



**THE SUPREME COURT  
DETERMINATION**

**IN THE MATTER OF SECTION 23 OF THE CRIMINAL PROCEDURE ACT 2010  
THE PEOPLE AT THE SUIT OF THE  
DIRECTOR OF PUBLIC PROSECUTIONS**

**-v-**

**A.B.**

**APPLICANT**

**Neutral Citation:** [2021] IESCDET 31

**Supreme Court record no:** S:AP:IE:2020:000119

**Court of Appeal record no:** A:AP:IE:2018:000318

**Circuit Criminal Court Bill No:** LH47/14

**Date of Determination:** Monday, 15<sup>th</sup> March 2021

**Composition of Court:** Clarke C.J., O'Malley J., Baker J.

**Status:** Approved

**APPLICATION FOR LEAVE TO APPEAL TO WHICH ARTICLE 34.5.3° OF THE  
CONSTITUTION APPLIES**

**RESULT:** The Court does not grant leave to the applicant to appeal to this Court from the Court of Appeal

**REASONS GIVEN:**

**ORDER SOUGHT TO BE APPEALED**

<b>COURT:</b> COURT OF APPEAL
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<b>DATE OF JUDGMENT OR RULING:</b> 28 <sup>th</sup> January, 2020
<b>DATE OF ORDER:</b> 10 <sup>th</sup> March, 2020
<b>DATE OF PERFECTION OF ORDER:</b> 20 <sup>th</sup> October, 2020
THE APPLICATION FOR LEAVE TO APPEAL WAS MADE ON 3 <sup>rd</sup> November, 2020 AND WAS IN TIME.

### **General Considerations**

- 1.** The jurisdiction of the Supreme Court to hear appeals is set out in the Constitution. As is clear from the terms of Article 34.5.3<sup>o</sup> thereof and the many determinations made by this Court since the enactment of the Thirty-third Amendment, it is necessary, in order for this Court to grant leave to appeal from a decision of the Court of Appeal, that it be established by the applicant that the decision sought to be appealed involves a matter of general public importance, or that it is otherwise necessary in the interests of justice that there be an appeal to this Court.
- 2.** The general principles applied by this court in determining whether to grant or refuse leave to appeal, having regard to the criteria incorporated into the Constitution as a result of the Thirty-third Amendment, have now been considered in a large number of determinations and are fully addressed in both a determination issued by a panel consisting of all of the members of this court in *B.S. v. Director of Public Prosecutions* [2017] IESCDT 134, (Unreported, Supreme Court, 6 December 2017) and in a unanimous judgment of a full court delivered by O'Donnell J. in *Quinn Insurance Ltd. v. PricewaterhouseCoopers* [2017] IESC 73, [2017] 3 I.R. 812. Accordingly, it is unnecessary to revisit the new constitutional architecture for the purpose of this determination.
- 3.** It should be noted that any ruling in a determination is a decision particular to that application and is final and conclusive only as far as the parties are concerned. The issue calling for the Court's consideration is whether the facts and legal issues meet the constitutional criteria as above identified. It will not, save in the rarest of circumstances, be appropriate to rely on a refusal of leave as having a precedential value relative to the substantive issues, if and when such issues should further arise in a different case. Where leave is granted on any issue, that matter will be disposed of in due course in the substantive decision of the Court.
- 4.** Furthermore, the application for leave filed and the respondent's notice are published along with this determination (subject only to any redaction required by law), and it is therefore unnecessary to set out the position of the parties in any detail.

## **Background**

- 5.** The applicant seeks leave to appeal against the order of the Court of Appeal quashing his acquittal on a number of charges in the Circuit Court and ordering his retrial on those charges.
- 6.** The applicant was charged with 18 offences under the provisions of the Waste Management Act 1996. At his trial he challenged successfully the validity of a search warrant relied upon by the authorised officer of the relevant local authority for the purpose of entry onto land used (although not, it appears, owned) by the applicant and the gathering of evidence relating to various materials allegedly found thereon.
- 7.** It is clear that the trial judge considered the identification of the lands in the warrant to have been insufficient. In ruling on the issue, she stated "So, I agree that that the deficiency is fatal and the warrant is inadmissible". In response to a reference by counsel for the prosecution to the decision of this Court in *The People (Director of Public Prosecutions) v J.C.* [2017] 1 IR 417, ("J.C.") she indicated that she was aware of it but did not consider that it had any application.
- 8.** Although the trial appears to have proceeded to some extent after the ruling, the trial judge directed the jury to acquit the applicant on all charges on the close of the prosecution case.
- 9.** The respondent then lodged a "with prejudice" appeal pursuant to s.23 of the Criminal Procedure Act 2010, on the ground that the trial judge had made a ruling that erroneously excluded compelling evidence.

## **The Court of Appeal**

- 10.** The applicant does not appear to have seriously disputed the proposition that the evidence obtained as a result of the search was "compelling" within the meaning of s.23 of the Act of 2010. The debate seems to have focussed, rather, on whether the trial judge had actually decided to exclude that evidence. The applicant argued that the prosecution could have applied to have it admitted notwithstanding the ruling.
- 11.** The Court was satisfied that the prosecution submissions in the course of the *voir dire* had addressed the issue of the discretion to admit evidence in the event that it was found to have been unlawfully obtained, and that the trial judge had ruled that the warrant was invalid and the evidence obtained on foot thereof was inadmissible. The Court went on to hold that the trial judge had erred in finding the warrant to be invalid.

**12.** Further submissions were then heard as to what order should follow. In deciding to quash the acquittals and remit the matter for retrial, the Court noted that the prosecution did not have an automatic right to such an order. It took into consideration the fact that while there was no identifiable individual victim of the offences, there was a public interest in ensuring that prosecutions for alleged transgressions of laws protecting the environment were pursued. Four specific points were made on behalf of the applicant, of which three related to factual and procedural matters pertaining to the trial that were not accepted by the Court of Appeal as raising fair trial arguments. The fourth point was to the effect that the lapse of time since the offences were allegedly committed meant that it would not be in the interests of justice to order a retrial. The Court of Appeal took into account the nature of the offences, the lengthy investigation required, and the delays in getting matters on for trial on the relevant Circuit and the likelihood of further delay in getting it heard again. However, it considered that a retrial was entitled to considerable priority. Given the seriousness of offences related to the environment, it was in the interests of justice to order a retrial.

#### **The application for leave to appeal**

**13.** The notices filed by the parties are available on this website subject to any necessary redaction. Accordingly, they will not be summarised here at any length.

**14.** The applicant maintains his position that the warrant was invalid but does not advance any argument that this issue could amount to either a point of law of general public importance or a matter that should be dealt with by this Court in the interests of justice. In so far as a point of law has been formulated, it appears to be that the prosecution misinterpreted the ruling of the trial judge, and that it would have been open to the prosecution to seek to have the evidence admitted after the ruling. It is suggested that in those circumstances, by failing to pursue options that were reasonably available, the prosecution has failed to meet the standard applicable to s.23 of the Criminal Procedure Act 2010. This provision should be seen as one that must be used sparingly and as a matter of last resort, and the manner in which it was applied in this case should be reviewed by this Court.

#### **Decision**

**15.** The applicant has asserted that the prosecution, and subsequently the Court of Appeal, misinterpreted the ruling of the trial judge. Since this Court's jurisdiction is no longer one for the correction of error, this issue could not give rise to a point of law of general public importance. Further, since the applicant has not explained what interpretation should have been put upon the ruling, and since this Court is in no

better a position to interpret it than the Court of Appeal, the interests of justice do not require that the matter be considered at another level of appeal.

**16.**The applicant also asserts that the prosecution could and should have sought to have the evidence admitted notwithstanding the ruling. Again, he has not put forward a view as to the effect of the ruling and has not explained what steps he believes the prosecution could or should have taken. The Court of Appeal has explained in concrete terms in its judgment in this case how a trial judge should carry out the process required under the principles set out in *J.C.* If this is what the applicant has in mind (which invites a degree of speculation on the part of this Court), no argument has been put forward on which to base a finding that the Court of Appeal erred in holding that the trial judge in her ruling had rejected the prosecution submission that she should exercise her discretion in the manner considered in *J.C.*

**17.**No other argument has been made to the effect that the Court of Appeal erred in ordering a retrial.

**18.**In the circumstances, the Court does not consider that the constitutional criteria have been met. Leave to appeal will accordingly be refused.

**And it is hereby so ordered accordingly.**