AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2018:000134

O'Donnell J.
McKechnie J.
Dunne J.
Charleton J.
O'Malley J.

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

Between/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Prosecutor/Respondent

AND

T.N.

Defendant/Appellant

Judgment of O'Donnell J. delivered on the 31st day of July, 2020.

1. On the 27th of October, 2015, the appellant, T.N., was acquitted by direction of the trial judge on eight counts of breach of the Waste Management Act 1996 ("the 1996 Act") relating to the operation of a landfill site at Kerdiffstown, County Kildare. The essential

basis upon which the direction was granted related to the interpretation of s. 9 of the 1996 Act, and in particular the term "manager". Section 9(1) of the 1996 Act, provides:-

> "Where an offence under this Act has been committed by a body corporate and is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of a person being a director, manager, secretary or other similar officer of the body corporate, or a person who was purporting to act in any such capacity, that person as well as the body corporate shall be guilty of an offence…"

2. The Director of Public Prosecutions ("D.P.P.") appealed that decision to the Court of Appeal pursuant to s. 23(3)(b) of the Criminal Procedure Act 2010 ("the 2010 Act") and the Court of Appeal concluded that the direction was wrong in law. In a further decision of the 20th of June, 2018, the Court of Appeal ordered that the appellant, T.N., be retried on the charges. This court granted leave to appeal, and on the 28th of May, 2020, (McKechnie J.; O'Donnell, Dunne, Charleton, and O'Malley JJ. Concurring ([2020] IESC 26)) upheld the decision of the Court of Appeal that the ruling of the trial judge as to the interpretation of the term "manager" was erroneous. It is now necessary to consider whether the court should also uphold the decision of the Court of Appeal that the appellant should be retried on the offences with which he was charged.

3. It is clear that, in order to succeed in this appeal, the D.P.P., in addition to persuading the court that the direction made by the trial judge was wrong in law pursuant to s. 23(3)(b)(i) of the 2010 Act, must also satisfy the court that the evidence adduced in the proceedings was evidence upon which a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt pursuant to s. 23(3)(b)(ii) of the 2010 Act. In addition, before a court can order a re-trial, it must be satisfied that it is in the interests

of justice to do so having regard to the matters set out at s. 23(12) of the 2010 Act. Section 23(12) provides as follows:-

> "In determining whether to make an order under *subsection (11)(a)* [*that is to quash the acquittal and order a re-trial*], the Supreme 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,
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> (*c*) the interest of any victim of the offence concerned, and
>
> (*d*) any other matter which it considers relevant to the appeal." (*Italics in original.*)

4. It follows from the foregoing that the two issues which must be considered on this application are whether the evidence satisfies the test in 23(3)(b)(ii) and whether it is in the interests of justice, having regard to the matter set out at s. 23(12), that there should be a re-trial.

Is the evidence such that a jury might reasonably be satisfied beyond a reasonable doubt of the guilt of the accused?

5. In this case, the offences alleged relate to the management and conduct of a landfill site between 2003 and 2008. Extensive evidence was given in the trial court, and each side has sought to lay emphasis upon different aspects of the evidence in support of their contentions. The question posed by s. 23(3)(b)(ii) is an unusual one for an appellate court, which did not hear the evidence in question, particularly in circumstances where the outcome of the court's deliberation may well result in a re-trial of the accused on that evidence. It is perhaps useful, therefore, to briefly place this particular limb of the Act in context.

6. The Criminal Procedure Act 2010 introduced into Irish law the concept of what is described as a "with prejudice" prosecution appeal to distinguish it from the "without prejudice" appeal that was, and remains, possible under the provisions of the Criminal Procedure Act 1967. The 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. Under s. 8 of the 2010 Act, an application can be made for a re-trial, notwithstanding an acquittal, where there is "new and compelling evidence against a person…in relation to the relevant offence concerned" and "it is in the public interest to do so". This will often occur where new evidence has emerged as a result of advances in forensic science and, in particular, D.N.A. testing. Section 9 permits a re-trial following an acquittal, in circumstances where there is, again, "compelling evidence" against the person concerned and it is in the public interest to do so and where, subsequently, the person or another person has been convicted of an offence against the administration of justice relating to the proceedings which resulted in the acquittal. These are described as tainted acquittals. Section 23 contemplates the possibility of an appeal against an acquittal where the case has either been terminated by a ruling made by a trial judge (which is the subsection invoked here) and where it is contended that such a ruling is erroneous in law or, under s. 23(3)(a), where a ruling has been made excluding evidence (again described as "compelling") which is alleged to be erroneous and which, nevertheless, has the effect of leading to an acquittal. Compelling evidence for such purposes is defined by s. 23(14) as evidence which:-

> "(*a*) is reliable;
>
> (*b*) is of significant probative value, and

(*c*) 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."

7. As the Act at least implicitly acknowledges, these four instances are exceptions to a long-established principle of the common law that an acquittal, whether by decision of a jury or in direction of a trial judge at a trial, is final and gives rise to the well-known plea in bar of *autrefois acquit*, also known as the rule against double jeopardy. The rationale of the Act appears to be that, in certain limited circumstances, the interests of justice may require that cases which have terminated in acquittal, and even in the acquittal by verdict of a jury – which has always had a particular force and sanctity in the common law – should nevertheless be reopened, either because developments in science have produced evidence of overwhelming force and cogency, or that the acquittal was tainted and cannot be said to have been arrived at after a trial in due course of law. The Act also recognises that the laws of crime and evidence have become increasingly complex and that there may be many rulings of a trial judge, nearly always made under significant pressure of time, which may have the effect of terminating prosecutions before they can be the subject of an adjudication by a jury. Apart from the consequences of the particular trial, such rulings may be based upon, or themselves create, precedents that can have a wide-ranging impact on the enforcement of the law and which, if erroneous, ought to be corrected. The Act therefore seeks, it appears, to balance the public interest in permitting certain re-trials and prosecution appeals with a recognition that such circumstances are an exception to a general and important rule on the finality of acquittals in criminal trials.

8. Section 23(3)(b) requires the court to consider if the evidence adduced before the trial is such that a jury might reasonably be satisfied beyond a reasonable doubt of the guilt

of the accused. This does not, on its face, involve the more complex question of considering whether any such evidence can be said to be compelling which involves an assessment by an appellate court of reliability and significant probative value. In this regard, I do not accept the contention of the appellant that under s. 23(3)(b) the court must consider whether the evidence is compelling: on the contrary, the omission of that term from s. 23(3)(b) is a clear indication that the court should consider the relatively familiar question of whether the evidence adduced 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. Nevertheless, this is a delicate task where a consequence of the decision may be a re-trial on such evidence. In this case, moreover, we have been informed that, if there is a re-trial, T.N. will likely be tried with a co-accused; the latter has been charged and will, it appears, be tried in any event. In those circumstances, I think it is desirable not to consider the evidence in any detail unless that is unavoidable. I will therefore assume, for the purposes of this argument only, that the evidence is capable of satisfying the test under s. 23(3)(b)(ii) and turn to the question of whether it is in the interests of justice that the acquittal should be quashed, and a re-trial of T.N. ordered, having regard to the matters set out in subss. 11 and 12.

Is it in the interests of justice to quash the acquittal and direct a re-trial?

9. Counsel for both the appellant and respondent have referred us to the most recent cases in which the 2010 Act has been invoked, notably: *The People (D.P.P.) v. A. McD.* [2016] IESC 71, [2016] 3 I.R. 123 ("*A. McD.*"); *The People (D.P.P.) v. Dekker* ("*Dekker*") [2015] IESC 107, [2017] 2 I.R. 1; and *D.P.P. v. J.C.* [2015] IESC 50, [2017] 3 I.R. 417 ("*J.C.*"). Counsel have sought to draw comparisons with the facts of those cases, with counsel for the appellant drawing comparisons with *J.C.* where no re-trial was ordered, and counsel for the D.P.P. emphasising points of similarity with *A. Mc.D.*

and *Dekker* where re-trials were ordered. I consider, however, that such factual comparisons are of limited value in this case. For present purposes, I consider that the concluding paragraphs of the judgment of McKechnie J. in *A. McD.* (paras. 112 to 117) provide the most useful guidance.

10. In those paragraphs of the judgment in *A. Mc.D.*, it is emphasised that s. 23 cannot be considered a routine vehicle for the prosecution to appeal a ruling with which it is dissatisfied. It is, I would add, clear, at almost every point at which the Act considers the matter, that it is not seeking to establish a mirror image of an appeal by an accused person from a conviction. McKechnie J. contrasts the provisions of s. 23 with the provisions of s. 34 of the Criminal Procedure Act 1967, which permits a without prejudice appeal, and indicates that the prosecution must consider in each case whether that is not a more appropriate vehicle if it is desired to obtain a definitive decision on law which may be of wider application in other cases. This, I consider, is an important point. There is no necessary correlation between the significance of the ruling, alleged to be in error, and the importance of the particular prosecution. 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. Here, the prosecution contend that both features are present: the ruling on the interpretation of s. 9 of the 1996 Act has wide implications for environmental prosecutions and, indeed,

prosecutions of corporate crime more generally. However, the prosecution also emphasise the seriousness of the offences with which T.N. is charged. There is no doubt that the factual matters alleged are very significant. It was estimated, for example, that, in addition to nuisance and noxious odour, the waste plant was involved in dumping approximately 500,000 tonnes of material on the northwest portion of the site which was not licensed for any such waste disposal. There is, therefore, no doubt that these are serious matters and that there was a strong public interest in seeing charges prosecuted in relation to them.

11. In addition to the observations of McKechnie J. in *A. McD.*, I would add that the structure of the Act appears to make it clear that the question of a re-trial is a separate and distinct issue, and does not follow automatically from a determination that a directed verdict, or a critical ruling resulting in an acquittal, is erroneous (see the observations to similar effect of Denham C.J. and MacMenamin J. in *J.C.* at pp. 427 and 468, respectively). This again emphasises the exceptional nature of the order quashing an acquittal and directing a re-trial, and reinforces the obligation of the court to approach that issue with particular care.

12. It was observed by counsel that subs. 12 provides little guidance as to how a court might resolve a particular case. In particular, it was suggested that subs. 12(a) is little more than a statutory recognition of the general rule. A court would not order a re-trial where that could not be conducted fairly, and any court which was conducting such a re-trial would be obliged to terminate it if it in turn concluded that it could not be conducted in accordance with the fairness which is required under the administration of justice. However, subs. 12(a) is of some significance since it recognises that re-trials pose particular problems. They are very far from laboratory experiments which can be re-run with the exclusion of doubtful variables, and with an assurance that all other aspects

can be reproduced as faithfully as they were in the first experiment. Instead, a trial is an organic process. Most obviously, witnesses may be unavailable, but even if all witnesses are assembled, and the same teams participate, a re-trial is not the same as the first hearing. Witnesses will not be able to ignore the fact that this is a replay of the first trial, and cannot be expected to pretend that they have not given this evidence before, or indeed often been asked the same questions before. Inevitably, the transcript of the first trial provides a record against which the evidence in the second trial is tested. In addition, the tactics of the parties their approach to the case and the versions of the facts which they wish to portray will all have been revealed in the first trial. In a number of ways, therefore, a re-trial raises distinct issues. As in many other aspects of life, it is not possible to step into the same river twice. These features do not render re-trials unfair *per se*, but they are aspects which a court must take into account and which may loom large in some cases.

13. Counsel for T.N. sought to rely on what he described as the absence of any victim, and therefore to contend that the court did not have to have regard to subs. 12(c) and this was a positive point in favour of T.N. I do not think that this argument can, however, be accepted. Counsel for the D.P.P. pointed to the people in the immediate vicinity of the landfill who had given evidence of the considerable nuisance they had experienced. But, in a broader sense, breach of waste management licence is made enforceable by the criminal law precisely because it is not a victimless crime. Damage to the environment is damage to the public interest generally. Subsection 12(c) is, in that sense, a reminder to the court that the focus of the inquiry is not merely on the impact of any re-trial on the accused person.

14. It is, however, undoubtedly significant in this case that the Act directs the court's attention to the amount of time that has passed since the act or omission that gave rise

to the indictment. Counsel referred us to an extract from the 2017 edition of *Archbold: Criminal Pleading, Evidence and Practice* (Sweet & Maxwell), para. 7-112, on the jurisdiction to order a re-trial in the interests of justice. The authors observe that the decision to order a re-trial requires an exercise of judgment involving a consideration of the public interest and the legitimate interest of the defendant. The interest of the public was "generally served by the prosecution of those reasonably suspected on available evidence of serious crime, if such prosecution could be conducted without unfairness to, or oppression of, the defendant". However, the authors continue "[*t*]he legitimate interests of the defendant would call for consideration of the time which had passed since the alleged offence and any penalty already paid". The question of a penalty already paid will rarely arise in the case of the prosecution's appeal against acquittal, although it may arise where there has been a conviction and a subsequent decision in the Court of Appeal quashing the conviction on grounds which it is contended are erroneous. However, subs. 12(b) is a statutory recognition that lapse of time has a particular weight in the consideration of the question of the quashing of an acquittal and the ordering of a re-trial. The subsection is not directed solely (or, perhaps, principally) towards the type of lapse of time or prosecutorial delay which can render a trial unfair, since that is likely to be capable of being captured under subs. (a) and, perhaps, subs. (d). It is clear that the inquiry under this subsection is not the same as that which is carried out by a court considering the question of lapse of time or culpable delay in relation to a pending trial. As Clarke J. (as he then was) observed in *J.C.* (at p. 455):-

> "A lapse of time which would not be sufficient, in all the circumstances of a particular case, to justify either the prohibition of a criminal trial or the withdrawal of a trial from a jury by reason of prejudice established at the trial,

is quite a different thing from lapse of time, falling far short of that, which might nonetheless properly be taken into account as part of an overall assessment of where justice lies in the context of considering whether to direct a retrial."

15. At the risk of restating the obvious, this is because, during the relevant period of time, the accused person has not only undergone a trial, but that trial has resulted in an acquittal, which, as a matter of history, was a complete termination of the criminal process and which remains normally the case in the vast majority of criminal trials. Time is therefore an important and distinct consideration on the question of any retrial under the 2010 Act, and involves a different assessment than that which is made when it is alleged that a fair trial cannot be had because of lapse of time.

16. At a number of points, the 1996 Act emphasises the importance of speed. Thus, s. 23(4) provides that an appeal under this section shall be made on notice to the person who is the subject of the appeal within 28 days, or such longer period not exceeding 56 days as the Supreme Court (and now Court of Appeal) may determine from the date of the acquittal. Under s. 23(13)(b), where there is an order for any re-trial, the re-trial shall take place as soon as practicable, and under s. 24, the outcome of an acquittal after such re-trial is final. All this is logical. An acquittal is a very significant event in a criminal trial. As a matter of history, it was a final determination that barred any further prosecution, and was accepted as the adjudication on the guilt or innocence of the accused. A challenge to that acquittal and a re-trial with a possible conviction creates an element of unavoidable uncertainty. There are competing decisions of the courts: an acquittal; an appeal quashing that acquittal; and the possibility of a conviction following a retrial. There are reasons why it has been considered appropriate to provide for a limited exception to that general principle of finality, but it is clearly important

that the entire process should not be drawn out and that everything occur within a reasonable time period from the original alleged offence.

17. In this case, the events concerned appear to have occurred between 2003 and 2008. Counsel for the D.P.P. sought to emphasise that the evidence was still available and had not degraded due to the passage of time because much of the evidence was documentary. It is true that this case does not depend upon the recollection of witnesses, but it will be necessary for evidence to be given relating to this period, which on any view, is now a long time ago. It appears a decision was taken to bring prosecutions in or around 2007 or 2008, but T.N. was only charged in 2012, and the trial commenced in 2015. Thereafter, further time has elapsed in the prosecution of the appeals. I accept that some lapse of time in this regard is inevitable, and indeed that the primary focus of the Act is on the period between and the acts or omissions giving rise to the indictment and the present day. However, it appears unlikely that any re-trial, even if given particular expedition could be conducted this calendar year. Accordingly, the court must consider whether a re-trial in, perhaps, 2021 of a man acquitted in 2015 in relation to events occurring between 2003 and 2008 is required by the interests of justice. I accept that these are serious matters and there is generally a public interest in the prosecution of environmental crime, that such prosecutions may be difficult, and preparations can take some time, but on any view this is a very considerable laspse of time. This is, perhaps, a borderline case. Having regard, however, to the specific identification of lapse of time as a factor at subs. (12)(b), significant weight must be given to this aspect of the case. Having regard to the structure of the Act, and the exceptional nature of a prosecution appeal against an acquittal, I consider that while it has been important to determine the correct interpretation of the term "manager", which is of general importance in the law, it has

not been demonstrated that it is in the interests of justice to quash the acquittal and direct a re-trial of the particular individual. Accordingly, being, in the language of the Act, not satisfied that it is in the interests of justice to quash the acquittal, I would reverse the decision of the Court of Appeal, affirm the acquittal under s. 23(11)(b), and refuse to order a re-trial.