be relevant to) all cases, in many appeals one of those factors will clearly predominate over the others. So, in *JC* what was central was that, if the respondent were to be re-tried, he would face a trial subject to new legal principles relating to the exclusion of evidence in search warrant cases which had not been framed when he faced his first trial. In this way, factors of double jeopardy, legal certainty, retroactivity and the consideration that the respondent would, if re-tried, be subject to a jeopardy to which other like positioned persons had not been exposed, were thus centrally

important. In *TN* (a '*borderline case*' (para. 17)) it was the fact that the application related to a prosecution for events occurring between 2003 and 2008, resulting in an acquittal in 2015 that particularly influenced the Court, while in *DK*, the fact that the circumstances that resulted in the error (as it was found to be) of the trial judge arose from the refusal of the alleged victim to give evidence in accordance with a statement he had made to the Gardaí was, while not dispositive, viewed by the Court as '*critical'*. Where this is the case, it may in at least some cases be useful to view the exercise as one involving the placing of that dominant factor (in whichever direction it points) against the others to see if they support or negate the outcome demanded by the former alone.

15. Here, I do not think that there can be any doubt but that for the purposes of this aspect of the appeal, the predominant feature of this case is the nature and gravity of the offences alleged. The interests of victims of such offences, and the public interest in the due prosecution of those alleged to have committed them are self-evident, not least of all when the offences are alleged to have occurred in the context of family relationships and involve particularly vulnerable persons. It is unnecessary to recite here either the details of the allegations against the appellant, or the particulars of the admissions she is alleged to have made. Suffice to say that they are most serious. To that extent, the case comes close to the scenario suggested in the passage from *TN* to which I have earlier referred: while this Court granted leave to appeal the decision of the Court of Appeal in this case having regard to the importance of the question of admissibility of statements of the kind in issue, this appeal involves

allegations of grave offences in circumstances in which there is a pressing public interest in the trial proceeding.

16. There may well be cases in which, even when confronted with alleged offences of this nature and gravity, the Court will nonetheless conclude that it is not in the interests of justice to order a re-trial. This is likely to be particularly the case where the accused can point to a defined prejudice in connection with their defence of the proceedings in the event that there is such a re-trial. Noting that such prejudice would not have to meet the level required to ground an order of prohibition, there are simply no such circumstances here. The alleged victims will not be giving evidence, and the evidence relied upon by the prosecution stands in the form of video recording and transcripts of the alleged confessions. The clinical psychologist is, as I have noted, in a position to give evidence and to be cross-examined.

17. Absent such prejudice, there is no basis in the circumstances identified on behalf of the appellant that displace the interests of both the alleged victims and the public interest in the charges against the appellant being duly tried. Certainly, the time that has passed since the appellant's arrest is not insubstantial, and the period over which the offences are alleged to have occurred is both extensive and carries back to a period similar to that in play in *TN*. The nature of the offences alleged, however, take this case out of the '*borderline'* situation that presented itself in *TN*. It is in no sense to diminish the stress that will undoubtedly be occasioned to the appellant if the Court does quash the acquittal to observe that this is an inevitable feature of any re-trial, on any offence, and

thus that in this case, that in and of itself it cannot justify displacing other factors that militate in favour of a re-trial. The fact that the appellant was told at the end of July 2015 that she would not be prosecuted is not of significance where this could not, necessarily, amount to an assurance that in the event of a change in circumstances the Director would be precluded from proceeding as she did and where the appellant was aware from November of that year that there was (at least) the prospect of criminal charges consequent upon what is said to have been disclosed in the course of the interviews of August and September of that year.

18. In those circumstances, and again reiterating the exceptional nature of the jurisdiction arising under s. 23 of the 2010 Act, the Court should make the orders sought.