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| **Judgment Title:** McK -v- D  **Neutral Citation:** [2004] IESC 31  **Supreme Court Record Number:** 42/03  **High Court Record Number:** 2000 9060P  **Date of Delivery:** 17/05/2004  **Court:** Supreme Court  **Composition of Court:** Keane, C.J., Denham J., Murray J., Fennelly J., McCracken J.  **Judgment by:** McCracken J.  **Status of Judgment:** Approved   |  |  |  |  | | --- | --- | --- | --- | |  | | | | | **Judgments by** | **Link to Judgment** | **Result** | **Concurring** | | McCracken J. | [Link](http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/2A5E5F7E8D18519C80256ED2004860B2?opendocument) | Appeal allowed - set aside High Court Order | C.J., Denham J., Murray J. | | Fennelly J. | [Link](http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/C69EA6832C3C5AD580256ED200481AA9?opendocument) | Appeal allowed - set aside High Court Order | C.J., Denham J., Murray J. | |  | | | |   **Outcome:** Allow And Set Aside |
| **THE SUPREME COURT**  **042/03**  ***Keane CJ*** ***Denham J*** ***Murray J*** ***Fennelly J*** ***McCracken J***   **In the matter of Proceeds of Crime Act 1996**  ***Between:***  **McK** **Plaintiff/ Respondent**  **AND**  **D** **Defendant/Appellant**  **Judgment of Mr Justice McCracken delivered on the 17th day of May 2004** **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**   I have had the opportunity of reading the judgment of Fennelly J delivered herein, and I am in complete agreement with his conclusion that the Proceeds of Crime Act 1996 has no application to the proceeds of crimes committed outside the State. Accordingly I also would allow the appeal and set aside the order of the High Court.   With regard to the findings made by the learned President on the evidence, there is no doubt that there is a certain ambiguity in his judgment, but I am not convinced that he was in fact in error. In any event I think it would be helpful to explain the different functions of section 3 and section 8 of the Act.   In his judgment the learned President said:-  *“The Proceeds of Crime Act 1996 requires me to make an order pursuant to that section (section 3) if it appears to me on evidence tendered by the plaintiff including evidence admissible by virtue of section 8 of the Act that:-*  *(1) The defendant is in possession or control of specified property.*  *(2) In the circumstances of this case that the specified property was acquired in whole or in part with property that directly or indirectly constitutes the proceeds of crime and*   *(3) that the value of the property is not less than £10,000.”*  This is only a partial statement of the provisions of section 3. The section in fact provides that the Court shall make the order unless it is shown to the satisfaction of the Court on evidence tendered by the respondent that the property does not constitute directly or indirectly proceeds of crime and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime. However, the learned President then continued in his judgment to set out the provisions of section 8 of the Act, and held, apparently in the context of section 8, that:-  *“The order shall be made unless it is shown to the satisfaction of the Court on evidence tendered by the defendant or any other person that the property was not acquired in whole or in part with property directly or indirectly constituting the proceeds of crime or if it is satisfied that there would be a serious risk of injustice.”*  This provision, of course, is a provision of section 3 rather than of section 8. He then continued:-  *“On the application the plaintiff an authorised officer of the Criminal Assets Bureau gave evidence pursuant to section 8 of the Proceeds of Crime Act 1996 satisfying me as to the requirements of section 3 of the Proceeds of Crime Act 1996.”*  He continued to find that on the evidence of two police officers there were reasonable grounds for the Plaintiff’s belief. He then proceeded to consider the evidence given on behalf of the Defendant and held that the Defendant had not satisfied him that the premises were not acquired at least in part by the proceeds of crime. At the end of the day, I think the learned President applied the correct tests, and that his ultimate findings should stand. However, there was undoubted confusion between the two sections, and I believe a clarification of the position would be in order.  It seems to me that the correct procedure for a trial judge in circumstances such as those in the present case is:-  (1) He should firstly consider the position under section 8. He should consider the evidence given by the member or authorised officer of his belief, and at the same time consider any other evidence, such as that of the two police officers in the present case, which might point to reasonable grounds for that belief.   (2) If he is satisfied that there are reasonable grounds for the belief, he should then make a specific finding that the belief of the member or authorised officer is evidence.   (3) Only then should he go on to consider the position under section 3. He should consider the evidence tendered by the applicant, which in the present case would be both the evidence of the member or authorised officer under section 8 and indeed the evidence of the other police officers.   (4) He should make a finding whether this evidence constitutes a prima facie case under section 3, and if he does so find, the onus shifts to the respondent or other specified person.  (5) He should then consider the evidence furnished by the respondent or other specified person and determine whether he is satisfied that the onus undertaken by the respondent or other specified person has been fulfilled.  (6) If he is satisfied that the respondent or other specified person has satisfied his onus of proof then the proceedings should be dismissed.  (7) If he is not so satisfied he should then consider whether there would a serious risk of injustice. If the steps are followed in that order, there should be little risk of the type of confusion which arose in the present case. |