THE COURT OF APPEAL

Record No: 318/2018

President
McCarthy J.
Donnelly J.

BETWEEN/

THE PEOPLE
(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

APPELLANT

- AND –

A.B.

RESPONDENT

JUDGMENT of the Court delivered on the 28th day of January, 2020 by Ms. Justice Donnelly

1. This is an appeal on a question of law from the acquittal of the respondent by direction of the trial judge sitting in the Circuit Court on all 18 counts for alleged offences under the Waste Management Acts, 1996 to 2011. This appeal is brought by the Director of Public Prosecutions ("the appellant") pursuant to section 23(1) and (3) of the Criminal Procedure Act, 2010 ("the 2010 Act").

2. Section 23 of the 2010 Act permits with prejudice prosecution appeals against acquittals where one (or both) of the following situations apply:

   (a) A ruling was made by a court during the course of a trial […] which erroneously excluded compelling evidence, or

   (b) 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 where –

      (i) the direction was wrong in law, and
      (ii) 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 in respect of the offence concerned.

3. The appellant submits that in ruling inadmissible all evidence obtained, following a search of certain lands carried out in purported reliance upon a search warrant, the trial judge had erroneously excluded compelling evidence. This evidence was in essence the only evidence relating to some counts on the indictment, but it was also central to the decision by the trial judge to give a direction in respect of all counts. This arose in circumstances

where, despite certain other evidence observed in visits to the farm by members of the relevant County Council subsequent to the search carried out on the 31st August, 2011 being presented to the jury, the trial judge ruled that there was insufficient evidence to go to the jury and that it would be unfair to let the jury hear the case, based upon her earlier ruling in respect of the search warrant.

4. Ms. Rebecca Walsh, Assistant Scientist with the relevant County Council and an authorised person within the meaning of the Waste Management Acts, visited the lands which appear by common case to be in the ownership of the respondent. In April 2011, she entered the land in pursuance of her powers as an aforesaid authorised person. She met with the respondent who told her she was a trespasser but took no steps to obstruct or impede her visit.

5. Following ongoing investigations, on the 25th day of August 2011, Ms. Walsh applied for and was granted, a warrant to search certain property by Judge Hamill in the District Court on foot of sworn information. The sworn information referred to information she had received in respect of:

> "Farmland in the townlands of C and K, K, X, County Y. The premises is approximately 144 acres in size and contains sheds and a quarry. I believe that these farmlands, sheds and quarry are in the ownership of AB, K, K, County Y. The premises is within the District Court area of X, District No. Z."

6. The warrant, as issued, permitted entry by various personnel "on the premises comprising of approximately 144 acres of lands and including sheds and a quarry in the townlands of C and K, K, X in the County of Y, in the said Court Area and District aforesaid…"

7. A *voir dire* was held in respect of the validity of the search warrant. The respondent made substantial submissions questioning the status of Ms. Walsh as an authorised person and also made an objection to her alleged lack of candour with the District Court in outlining more fully that the information she was relying upon came in part from a neighbour with a history of disputes with the respondent. The respondent's submission, as to the purported inadequacy of the description of the premises, forms the mainstay of this appeal. At the trial, counsel submitted as follows:

> "Otherwise, insofar as the warrant is concerned, it could be effectively read to include any premises of farmland in those specified townlands, including sheds and a quarry, therefore, the warrant on its face is bad."

8. At the trial, counsel for the prosecution submitted that the warrant contained a thorough description of the lands. Counsel referred to the size of the farm being 144 acres which they said was significant in the area. Much of the rest of counsel's submission was taken up with dealing with the other aspects of the submissions of the respondent. However, counsel did return to the aspect of judicial discretion and submitted there was no prejudice to the accused. Counsel submitted there was no unfairness in the present case. Counsel submitted that this was a big farm and it was located at that address.

9. Counsel for the appellant submitted to the trial judge that to rule the search warrant invalid would be to take the type of very artificial approach that was being taken to search warrants many years ago and was totally against the decision in *The People (DPP) v. J.C.* [2017] 1 I.R. 417. In respect of *JC*, counsel for the appellant submitted at the trial that the warrant did not involve a constitutional right in the sense that *JC* was concerned with, because no dwelling unit was on the land, the warrant only concerned farm lands.

10. In answer to that submission, the trial judge replied "Okay, so *JC* doesn't apply." She then asked whether counsel was saying that the defence's submission was wrong, that it was not a bad warrant. Counsel for the prosecution replied in that he was saying it was not a bad warrant because if the local postman received this information he would know the address. There was no deception or confusion in the way it would have been received. He then returned to the position set out in *JC* where a balancing test was applied and that there was a right of the community to be taken into account. He submitted that it came down to a question of genuine fairness and he submitted that there was no unfairness here because when the search was carried out it all turned out to be correct. He submitted that this was a hazardous dump.

11. Counsel for the respondent submitted in reply that there was no reason why the investigating agencies of the State could not have gotten their "house in order" and "done the job properly". There was ample time available to them and this alleged trespass had been going on for a number of years. He submitted:

> "This is not a *JC* situation where there is a trifling error or something of that nature. This is a huge error on the face of the warrant, such that it cuts to the very core of the powers that are available to the agencies and the task force involved. And, in the circumstances, the Constitution is there not just to protect what might be described as constitutional rights. It's there to ensure that the agencies of the State conduct themselves in accordance with the law and I would submit that they clearly haven't done that and that the court should not give its *imprimatur* by saying that, even though the warrant is defective, even though the powers of entry were defective, there is no prejudice to my client. Otherwise, what's the point in having search warrants? Anybody can just go onto the land and do what they want, whenever they want."

12. The trial judge gave her ruling with respect to this issue as follows:

> "Now, this is a defence application for change (sic) of the evidence of Rebecca Walsh and it has been challenged in relation to two aspects. So in respect of the first submission […]
>
> The second argument raised as to the search warrant, and in respect of that aspect of the warrant there were a number of matters addressed. I agree with counsel that the constitution is there to ensure that the agencies of the state conduct themselves in accordance with law when it comes to entering upon premises. This case opened in the presence of the jury with specific evidence and calls we had with

the director, with respect to maps and aerial photographs and reference to the folios and three particular maps in that regard in order to identify the property concerned. Clearly, the purpose was to ensure that the Court and the jury knows exactly where the locus of the alleged offending was and, bearing that in mind, where there were no specific towns or buildings, save for the water tower identified from the maps, the preciseness of adducing such evidence was in direct contrast to the approach in respect of the warrant and the descriptions therein.

I agree with the point made on behalf of the accused man by Mr Orange that the specifics referenced in the information do not reflect what's contained in the search warrant in terms of the description of the land. I refer back to the aerial photographs which were produced, wherein the property of [AB] was delineated in red and, in that regard, one can see that all the area there are town lands, save for the water tower on one side of the road and some houses on the other, but all of that area contained within that photograph is clearly farmland or some type of agricultural land, and it's not built upon. And, again, I make reference to the folio numbers with the three separate maps within the particular descriptions in relation to the land. And again, those descriptions were not correctly reflected in the warrant and it is not satisfactory.

In relation to the information contained in the warrant, it wasn't even reflected word for word. In relation to the information that reflected in the information grounding the application for a search warrant, that wasn't properly reflected in terms of the property's description belonging to [AB] upon which the parties were seeking to enter and the applicants for the warrant were seeking to enter in terms of the actual warrant that was issued. Am I making myself clear enough?

MR ORANGE: Yes, Judge.

JUDGE: Just to be sure. So, I agree that that deficiency is fatal and the warrant is inadmissible. In terms of the remainder of the arguments submitted on the part of the address, it is clear that the county council were entitled to hear complaints from parties that were made previously and I make no further observations in that context. An observation I can make on that is that the chains of efficiency were clearly not well oiled at that point in time, bearing in mind that interest in the lands of [AB] was ongoing for a period of years, in fact over five years at that point in time.

Both parties have advised me that the decision in JC is not in issue, so I'm dealing with this warrant in relation to the evidence as adduced and submissions alone. The admission is fatal and, as I've indicated already, the independent process for applying for a search warrant still exists and the protections remain in law for a particular reason, and that is that people must act in accordance with law and those protections are there and they are to be upheld.

MR O'KELLY: Judge, I need to take further instructions at this stage. It may take a bit of time.

JUDGE: Will I send the jury home 'til Tuesday?

MR O'KELLY: Yes, Judge, if you'd do that. Thank you. There is just one matter. You said, Judge, that both parties said that JC did not apply --

JUDGE: Is not right here.

MR O'KELLY: That had not in fact been my submission. What I was saying is that JC --

JUDGE: I said "not in issue".

MR O'KELLY: Yes.

JUDGE: So I'm dealing with it on the basis of the evidence and submissions alone. It was Mr Orange - if I want to be correct - had indicated that it was a constitutionality in relation to --

MR O'KELLY: Yes, Judge. What I was actually arguing, I'm saying, yes, of course, this doesn't apply but, nevertheless, what I probably did not make clear enough was I was saying JC represents the present law. I wasn't saying it was --

JUDGE: Well, I know that and that's why I said the independent process for applying for search warrants still exists and, looking in the background at JC being there and the fact that it has changed much of the case law in terms of the jurisprudence that had been in existence in terms of defects on the warrant.

MR O'KELLY: Thank you, Judge."

Compelling Evidence

13. Under section 23 of the 2010 Act, compelling evidence means evidence which is:

    (a) reliable,

    (b) 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.

14. There is no particular dispute about the fact that the evidence obtained as a result of the search was compelling evidence in the sense described in the statute. If permitted, the evidence would have revealed that following a two day search of the lands which included a survey and the taking of soil and water samples, pollutants including diesel hydrocarbon, builder's waste, garden waste, chicken manure and animal carcasses were found. Trial pits were dug. Two excavators were brought onto the site. A buried

intermediate bulk container containing an oily substance was uncovered in a trial pit excavation area. It recorded the maximum recordable reading on the portable site meter used to test for gases and organic compounds. There was evidence of substantial hydrocarbon content. These appear to have been deposited in depressions on the surfaces and filtered through the waste until they reached the rock and clay below, approximately 2 to 2.5 metres below ground level. Hydrocarbon waste had also been buried in the bulk container within the mass of the waste. It appears to have had significant probative value and when taken together with all the other evidence a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offences concerned.

15. The respondent makes the point that there were certain missing witnesses in respect of proof of certain samples and certain issues. This does not appear to affect the overall probative value of the nature of this evidence. This is a question of whether a retrial should be ordered if a decision is made that the trial judge made an error in excluding the compelling evidence.

The Legal Issues

16. During the course of the hearing before this Court, there was much discussion about whether the trial judge had made a determination to exclude the evidence or had simply determined that the "warrant was inadmissible". Counsel for the respondent submitted that the prosecution could have made a request to have the evidence admitted subsequent to her determination but that they did not do so. The appellant submits that the prosecution's request for the trial judge to admit the evidence if she found the warrant was invalid was part and parcel of their submissions in the *voir dire*. Furthermore, when the judge made her decision it was clear and decisive and brooked no further engagement. Moreover, counsel did point out to the trial judge, her error in respect of the position with regard to the decision in *JC* as set out above.

17. Arising from the numerous decisions in this area but in particular following the seminal decision of *JC*, it appears to us that when a warrant is being impugned in a criminal case during the course of a *voir dire*, it is incumbent upon a trial judge to approach the decision by making the following sequential determinations:

    a) Is the warrant valid or invalid? If valid, the evidence is admissible and no further ruling on this issue is required.

    b) If the warrant is invalid, is the court dealing with illegally obtained evidence or unconstitutionally obtained evidence?

    c) If illegally obtained evidence is at issue, is the evidence admissible in accordance with the principles set out in *DPP v. O'Brien* [1965] I.R. 142 and in *JC* in so far as the latter case refers to illegally obtained evidence?

    d) If unconstitutionally obtained evidence is at issue, is the evidence admissible in accordance with the test set out in the judgment of Clarke J at para 5.10 of *JC*?

18. In most cases, the evidence in the *voir dire* will be elicited by the prosecution with a view to satisfying the question of validity of the warrant *as well as* the exercise of discretion should the trial judge rule that the warrant is invalid. Naturally, the subsequent submissions should expressly address those issues required for determination in the sequence as set out in the preceding paragraph. In those cases where it may be more efficient to deal evidentially with each issue stage by stage, this should be indicated clearly by counsel in advance of any evidence being heard. No situation should ever arise where there is any doubt in the mind of the judge, or those representing the prosecution and defence, as to what issue(s) is being addressed in evidence and in submissions.

19. In the present case, we are satisfied that although the trial judge used the phrase, the "warrant was inadmissible", it was clear from the context in which it was said that she was ruling that the warrant was invalid and that the evidence obtained on foot thereof was inadmissible. In our view, the submissions and in particular the prosecution submissions before the trial judge had addressed the issue of the discretion to admit evidence. In the manner in which the trial judge delivered her ruling, it was decisive for the issue of admissibility of the evidence.

Did the Trial Judge Correctly Rule that the Warrant was Invalid?

20. Arising from the above, the first matter for determination by this Court is whether the trial judge was correct in ruling that the warrant was invalid. At the outset, it must be noted that the only issue raised in this case under this heading was whether the lands were inadequately described in the search warrant. This Court is therefore not dealing with a warrant where there was a failure to satisfy a statutory pre-condition to the issuing of the warrant.

21. Moreover, there has been no contest before us that information laid before the District Court for the purposes of seeking the search warrant was inadequate as to description because it referred to the lands as being believed by Ms. Walsh to be in the ownership of the respondent. It was submitted by the respondent that in order for the lands to be accurately described the folio should have been stated on the warrant, or a map should have accompanied the warrant by, for example, being scheduled thereto.

22. The respondent makes a preliminary objection to this Court interfering with the finding of the trial judge that the lands were inadequately described. The respondent accepts that the issue in the present case is one of a mixed matter of law and fact. We are satisfied that the question of whether a particular description of land or a premises is inadequate for the purposes of identification in a warrant is generally a matter of law (see for example the case of *The People (DPP) v. Mallon* [2011] 2 I.R. 544 referred to below). There will be situations where a trial judge has made certain findings based upon the evidence at trial which will be binding on the Court of Appeal. An example may again be found in *The People (DPP) v. Mallon* where the Court of Appeal was bound by the finding of fact that there was no address in Dublin or elsewhere of 4 Marrowbone Close. In the present circumstances, we are not satisfied that the statement by the trial judge that the lands were inadequately described was a finding of fact that is beyond review by this Court. The trial judge's finding was one that amounted to a finding that as a matter of

law the lands were inadequately described for the purposes of the validity of the search warrant.

23. On the substantive issue, the respondent submitted that the failure to identify the premises renders the warrant invalid in law because it was effectively a general warrant that may apply to the entire area of the two townlands. The respondent relies upon the decision of *The People (DPP) v. Mallon* to make this point.

24. The appellant submits that the property is not inadequately described in the search warrant. Although the address given did not contain the owner's name it was the correct address of the property and contained all the elements necessary to identify the premises in the terms that it was described in the Land Registry folio. The farm did not have a dwelling on it and it did not have an address containing a particular name other than the names referred to above.

25. From the evidence at trial, it appears that the lands in question were to be found in a specific folio. Maps were also produced at the trial which helped identify the property. The folio did not reflect the ownership of the appellant as the lands were stated therein to be in the ownership of MM, apparently the mother of the respondent. This folio was not referred to in the information seeking the search warrant and as stated above, Ms. Walsh stated in that information that she believed the lands were in the ownership of the respondent.

26. The decision in *The People (DPP) v. Mallon* is particularly apposite to this case. In that case, a search warrant had been issued for a premises, 4 Marrowbone Close, Dublin 8. The address for the premises actually searched was 4 Marrowbone Lane Close, Dublin 8. Evidence produced by that accused demonstrated that there was no premises with an address of 4 Marrowbone Close, Dublin 8.

27. O'Donnell J. delivering the judgment of the Court of Criminal Appeal, reviewed the existing case law on search warrants. Having referred to the case of *The People (DPP) v. Balfe* [1998] 4 I.R. 50, a case where all the statutory criteria had been met, at least on a *prima facie* basis, and the impugned misdescription was not a breach of any condition or criterion imposed by the legislature and was simply in error, that court had held that there was no basis in law for the proposition that such an error invalidates a document which accords with all specified requirements of the law. O'Donnell J. stated:

> "*This reasoning is useful in attempting to understand the case law in this area. An error in a warrant does not necessarily invalidate; it may be in the words of the judgment 'simply an error' or a 'regrettable misdescription'*."

28. Having reviewed the case law further, O'Donnell J. stated at para. 44:

"It is now clear that a mere error will not invalidate a warrant, especially one which is not calculated to mislead, or perhaps just as importantly, does not mislead. Indeed, the fact that warrants perfectly regular on their face may be invalidated if it can be demonstrated

by evidence that there was no jurisdiction to issue them, demonstrates that error alone is not the critical factor. This latter fact illustrates the important feature that those warrants which have been found invalid are most clearly those where there was no jurisdiction to issue the warrant because a statutory precondition had not been fulfilled."

29. O'Donnell J. went on to say that –

> *"More difficulty arises with those cases which appear to deal only with errors in the body of the warrant. It is now quite clear that although a warrant should be prepared with care, not every error will lead to invalidation of the warrant. In particular, where the substance of the warrant as opposed to the form is not open to objection, invalidity will not necessarily ensue. In such cases, the nature of the error or omission must be scrutinised to see if it is of fundamental nature. Among the factors which may be taken into account are whether the error is a mere misdescription or whether it is likely to mislead."*

In respect of the warrant at issue before the Court, O'Donnell J. stated:

> "*It seems that the more natural way of approaching the warrant is to ask if it adequately describes a premises that does exist – namely the premises searched. What was involved here can be properly described as a mere misdescription. Indeed, it can be only be described as a misdescription in the sense that it is not a complete and full address. It does, in the court's view, describe these premises, although it could do so more completely. But in the words of the decided cases, it was not calculated to mislead, and perhaps just as tellingly, did not mislead. If before the execution of the warrant an issue had arisen as to what premises was described in it, the court does not believe that anyone knowing of the existence of 4 Marrowbone Lane Close, whether postman, taxi driver, a member of an Garda Síochána or occupier, would have had difficulty in pointing out the premises. In that sense it is telling that the interpretation of the warrant advanced by the accused is that it must be read as authorising the search of nowhere – premises that simply do not exist. It seems more natural to understand the warrant as being directed to premises which do exist and to see this as an adequate, if imperfect, description of them. Taking the three words that make up the full address of the premises, there is no doubt that the word omitted 'Lane', is the least important in identifying these premises. 'Marrowbone' identifies the cluster of streets which are in Dublin 8 and 'Close' the particular street. If the choice is therefore to understand the word as referring, albeit imperfectly and incompletely, to the premises searched, or as referring to nowhere, then the conclusion seems obvious and even unavoidable."*

30. The crucial question for this Court is whether the words being used can be understood as referring, albeit imperfectly and incompletely, to the premises searched, or as referring to nowhere? That requires careful scrutiny of the warrant and the evidence.

31. In the present case, unlike in *The People (DPP) v. Mallon*, there was no evidence to show that the description of the land did not match any other land. *In The People (DPP) v. Mallon*, there was no 4 Marrowbone Close anywhere in the country. Counsel for the respondent urged the Court to have regard to the fact that there was no evidence to show that there were no other farms matching this description in the townlands.

32. It appears therefore that unlike *The People (DPP) v. Mallon*, there is no suggestion that the description referred to "nowhere". The description matched the lands actually searched, although the prosecution did not establish in evidence that the description did not match any other lands in that townland.

33. The lands in question were not identified to a perfect standard. That could have been done if the folio reference had been given or if a map of the lands had been incorporated into the search warrant. Even the fact that the lands were believed to have been in the ownership of the respondent would have assisted in the identification. Of course, if this had been done there would have been no *voir dire* or appeal on this issue. It therefore would have saved court time, legal fees and the burden, financial and otherwise, of the attendance of witnesses at trial for longer periods than otherwise would have been necessary. Indeed, the trial judge correctly contrasted the detailed evidence given by way of maps and aerial photographs in the trial with the approach taken to obtaining the warrant. It must be emphasised that regardless of the decision this Court has reached in this case, greater care must be taken by those tasked with drafting applications for search warrants (as well as those issuing them) to identify with precision the land or premises to which the warrant relates.

34. Perfection in the identity of the land/premises is not required for the search warrant to be valid, what is required is an adequate description. In the view of the Court, the lands were adequately described in so far as they identified the size of the land, the fact that there was a quarry and sheds on it and that it was in two named townlands. Indeed, the reference to two townlands is a particular feature of this case which must, by its very nature, narrow down the number of farmlands to which it could possibly refer. The fact of a quarry on the land is also of significance.

35. Another feature of this case is the fact that the authorised officer who had sought the warrant had in fact entered onto the lands in her capacity as an authorised officer about four months earlier. She had met the owner, the present respondent, on the lands. On the day she entered the lands with the search warrant, the respondent was not present. If the owner had been present and had read the search warrant, this Court has no doubt that he, as a reasonable landowner, would have known that the warrant referred to his property given the particular features of the property referred to above and the fact that he already had an interaction with the authorised officer on his lands. He would have had no reasonable basis to reach a conclusion that the warrant did not refer to his lands. There was nothing in the warrant which was likely to mislead him, as a reasonable property owner, into thinking that the warrant did not refer to his lands. He was the person required under penalty to comply with its terms. There was sufficient information

available to assess the validity of the warrant and precisely what it authorised in terms of entry to the lands. The error was in the lack of a complete or perfect description of the lands, but this Court is satisfied that it was an adequate description of the lands and was not likely to mislead.

36. In those circumstances, this Court is satisfied that the trial judge erred in holding that the warrant was invalid.

What Order should Follow the Court's Finding?

37. Under the provisions of s. 23 (11) of the 2010 Act, the Court of Appeal may

(a) quash the acquittal and order the person to be re-tried for the offence concerned if it is satisfied-

i. that the requirements of subsection 3(a)(i) or (b) as the case may be, are met, and

ii. that, having regard to the matters referred to in subsection (12), it is, in all the circumstances, in the interests of justice to do so,

or

(b) if it is not so satisfied, affirm the acquittal.

38. In determining whether to make an order under paragraph (a) above, under s. 23(12) the Court of Appeal, shall have regard to-

(a) whether or not 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 interest of any victim of the offence concerned, and

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

39. Certain submissions were made by the respondent as to why this Court should not order a retrial. The Court is not satisfied that the issue of whether to order a retrial has been sufficiently addressed in any of the submissions to enable the Court to make its decision. The Court invites the parties to make further submissions addressing the matters set out in the legislation and in the decision of the Supreme Court in *JC*. Without restricting any possible relevant submissions, we would invite the parties to address the manner in which the trial proceeded below including the availability of witnesses at that trial and for any proposed trial that may take place and the lapse of time since the acts or omissions giving rise to the indictment.

ADDENDUM

In an *ex tempore* ruling on the 10th March, 2020 the Court determined that the case should remitted to the Circuit Court for re-trial. The text of that ruling is set out hereinafter.

1. Having delivered judgment on the 28th January 2020, this Court sought further submissions as to whether a retrial should be ordered. Written submissions were filed and further oral submissions were made today by both parties.

2. Under the provisions of s. 23 (11) of the 2010 Act, the Court of Appeal may

   (c) quash the acquittal and order the person to be re-tried for the offence concerned if it is satisfied-

      i. that the requirements of subsection 3(a)(i) or (b) as the case may be are met, and
      ii. that, having regard to the matters referred to in subsection (12), it is, in all the circumstances, in the interests of justice to do so, **or**

   (d) If it is not so satisfied, affirm the acquittal. [Emphasis added]

3. In determining whether to make an order under paragraph (a) above, under s. 23(12) the Court of Appeal, shall have regard to-

   (e) Whether or not it is likely that any re-trial could be conducted fairly

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

   (g) the interest of any victim of the offence concerned, and

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

4. As the Supreme Court (Denham C.J.) stated in *People (DPP) v J.C.* [2015] IESC 50, [2017] 3 I.R. 417 at the core of the consideration is "*the interests of justice*" and that the matters set out in s.23(12) are not exhaustive. The fact that the prosecution chose a with prejudice appeal does not give rise to an automatic retrial.

5. In the present case, there is no particular identifiable victim. The victims are the people of Ireland who have a justified interest in ensuring that prosecutions for alleged transgressions of laws protecting the environment are pursued.

6. The respondent submitted four main points:

   a) that crucial witnesses were not available, therefore the retrial would not be a fair trial;

b) that a lay witness who gave evidence was commented upon unfavourably by the trial judge in the course of the rulings in the trial and in any retrial he would have the opportunity to mend his hand;

c) that the prosecution had amended the indictment in light of the judge's ruling and that it would be either impossible or unfair to unpick those amendments; and

d) 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.

7. At the trial, the prosecution had not been in a position to call the investigating guard nor the county engineer. The prosecution submitted that those witnesses are in all likelihood unavailable into the future. The prosecution submitted that the evidence of the witnesses at the retrial will be based upon the observations of two scientists and an engineer who entered on the site for two days following the search pursuant to the warrant at issue in this appeal. An "on the spot" test took place which revealed it is stated a high reading of hydrocarbons. The prosecution do not intend to rely upon any samples that were taken and sent for testing elsewhere.

8. The respondent submitted that the prosecution would face insurmountable problems in the absence of chain of evidence and in reliance upon the oral testimony of these witnesses. We consider that such a contention is not self-evident. The chain of evidence issue appears not to be an issue in light of the prosecution plan. That is a matter for the trial of the action and we are not satisfied that the interests of justice required that no retrial can be ordered.

9. In relation to the lay witness, who clearly is a contentious witness from the defence perspective, we are again not satisfied that any issue about a potential change of evidence requires that no retrial be ordered. In any retrial there is always a possibility of an individual witness changing or more likely tailoring evidence having regard to the manner in which the previous trial was conducted. That is a matter to which all parties will be alive. Indeed, it is part of the reason why a transcript is always made available prior to any retrial. We are satisfied that there are sufficient safeguards to protect against any injustice that might arise from the possibility of any such change in evidence. No fair trial point arises.

10. In relation to the amendment of the indictment, we are satisfied that this is not a matter which would mean a retrial would be unfair. In this case, the erroneous ruling out of compelling evidence by the trial judge lead to a number of counts on the indictment not being able to proceed. These matters could proceed to trial without any further change. In respect of those counts which were amended at the prosecution's request in attempting to deal with the court ruling, we are satisfied that the subsequent decision to direct an acquittal was based upon the earlier erroneous ruling in respect of the compelling evidence. We are satisfied that it is in the interests of justice to direct a retrial on those amended counts on the indictment of which he was acquitted. It would not be

unfair to do so. Any further application to amend those amended counts is a matter for the trial judge.

11. Finally, we have considered the issue of the lapse of time since these offences were allegedly committed. Part of that lapse of time was by virtue of the nature of the offences and the lengthy investigation that was required. More relevantly, it seems that a significant amount of the time was due to delays on the Circuit. These delays are highly regrettable. It seems that a period of about 4 years lapsed before this matter could get on for trial on the Circuit Court. There will undoubtedly be some further delay before the matter could get on for a retrial. The prosecution has told this court that if a retrial was ordered it would be mentioned before the Circuit Court on the 21st April, 2020 with a view to getting a trial date before the end of this year. It appears that another case in which a retrial was ordered and which did not concern any issue of personal violence, has taken about nine or ten months to get a trial date. We are acutely conscious that there are a number of competing priorities before the courts in terms of cases. A retrial is a matter however that requires to be considered as deserving considerable priority.

12. Despite the fact that there has been a significant length of time in this matter getting to trial in the first place, we are satisfied that given the seriousness of the alleged offences which relate to the protection of the environment, it is in the interests of justice to order a retrial despite the delay that has occurred to date and the delay into the future that will inevitably occur before this trial can proceed. We are entitled to expect however that it will receive a level of priority and the prosecution must bring to the attention of the Circuit Court the views of this Court as to priority in respect of this matter.

13. We have considered the cumulative effect of all of these matters on the interests of justice. Despite the delays that have occurred and the procedural issues that have arisen with respective witnesses and the indictment, we are satisfied that it is in the interests of justice to order a retrial.