THE SUPREME COURT

DETERMINATION

THE PEOPLE AT THE SUIT OF THE

DIRECTOR OF PUBLIC PROSECUTIONS

AND

NIALL BYRNE

APPLICANT

Neutral Citation: [2021] IESCDET 23
Supreme Court Record No.: S:AP:IE:2020:000141
Court of Appeal Record No.: A:AP:IE:2018:000223
High Court Case No.: N/A
Date of Determination: Friday, 19th February 2021
Composition of Court: O'Donnell J., Charleton J., Woulfe 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.

ORDER SOUGHT TO BE APPEALED

REASONS GIVEN:

COURT: COURT OF APPEAL
DATE OF JUDGMENT OR RULING: 20th April 2020
DATE OF ORDER: 26th November 2020
DATE OF PERFECTION OF ORDER: 14th December 2020
THE APPLICATION FOR LEAVE TO APPEAL WAS MADE ON 24th December, 2020 AND WAS IN TIME.

General Considerations

1. 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 *BS v. Director of Public Prosecutions* [2017] IESCDET 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.

2. It should be noted that any ruling in a determination is between the parties. It is final and conclusive as far as the parties are concerned, and is a decision in relation to that application only. The issue determined on the application for leave is whether the facts and legal issues meet the constitutional criteria to enable this Court to hear an appeal. It will not, save in the rarest of circumstances, be appropriate to rely on a refusal of leave as having a precedential value in relation to the substantive issues in the context of a different case. Where leave is granted, any issue canvassed in the application will in due course be disposed of in the substantive decision of the Court.

Background

3. This determination concerns a decision of the Court of Appeal (Birmingham P; McCarthy J. and Kennedy J. concurring) which dismissed an appeal by the applicant. The applicant was convicted on one count relating to a tiger kidnapping-style incident that had occurred on the 13th and 14th March, 2005. The applicant was convicted of robbery of cash in a sum in excess of two million Euro contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. The jury were unable to agree in relation to the remaining counts. The applicant was subsequently sentenced on the 16th July, 2018 to a term of ten years' imprisonment. The circumstances of the offences are set out in full of the judgment of the Court of Appeal.

4. The trial concerned the false imprisonment of four members of the one family, the Richardson family from Raheny, and the subsequent theft of €2.28m in cash from a Securicor van driven by one of the family members, Securicor employee Paul Richardson. On the 13th of March 2005, a number of men forced entry into the Richardson family home. They falsely imprisoned the family with the intention of

forcing Paul Richardson, in the face of threats of harm to his family, to perform certain acts in his capacity as an employee of Securicor in order to facilitate the robbery. Paul Richardson's wife, Marie, and their two teenage sons, Ian and Kevin, were taken from their family home and brought to Cloonwood, County Wicklow, where they were kept overnight, while Paul Richardson was kept at the family home.

5. On the following morning, the 14th of March 2005, Paul Richardson reported for work, and acting under duress and in accordance with instructions, facilitated the dropping off of the €2.28m in cash at the car park of the Anglers Rest Public House in the Strawberry Beds, Dublin. The three other members of the Richardson family were left tied up in Cloonwood, but at one stage managed to release themselves and to obtain assistance.

6. This tiger kidnapping has given rise to lengthy and complex legal proceedings. It may be helpful to outline that history. In Trinity term 2009, the applicant, Mark Farrelly, Jason Kavanagh, Christopher Corcoran and David Byrne stood trial with Judge Hunt, as he then was, presiding. Mr Farrelly, Mr. Kavanagh, and Mr. Corcoran were convicted and the jury disagreed in respect of the applicant and David Byrne. In Michaelmas 2011, the applicant and David Byrne stood trial with Judge Patrick McCartan presiding. In both cases, the jury disagreed. In Trinity 2012, the appeals of Jason Kavanagh, Mark Farrelly and Christopher Corcoran were before the Court of Criminal Appeal. Their appeals were allowed, essentially on *Damache* grounds. In Trinity term 2013, applications made by the applicant and David Byrne to prohibit their further prosecutions came before the High Court (Hogan J). Mr David Byrne was refused an order of prohibition, but such an order was granted to the applicant. Michaelmas 2013 saw the third jury trial, this time with Judge Martin Nolan presiding.

7. Four men stood trial, one of whom, Mr. AC, was acquitted. Mr. Jason Kavanagh was convicted and there were disagreements in the case of Mark Farrelly and Christopher Corcoran. The fourth jury trial took place in Hilary term 2015, with Judge Mary Ellen Ring presiding. Mark Farrelly and Christopher Corcoran were both acquitted by direction of the trial judge. In Michaelmas 2015, the Supreme Court ruled that the applicant and David Byrne could be retried. In June 2016, the Court of Appeal upheld an appeal brought by the DPP against the acquittal by direction of the trial judge of Mark Farrelly and Christopher Corcoran and ordered a retrial. A further jury trial, the fifth, took place in Hilary term 2018, with Judge Melanie Greally presiding. This trial saw the applicant, Mark Farrelly, David Byrne and Christopher Corcoran convicted. It

was the outcome of that trial which gave rise to the Court of Appeal decision now sought to be further appealed to this Court.

Decision

8. The applicant contends that the Court of Appeal decision involves a matter of general public importance, relating to what constitutes "inadvertence" within the meaning of the test laid down in *The People (DPP) v. J.C.* [2017] 1 I.R. 417. The factual context is as follows. In the present case the prosecution relied on mobile phone records obtained by two senior Gardaí in accordance with s.98 (2B) of the Postal and Telecommunications Services Act 1983, as inserted by s. 13(2) of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993. It was submitted by the defence that the Gardaí should have utilised the newer procedure under Part 7 of the Criminal Justice (Terrorist Offences) Act 2005, which provided a new statutory code for the accessing of mobile phone records by the Gardaí, in circumstances where both senior Garda officers stated that they were unaware of the commencement of the 2005 Act provisions a week prior to requesting the information.

9. The trial judge noted that the 1983 Act, as amended, was not expressly repealed by the 2005 Act. She was also not persuaded that the 1983 Act was repealed by implication by the 2005 Act. She concluded, however, that in seeking access to mobile phone data, the two senior Gardaí were obliged to apply the provisions of the 2005 Act, from the date of its commencement. In the circumstances she held that the data was requested without lawful authority and this constituted an infringement of the applicant's constitutional right to privacy. She went on to find, however, that the violation of the applicant's right to privacy was not a conscious or deliberate one, and amounted to inadvertence as contemplated by the *J.C.* test. She went on to exercise her discretion to admit the mobile phone records into evidence.

10. The Court of Appeal held that the trial judge's decision to exercise her discretion in favour of admitting the evidence and not excluding the evidence was one that was clearly open to her, and went further and said that the decision was clearly correct.

11. The applicant contends that a matter of general public importance arises involving the limits and application of the *J.C.* test as to "inadvertence", including the following issues:-

(i) the degree to which members (and particularly senior members) of An Garda Síochána should be aware of prior changes in the law relevant to the performance of their functions;

(ii) the circumstances in which knowledge of prior changes in the law might be imputed to members of An Garda Síochána;

(iii) the extent to which the state of mind of other officers or officials in the prosecuting authorities is relevant to considering whether a breach of rights is inadvertent or deliberate and conscious;

(iv) whether the use by a senior member of An Garda Síochána of the wrong statutory framework for accessing sensitive mobile phone data constituted a reckless or grossly negligent breach of the applicant's rights, or was an unacceptable lack of knowledge on that member's part, such that the evidence of the data should have been excluded.

12. The respondent contends that this issue turns on whether the trial judge was correct in the exercise of her discretion to admit the evidence, using the reasoning given in the *J.C.* judgment. Therefore, this issue is case-specific and there is no matter of general public importance to be decided.

13. The application for leave filed, and the respondent's notice in response thereto, are both 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 further detail. No aspect of this ruling has precedential value as a matter of law.

14. The Court is not satisfied that the present case squarely raises a matter of general public importance. It was not suggested in this case that the 1983 Act, as amended, was expressly repealed and therefore the case turns on a very particular factual situation as regards the asserted illegality, including asserted unconstitutionality, of the evidence obtained. The Court of Appeal judgment noted (at para. 21) that in a situation where the appeal had proceeded on the basis that the trial judge had concluded that an inappropriate procedure had been followed and that constitutional rights were thereby infringed, and that, therefore, the issue on appeal was whether it was open to the judge to nonetheless admit the evidence, they would approach the appeal accordingly. In a situation where the correctness or otherwise of the trial judge's conclusion that the 1983 Act procedure could no longer be invoked had not been the subject of full debate, the Court of Appeal expressed no concluded view on the issue, but contented themselves by observing that they could fully see how other judges came to a different conclusion.

15. In the circumstances, while there may be issues as to the precise parameters of how the test of inadvertence applies which will need to be defined by further case law (as per Clarke J., as he then was, at para. 5.17 of his judgment in *J.C.*), the Court is not satisfied that this case is an appropriate case where such a matter of general public importance properly arises, because of the particular factual context as set out above. While the test for inadvertence may be refined in future case law as contemplated in *J.C.,* it does not follow that every refinement of the law must give rise to a point of law of general importance and require to be determined by this Court. Instead it is to be anticipated that such case by case decisions will be made in the decisions of the Court of Appeal. In this case it is unlikely that any decision would have direct application outside the precise and unusual factual circumstance of this case and have useful application more generally.

16. Further, the Court is not satisfied that it is necessary in the interests of justice that there be an appeal to the Supreme Court.

The Court therefore refuses the application for leave to appeal.

AND IT IS HEREBY SO ORDERED ACCORDINGLY.