

SUPREME COURT

Respondent's Notice 31/17



Supreme Court record number	S:AP:IE2016:000096 31
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[Title and record number as per the High Court proceedings]

The People at the suit of the Director of Public Prosecutions	V	Eamon Murphy
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Date of filing	
Name of respondent	The Director of Public Prosecutions
Respondent's solicitors	The Chief Prosecution Solicitor
Name of appellant	Eamon Murphy
Appellant's solicitors	ME Hanahoe Solicitors Sunlight Chambers 21 Parliament Street Dublin 2

1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name	The Director of Public Prosecutions
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The respondent was served with the application for leave to appeal and notice of appeal on date
10.03.2017

The respondent intends :	
<input type="checkbox"/>	to oppose the application for an extension of time to apply for leave to appeal
<input type="checkbox"/>	not to oppose the application for an extension of time to apply for leave to appeal
<input checked="" type="checkbox"/>	to oppose the application for leave to appeal
<input type="checkbox"/>	not to oppose the application for leave to appeal
<input checked="" type="checkbox"/>	to ask the Supreme Court to dismiss the appeal
<input type="checkbox"/>	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court
<input type="checkbox"/>	Other (please specify)

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise

complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal: ☐

Respondent's Representation

Solicitor			
Name of firm	Office of the Director of Public Prosecutions		
Email	ccmailbox@courts.ie		
Address	90 North King Street Smithfield Dublin 7	Telephone no.	01 8588500
		Document Exchange no.	DX 38
Postcode	Dublin 7	Ref.	2012/6756/SUP01
How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Exchange	<input type="checkbox"/>	
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	Dominic McGinn SC		
Email	dominic.mcgin@lawlibrary.ie		
Address	Law Library Four Courts Dublin 7	Telephone no.	0872251157
		Document Exchange no.	813021
Postcode			

Counsel			
Name	Desmond Dockery BL		
Email	dpdockery@lawlibrary.ie		
Address	Law Library Distillery Building 145-151 Church Street Dublin 7	Telephone no.	0872311938
		Document Exchange no.	816010
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address
Telephone no.
e-mail address

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

2. Respondent's reasons for opposing extension of time

Not applicable

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

The applicant's summary of the Court of Appeal's decision is not in dispute.

4. Respondent's reasons for opposing leave to appeal

If leave to appeal is being contested, set out concisely here the respondent's reasons why:

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)-

- * the decision in respect of which leave to appeal is sought does not involve a matter of general public importance
- * it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court

The forensic sample was taken from the Applicant in compliance with the Criminal Justice (Forensic Evidence) Act, 1990 and was, therefore, taken lawfully, following his arrest for questioning on 22nd November, 2011 in connection with his suspected involvement in an aggravated burglary and unlawful taking of a motor vehicle. The sample was analysed whilst in the lawful custody of Forensic Science Ireland (then, the Forensic Science Laboratory). There was no infringement of constitutional rights to bodily integrity or privacy arising from the manner in which the sample was obtained, analysed or preserved.

Subsequent failure to destroy the sample and record by 21st November 2012 (one year after it was obtained), notwithstanding failure to charge the Applicant with involvement in said offences or, alternatively, to procure an extension of time from the District Court within which to retain the sample, was an infringement of his statutory rights under the 1990 Act only, such that the learned Circuit Court Judge had a discretion to admit DNA evidence gleaned from the sample which matched DNA which had been extracted from a sample of

blood recovered from the crime scene.

Accordingly, the Court of Appeal's decision to uphold the learned Circuit Court Judge's ruling and to dismiss the appeal involved the application of well settled legal principles to the facts of the case.

In these circumstances the, Court of Appeal did not find it necessary to apply legal principles identified by the Supreme Court in *DPP v J.C (2015) IESC 31*.

There are no grounds for asserting, therefore, that the appeal involves a matter of general public importance or that the interests of justice require that there be a further appeal to the Supreme Court.

5. Respondent's reasons for opposing appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

1. The forensic sample at issue (a buccal sample) was taken from the Applicant on 22nd November, 2011 in compliance with the provisions of s.2 of the Criminal Justice (Forensic Evidence) Act, 1990 as amended by s.14 of the Criminal Justice Act, 2006. Accordingly, the sample was taken in accordance with law. This was never in dispute and in those circumstances, the Applicant's constitutional right to bodily integrity was not offended.
2. The sample was analysed whilst in the lawful custody of the entity then known as the Forensic Science Laboratory. DNA which was extracted from the sample matched DNA which was gleaned from a sample of blood which was recovered from the scene of the aggravated burglary. This was the evidence which was relied upon by the prosecution to secure the Applicant's conviction for aggravated burglary of an occupied dwelling house at Ballymahon, Co. Longford in the early hours of 3rd July, 2011.
3. However, the Applicant was not charged with involvement in the offences under investigation until 8th January, 2013, more than one year after the forensic sample was taken from him on 22nd November, 2011. Nor was application made to the District Court to extend time within which to retain the sample. Accordingly, there was an infringement of the Applicant's entitlement under the 1990 Act to have the sample and its record destroyed no later than one year after it had been taken in circumstances where he had not been charged by that time, namely, 21st November, 2012.
4. This failure to ensure destruction of the sample constituted a breach of the Applicant's legal rights. The retention of the sample beyond the period permitted by statute did not further infringe the Applicant's constitutional right to privacy. The information in question was no longer private. The Applicant's DNA profile had been garnered in accordance with law. The Applicant no longer had an interest in keeping the information private because it was no longer private. The DNA profile had already been lawfully obtained. Subsequently, the sample was unlawfully retained, but for the specific and limited purpose of being used as evidence in a criminal trial. Moreover, it was unlawfully retained for a limited period only. The Respondent relies upon the reasoning of the Court of Appeal to the following effect:

“Had the sample been taken at a time when it was intended, having taken the sample, to use it in a manner which was not provided for by law, the taking of the sample may well have amounted to a breach of the Appellant’s constitutional rights. However, the sample was taken at a time when it was perfectly lawful to take it and when there was no breach of constitutional rights in its taking involved. The fact that sometime later, the destruction of the sample was not effected as provided for by legislation does not retrospectively create a breach of the Appellant’s constitutional rights”.

5. Additionally, there was no further testing of the sample after the date by when it ought to have been destroyed. Therefore, concerns raised by the European Court of Human Rights [ECHR] in the case of **S & Marper v UK** never arose. **Marper** was concerned with the potential for infringement of the right to privacy which might arise where a sample of bodily tissue could be further analysed at a future time using technology yet unknown with a view to glean unique and private information relating, for example, to congenital disease.

6. Following **Kennedy v Ireland [1987] IR 587**, in which Hamilton P observed that the constitutional right to privacy was not an unqualified one, a constitutional right to privacy was invoked without success in several subsequent cases: see *Kane v Governor Mountjoy Prison* [1988] IR 757, *Devoy v Dublin Corporation* [High Court, Carroll J, 18/10/1995], *Trent v An Garda Sochana* [High Court, O’Donovan J, 18/01/1999], *Haughey v Moriarty* [1999] 3 IR 1, *Re Ansbacher (Caymen) Ltd* [2002] 2 ILRM 491 and *Herry v Associated Newspapers (Ireland) Ltd* [2009] 1 IR 316.

7. More recently, in **DPP v Michael Harty, [Court of Appeal, 10th May, 2016, Birmingham, Sheehan & Edwards JJ]**, the appellant’s claim to a constitutional right to privacy over a toxicology report which disclosed his blood alcohol levels at the time of his admission to hospital following a road traffic collision was defeated by the overriding public interest on foot of which An Garda Siochana were under obligation to investigate and gather evidence in connection with suspected dangerous driving causing death. The Court of Appeal held that, to the extent that the Gardai’s action of commissioning the toxicology report may have interfered with the Appellant’s privacy, it was a proportionate interference having regard to the greater public interest in the investigation and detection of crime. See also the decision of the High Court in **M.M v Commissioner of An Garda Siochana [2016] IEHC 254**.

8. The Respondent also cites the observation by the authors McMahon & Binchy at paragraph 37.100 of **Law of Torts (Third edition)** that;

“ongoing uncertainty as to the source, extent and character of a generic right to privacy manifest in the Irish case law may, in part, be also explained by a subconscious recognition by the judiciary in the few cases that have come before it that the concept is so fact specific that generalisations are both difficult and dangerous”.

9. The Court of Appeal considered the case of **DPP v J.C [2015] IESC 31** and held as follows:

“If it was indeed the position, which this court is satisfied does not arise in this case, that the taking of the sample in circumstances where there existed no provision for its destruction after a certain time period amounted to a breach of the Appellant’s constitutional rights, it was not taken in deliberate and conscious violation of constitutional rights such as would warrant its exclusion as

evidence”.

10. As for the absence of a system, at the material time, for routine destruction of records/data within the Forensic Science Laboratory, the Court of Appeal was wholly correct to characterise Dr Doak’s evidence at trial as evidence of a technical difficulty in giving effect to the stated policy of the legislature rather than as a calculated or cynical effort to undermine or ignore that policy.

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

Dominic McGinn SC
Desmond Dockery BL

6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

None

Are you asking the Supreme Court to:

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

☐

Yes

☒

No

If Yes, please give details below:

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?

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Yes

☒

No

If Yes, please give reasons below:

Signed: HELEN KEN
(Solicitor for) the respondent

Please submit your completed form to:

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

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.