An Chúirt Uachtarach

The Supreme Court

Supreme Court record : S:AP:IE:2024:00022; S:AP:IE:2024:00021; S:AP:IE:2024:00023
Court of Appeal record : 2022/229; 2022/228; 2022/230
High Court record : 2021/110 JR; 2021/154 JR; 2020/982 JR

[2024] IESC 52

Dunne J
Charleton J
O'Malley J
Woulfe J
Hogan J

Between

Declan Corcoran
Edel Doherty
Kyle Rooney

Applicants/Appellants

- and -

The People (at the suit of the Director of Public Prosecutions),

Prosecutor/Respondent

The Attorney General

Notice Party

Judgment of Mr Justice Peter Charleton, delivered on Thursday 14 November 2024

1. Can a judge in the District Court, whose colleague has already ruled that an offence is minor and thus fit to be tried summarily, that is without a jury, reconsider the nature of the offence of his or her own motion and, instead, refuse jurisdiction, thus sending the case for trial by jury to the Circuit Court? This is the principal issue which arises on this appeal. The charges in question which the second District judge regarded as non-minor concern the alleged breach of an order of the Central Criminal Court that children on trial for murder should not be identified.

2. Excepting minor offences being tried in a court of summary jurisdiction, special courts trying offences where the ordinary courts "are inadequate to secure the effective administration of justice and the preservation of public peace and order", and military tribunals having jurisdiction over offences against military law and in times of war or armed rebellion, the Constitution provides at Article 38.5 that "no person shall be tried on any criminal charge without a jury." At common law, all offences were triable by jury, prior to the creation by statute of a magistrates court. As offences became triable either by jury or by judge, legislation establishing new offences, or revising the mode of trial of existing crimes, provided for trial either summarily or by jury. Summary trial became possible on the proviso that, variously, the accused or the Director of Public Prosecutions consented to forego jury trial and the judge, on hearing a summary of the facts, decided that the offence was one where a jury trial was not required.

3. Essentially, save for the special categories of Special Criminal Court (Article 38.3) or persons subject to military law (Article 38.4) the Constitution is imperative that where an offence is not minor in nature, there must be a jury trial.

Events before the District Court

4. The cases of the applicants are essentially the same. There were originally a dozen or more people charged with the same offence of breach of s 252(1), (4) and 51(3) of the Children Act 2001, of which 10 were involved in this judicial review, these cases being taken as representative and binding as to result. On the charges being mentioned on 28 October 2020 in the District Court, Judge Brian O'Shea heard an outline of the facts and ruled: "I'm going to accept jurisdiction. I am satisfied that it's a matter that can be dealt with in this court within the sentencing regime of this court." The order of the court, dated 10 March 2022, notes: "Judge Brian O'Shea accepted jurisdiction + case adjourned to 2/12/2020 for plea or date [of trial]". On that latter date, the order of the court records: "Judge John Hughes refused jurisdiction + cases adjourned to 20/1/2021 for D.P.P directions". The task of Judge Hughes on that second day was, if appropriate, to accept any pleas of guilty that were forthcoming and for those seeking a trial to find a date for hearing or to put the matter in for management of what was quite an unwieldy group of cases.

5. Judge Hughes stated he was embarking on an "exercise of considering jurisdiction", noting that this had previously been accepted and that the Director of Public Prosecutions had consented to summary disposal. He recited that, on summary conviction the penalty was 12 months imprisonment maximum and/or a fine while on indictment that fine increased and as did the term of imprisonment to 3 years. Stating that he had considered "a broad outline of the facts", he ruled that the offences were not "minor in nature and are unfit for trial in the District Court summarily ... I am refusing jurisdiction and I am adjourning these cases to . . ."

6. These applicants then applied for leave to commence judicial review of the decision of Judge Hughes. That leave was granted on 1 March 2021 by Hyland J for the applicant Declan Corcoran, leave was granted for the applicant Edel Doherty on 1 March 2021 by Meenan J, and leave was granted for the applicant Kyle Rooney on 25 January 2021 by Simons J. The trial of the judicial review was decided by Phelan J on 8 July 2022.

Facts

7. In June 2019 two juveniles were convicted of murder before the Central Criminal Court, McDermott J presiding. The restrictions set out in s 252 and 51(3) of the Children Act 2001 applied to them, the prosecution contend, but that restriction was expressly stated in open court by

McDermott J. In consequence of the legislation, apart from any order of the trial judge, no one could legally identify those tried and convicted. Section 93 may also be a relevant provision. Section 51 of that Act provides for a penalty on conviction, as noted by Judge Hughes. The offence is triable either way, summarily or on indictment, and the consent of the Director of Public Prosecutions is required for summary disposal.

8. The penalty section reinforces the prohibition, it is contended in the proposed prosecution, subject to the trial judge acting to reveal names in the interests of justice, and provides:

> 51. (1) Subject to subsection (2), no report shall be published or included in a broadcast—
>
> > (a) in relation to the admission of a child to the Programme or the proceedings at any conference relating to the child, including the contents of any action plan for the child and of the report of the conference, or
> >
> > (b) which reveals the name, address or school of the child or any other information, including any picture, which is likely to lead to identification of the child.
>
> (2) Subsection (1) does not apply to the publication or broadcast of—
>
> > (a) statistical information relating to the Programme, and
> >
> > (b) the results of any bona fide research relating to it.
>
> (3) If any matter is published or broadcast in contravention of subsection (1), each of the following persons, namely—
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> > (a) in the case of publication of the matter in a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical,
> >
> > (b) in the case of any other such publication, the person who publishes it, and
> >
> > (c) in the case of any such broadcast, any body corporate which transmits or provides the programme in which the broadcast is made and any person having functions in relation to the programme corresponding to those of an editor of a newspaper,
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> shall be guilty of an offence and shall be liable—
>
> > (i) on summary conviction, to a fine not exceeding £1,500 or imprisonment for a term not exceeding 12 months or both, or
> >
> > (ii) on conviction on indictment, to a fine not exceeding £10,000 or imprisonment for a term not exceeding 3 years or both.
>
> (4) (a) Where an offence under subsection (3)—
>
> > (i) has been committed by a body corporate, and
> >
> > (ii) is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other

similar officer of the body corporate or any person who was purporting to act in any such capacity,

he or she as well as the body corporate shall be guilty of the offence and be liable to be proceeded against and punished accordingly.

(b) Where the affairs of a body corporate are managed by its members, paragraph (a) shall apply in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director of the body corporate.

(5) Where a person is charged with an offence under subsection (3), it shall be a defence to prove that at the time of the alleged offence the person was not aware, and neither suspected nor had reason to suspect, that the publication or broadcast in question was of a matter referred to in subsection (1).

(6) In this section—

"broadcast" means the transmission, relaying or distribution by wireless telegraphy of communications, sounds, signs, visual images or signals, intended for direct reception by the general public whether such communications, sounds, signs, visual images or signals are actually received or not;

"publish" means publish to the public or a section of the public, and cognate words shall be construed accordingly.

9. The allegation against all the applicants is that on social media they identified the two juvenile convicts in a manner which constituted an infringement of this legislation. Inflammatory comment is alleged to have been added by some of those. It is unnecessary to repeat or detail the charges any further.

Rulings

10. The High Court, Phelan J [2022] IEHC 435, quashed the orders of Judge Hughes in the District Court refusing jurisdiction to try these applicants summarily. That order was reversed by the Court of Appeal; Birmingham P, Donnelly and Edwards JJ, judgment of Edwards J [2023] IECA 315. The reasoning was based on the basis that where there is a decision by a judge in the District Court on first hearing an outline of the case to accept jurisdiction, another judge actually disposing by way of sentence of that case, or on hearing the actual trial following a not guilty plea, may, or under the Constitution, must, take a different view if the gravity of the circumstances are such that a jury disposal is required. The Court stated:

107. When, in the course of its procedural journey to trial, a criminal case before the District Court is dealt with by more than one Judge of the District Court, as not infrequently happens, at least one of the judges concerned must give consideration to whether the charged offence(s) are minor offences. However, while it is the case once one judge of the District Court has determined that an offence is a minor one, a second or subsequent District Court judge is entitled to proceed with the case without revisiting the question of jurisdiction, a second or subsequent Judge of the District Court is also perfectly entitled (assuming in the case of an offence triable either way the accused has not elected for trial by jury) to reconsider jurisdiction at any stage up until the point of decision in a summary trial, or the accused has intimated an intention to plead guilty. It is indeed

understandable that a second or subsequent Judge of the District Court might also opt to do so given the constitutional imperative to be ever vigilant to ensure that an accused's right to trial by jury will be respected and vindicated, in circumstances where they had not personally heard the evidence adduced on the earlier occasion on the issue of jurisdiction, and particularly if he/she may possibly be the judge of the District Court who, if the matter were to proceed summarily, would be hearing the substantive case.

Issues

11. Leave to further appeal was granted by this Court (Charleton, Woulfe, Collins JJ) on 30 April 2024; [2024] IESCDET 47, on the general issue as to the proper application of Articles 38.1 and 38.2 of the Constitution to the taxonomy and disposal of offences at a summary level and on indictment.

Classification of criminal offences

12. A brief note on the classification of offences may assist in the analysis which follows. This may best be set out concisely, noting that some principles are expanded on and that it is unnecessary to repeat the case law on which these are based:

- Formerly there were offences, whether summary or indictable, which were classified as felonies or misdemeanours;
- Now offences are arrestable offences, the distinction between felonies and misdemeanours having been abolished, ones carrying 5 years imprisonment, or otherwise;
- Jury trial was the mode of trial at common law and it was only by statute that summary trial before a magistrate was introduced in the 15th century;
- Offences traditionally carry a mental element (intention, knowledge, recklessness) but some are regulatory and do not carry those mental element (absolute liability offences to which any absence of awareness is not a defence and certain statutory offences where due care may be a defence if so defined);
- Traditionally, following the introduction of trial by judge alone, offences were indictable if serious and triable summarily if less grave;
- The Constitution, Article 38.5, forbids the trial of any offence save with a jury; the exceptions being minor offences and military offences or cases in special courts. The District Court only has jurisdiction to try offences that are minor and fit to be tried summarily.
- Most modern criminal offences are triable either way, summarily or on indictment. Section 2(2) of the Criminal Justice Act 1951 was an early introduction of offences where there was a choice of jurisdiction. The schedule to that Act listed offences triable either way, but here requiring the consent of the accused as well as the assessment of the District Court that the offence as alleged was minor in character. As substituted by s 8 of the Criminal Justice (Miscellaneous Provisions) Act 1997, the 1951 Act provides:

> (2) The District Court may try summarily a person charged with a scheduled offence if—
>
> > (a) the Court is of opinion that the facts proved or alleged constitute a minor offence fit to be tried summarily,

(b) the accused, on being informed by the Court of his right to be tried with a jury, does not object to being tried summarily, and

(c) the Director of Public Prosecutions consents to the accused being tried summarily for such offence.

- For those offences which may be tried summarily, the consent of the Director of Public Prosecutions is required, or exceptionally, as in the 1951 Act, that of the accused as well;
- Some offences, however, are summary only; for instance, absolute offences or strict-liability offences, or other minor crimes;
- The assessment of the gravity of an offence is done, where it is triable either way and the DPP consents, by the District Court judge who decides if the offence is minor based on the gravity of the circumstances and the consequent potential penalty for those circumstances as outlined;
- When the general principle set out in the prior paragraph was most accurate was before case management of trials and when cases were less complex and hence, there may be more than one judge dealing with a case and more than one judge sitting in the District Court area, with the same case going to a different judge after a previous judge has accepted jurisdiction;
- If, prior to or during the hearing of a trial, a District Court judge (whether the same judge or not who accepted jurisdiction) on reviewing the facts or on hearing evidence, comes to the conclusion that the gravity of the circumstances are such that a jury trial is required, or disposal according to the higher category of penalty applicable to indictable offences, the process must stop and the case must be sent by the District Court to the Circuit Court for disposal.;
- When a case goes to the Circuit Court, only the Director of Public Prosecutions, statutory exceptions apart, may continue the case;
- Once in the Circuit Court, there is no statutory mechanism of return to the District Court;
- On hearing in the Circuit Court, there is no obligation to impose a sentence at a higher level than that provided for in summary disposal in the District Court, the judge is obliged to impose a just and proportionate sentence;
- An appeal to the Circuit Court from a conviction in the District Court is a re-hearing but there is no statutory mechanism for a judge in the Circuit Court to decide that there should have been, or should now be, a criminal trial on indictment because once the District Court has embarked on sentencing, the die is cast as to jurisdiction.

13. The jurisdiction of the District Court is that granted by statute. Similarly, the Circuit Court, being a court of local and limited jurisdiction, takes its jurisdiction from statute. The exercise of that jurisdiction must not in either court exceed the amplitude of the powers granted. While under Article 34.3.1° there is a High Court with "full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal", in practice the criminal business of the courts has been divided up on the basis of a shifting classification of offences since the foundation of the State. In effect, while it was once possible for very minor offences to be tried in the Central Criminal Court, that jurisdiction is now statutorily confined to local and limited courts with only the most serious offences triable in the High Court, subject to lesser offences being joined on an indictment for crimes to which that court has been given primary responsibility. The history of the division of jurisdiction, especially as between summary and indictable crime, was set out by O'Higgins CJ in *The State (McEvitt) v Delap* [1981] IR 125, 129-131:

As considerable confusion appears to exist with regard to the exercise of summary jurisdiction, it may be helpful to look briefly at its development and history. The jurisdiction to try offences in a summary manner is a jurisdiction which depends entirely on statute. According to O'Connor's *Justice of the Peace* (1915 ed., vol. 1, p. 3) it was first given to Justices of the Peace by the statute 11 Hen. 7, c. 3, in relation to a number of statutory offences. That statute was followed by 33 Hen. 8, c. 6, which provided for summary conviction in relation to the offence of carrying dags or short guns. In ensuing years the statutory extension of the summary jurisdiction of Justices spread to a large variety of offences — both common law and statutory. In the last century the Petty Sessions (Ireland) Act, 1851, and the Fines Act (Ireland), 1851, Amendment Act, 1874, and other statutes in relation to Dublin, regulated and prescribed the procedure for the exercise of summary jurisdiction by Justices. These various statutes became known collectively as the Summary Jurisdiction Acts. In relation to particular statutes which created an offence and/or provided for summary trial, it was sometimes enacted that the defendant should have an option to be tried by indictment or that the Justices could so opt (e.g., s. 2 of the Merchandise Marks Act, 1887, and s. 46 of the Offences Against the Person Act, 1861). In the absence of such a provision, no right to trial by jury existed where summary trial was directed. Where an offence was created by statute and was not expressly or by necessary implication (*Cullen v. Trimble* (1872) 7 Q.B. 416) made subject to summary jurisdiction, it could only be tried by a jury as an indictable misdemeanour (Russell on Crime, 7th ed., p. 11; *R. v. Hall* (1891) 1 Q.B. 747).

On the establishment of the State, the District Court of Justice became (inter alia) the court of summary jurisdiction in relation to criminal matters. By s. 77A of the Courts of Justice Act, 1924, it was given all the jurisdiction which had been vested "by statute or otherwise in Justices or a Justice of the Peace sitting at Petty Sessions." This effectively transferred to the District Court of Justice the criminal jurisdiction formerly exercisable by Justices of the Peace under the Summary Jurisdiction Acts. In addition, s. 77B of the Act of 1924 gave that court summary jurisdiction in relation to specified indictable offences if the Justice was of the opinion that the offence was a minor one and the accused (on enquiry having been made of him) did not object. This latter provision was repealed by the Criminal Justice Act, 1951, and was replaced by s. 2 of that Act which empowers the District Court to try summarily 21 scheduled and indictable offences if the District Court be of the opinion that the facts alleged or proved constitute a minor offence, and if the accused, "on being informed by the Court of his right to be tried with a jury," does not object. Special provision is made for the Attorney General's consent also in relation to certain specified types of offence.”.”

Loss of opportunity

14. In the application for leave to appeal, the impression was given that transfer of a trial from the District Court to the Circuit Court involved a loss of opportunity for the accused. That contention was repeated in oral argument on the appeal, but deserves closer examination. Essentially, the contention is that certain statutory rights will be lost where an indictment is laid which existed where the trial of the offence remained summary only. Firstly, it is contended that the Criminal Law (Spent Convictions and Certain Disclosures) Act 2016 removes the possibility of a conviction being expunged by being recorded in the Circuit Court. With that contention may be added the argument that by reason alone of the District Court refusing jurisdiction, a higher sentence may be anticipated, or become likely, thus exceeding the threshold whereby under the 2016 Act, a conviction may disappear from the record of an individual. Section 5 of that Act provides:

5. (1) Where a person is convicted of an offence, whether before or after the commencement of this Part, and the conditions specified in subsection (2) are satisfied, then subject to provisions of this Part, the conviction may be regarded as a spent conviction.

(2) The conditions referred to in subsection (1) are the following, namely:

(a) the person shall be a natural person and shall have attained the age of 18 years at the date of the commission of the offence which is the subject of the conviction concerned;
(b) not less than 7 years shall have passed since the effective date of conviction;
(c) the sentence imposed by the court in respect of the conviction shall not be an excluded sentence;
(d) the person shall have served or otherwise undergone or complied with any sentence imposed, or order made by the court in dealing with the person in respect of the conviction concerned.

(3) Subject to subsection (5), no more than one conviction may be regarded as a spent conviction and if a person has more than one conviction, this section shall not apply to that person.

(4) Where in any proceedings before a court, a person is convicted of 2 or more offences which are committed simultaneously or arise from the same incident, and the court in passing sentence, imposes more than one relevant sentence in respect of those offences, the convictions shall be regarded as one single conviction.

(5) Subsection (3) shall not apply to a relevant sentence imposed by the District Court on a person in respect of an offence under—

(a) the Road Traffic Acts 1961 to 2015, other than section 53 of the Road Traffic Act 1961 ,
(b) section 37A of the Intoxicating Liquor Act 1988 ,
(c) section 4 , 5 , 6 , 7 , 8 , 8A(4) or 9 of the Criminal Justice (Public Order) Act 1994.

15. While the provisions of the 2016 Act are complex, nonetheless they precisely lay down the circumstances in which convictions may disappear from a person's domestic record. Some may have to be disclosed to other jurisdictions when applying, for instance, for a visa. Once an offence is not excluded under s 4, through definition, the legislation defines the parameters for expunging a record. Excluded are sexual offences and those offences reserved to the Central Criminal Court; which are now treason, murder, rape, aggravated sexual assault and s 4 rape. There is no exclusion for offences tried on indictment, save for these. The precision of the 2016 Act excludes the argument that transfer from the District to the Circuit Court strips an accused of statutory rights. Hence, s 4 in defining what may be expunged from a domestic criminal record precisely includes both courts and defines a single offence in such a way as to include an incident which gives rise to more than one charge:

"custodial sentence", in relation to a person convicted of an offence, means any sentence of imprisonment imposed by the District Court or a sentence of imprisonment for a term of 12 months or less imposed by any other court on the person in respect of the offence

(whether or not a fine is also imposed on the person in respect of the offence) and includes—

> (a) a sentence that is imposed concurrently with another sentence or sentences of imprisonment provided that the longer, or the longest, of the sentences is 12 months or less,
> (b) a sentence that is imposed consecutively with another sentence or sentences of imprisonment provided that the total period of imprisonment is 12 months or less,
> (c) a sentence of imprisonment for a term of 12 months or less, the execution of a part of which is suspended for a period specified by the court,
> (d) a sentence of imprisonment for a term of 12 months or less, the execution of a part of which is suspended for a period specified by the court but which suspension is subsequently revoked in whole or in part by the court,
> (e) a sentence of imprisonment for a term of 12 months or less, the execution of the whole of which is suspended for a period specified by the court but which suspension is subsequently revoked in whole or in part by the court, or
> (f) a sentence of imprisonment for a term of 12 months or less which is imposed on the person in relation to the offence following a revocation under section 8 or 11, as the case may be, of the Criminal Justice (Community Service) Act 1983 of a community service order in respect of the offence;

16. A single event can involve more than one charge; as where a burglar breaks into a home, both burglary and malicious damage are committed. See *The People (DPP) v FE* [2019] IESC 85. In sentencing, the overall culpability of the conduct is what is to be analysed in setting the headline sentence before any mitigation may be taken into account. Which segues into the other argument whereby it is posited that once a judge has a wider sentencing power, an accused becomes at risk of the imposition of a higher sentence. Thus, while remaining in the District Court, these applicants will be guaranteed that their sentence cannot exceed the statutory maximum applicable to that crime, while on moving to the Circuit Court, the potential sentence moves from a limited monetary fine to an expanded sum and the possible time to be spent in prison extends from 12 to 36 months. While a cause of concern to accused persons, the fundamental answer is that no judge is entitled to impose an unjust sentence. While the District Court may have refused jurisdiction on the basis that what the accused faces is not a minor offence, no binding ruling is thereby made whereby the Circuit Court either must, or should, exceed the maximum sentence for disposal in the District Court. The essence of the task of a sentencing judge is to find the correct sentence for an offender who is culpable to the degree that his or her involvement in an offence demonstrates. This is the most fundamental principle of sentencing; *The People (DPP) v Faulkner* [2024] IESC 16. Further, correction of error applies whereby from the District Court to the Circuit Court, an accused may seek a re-hearing on sentence, all Circuit Court sentences being capable of correction on appeal to the Court of Appeal at the instance of the accused or, if unduly lenient, where the Director of Public Prosecutions seeks a review.

17. The other right that is asserted to be lost by the applicants is one that arises under the Probation of Offenders Act 1907. It is argued that by virtue of jurisdiction being refused by the District Court, the chance of the application of probation vanishes. Section 1 of the 1907 Act provides:

> 1.—(1) Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any

punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either—

(i) dismissing the information or charge; or
(ii) discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.

(2) Where any person has been convicted on indictment of any offence punishable with imprisonment, and the court is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, in lieu of imposing a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.

(4) Where an order under this section is made by a court of summary jurisdiction, the order shall, for the purpose of revesting or restoring stolen property, and of enabling the court to make orders as to the restitution or delivery of property to the owner and as to the payment of upon money or in connexion with such restitution or delivery, have the like effect as a conviction.

18. Two options are available to the District Court when judges of that court consider applying the Probation Act either to a plea of guilty or upon conviction. Firstly, the court may decline to enter a conviction, despite the offender being guilty, but may, nonetheless, require him or her to enter, under oath, a promise of good behaviour. Secondly, the court may record a conviction and proceed to decline to apply any penalty but, rather, may require the offender to enter a solemn bond to be of good behaviour over a period of up to three years. The difference in wording from s 1(1) to s 1(2) is that the probation-instead-of-sentence provision is available to a judge on a plea or conviction on indictment in the Circuit Court, while the District Court has the wider and additional power to decline the imposition of a conviction.

19. Various powers are distributed by legislation to courts which may not be shared by others. For instance, a person convicted in the District Court is entitled to a full re-hearing of the evidence, on the basis of the restoration of the presumption of innocence, by the Circuit Court. While listed as an appeal, the case is tried as if the judge is hearing the testimony asserted to support the allegation of the offence for the first time; which in fact he or she is. The judge knows there has been a conviction, simply from the nature of the list being embarked upon, but will have no idea of the reasoning underpinning the judgment of the District Court whereby the accused was convicted. The case is heard again. But, on being convicted in the Circuit Court, while the appeal is by way of re-hearing should the accused appeal to the Court of Appeal under s 63 of the Court of Justice Act 1924, because of the presence of a transcript, that takes the form of legal argument as to whether a material error of law has been disclosed. A general right of appeal for the prosecution in respect of sentence was only introduced by s 2 of the Criminal Procedure Act 1993 where a sentence may arguably require reassessment by the Court of Appeal. Rather than such

appeals being a matter of routine, what is required is that the prosecution show an undue departure from the apposite standard.

20. It has never been considered that there must be completely uniform standards as between the form and manner of initiation and disposal of cases in various courts. Since the Constitution contemplates an overall authority in the High Court, with courts of local and limited jurisdiction, it is for the Oireachtas in principle to choose, subject to these constitutional limits, the subject matter, defining limits and powers of each court and the type and threshold for appeal from one court to another: see Article 36 which states:

> Subject to the foregoing provisions of this Constitution relating to the Courts, the following matters shall be regulated in accordance with law, that is to say:-
>
> i the number of judges of the Supreme Court, of the Court of Appeal, and of the High Court, the remuneration, age of retirement and pensions of such judges,
>
> ii the number of the judges of all other Courts, and their terms of appointment, and
>
> iii the constitution and organization of the said Courts, the distribution of jurisdiction and business among the said Courts and judges, and all matters of procedure.

Revision of a decision at the same level

21. While the applicants agree that a District Court judge may be entitled to refuse jurisdiction in circumstances where it had already been accepted, that, it is said, is only because a judge called upon to potentially convict and sentence an accused for the offence, must be satisfied that it is minor. It is argued, however, that there is no entitlement for a District Court judge to re-visit the issue of jurisdiction at an interlocutory stage when, it is said, the issue of jurisdiction does not arise, and the matter is not before the District Court for any substantive purpose. In this case, it is contended that the District Court judge erred in going beyond the case management function assigned to him by virtue of the case being listed before him for that purpose. Emphasis is placed on the background facts of proceedings at issue provided by counsel to Judge Hughes, mirroring, it is asserted, what had already been heard by Judge O'Shea on 28 October 2020 when he determined the jurisdiction issue. Re-visitation of jurisdiction must only occur in the context of what the District Court judge is actually being called to determine, it is contended. Hence, the applicants have submitted that the District Court judge was not entitled to re-visit the issue of jurisdiction in the absence of new or additional facts or unless the procedural circumstances required him to do so. It is said that Judge Hughes erred in relying on the authority of *State (O'Hagan) v Delap* [1982] IR 213 to refuse jurisdiction. That case, it is asserted, makes clear that some additional or new factor must come into the reckoning before the original order is reversed (there, the accused had indicated that he intended to plead guilty at a point before the District Judge indicated his change of mind). Several authorities are cited in purported support of that view, including, the decision of Ní Raifeartaigh J in *Gifford v DPP* [2017] 2 IR 761. The applicants seek to distinguish their case from the decision in *Reade v Judge Reilly* [2009] IESC 66, [2010] 1 IR 295, on the basis that here the District Court Judge was not being called upon to exercise his function or a jurisdiction in a manner that engaged Article 38.2 of the Constitution in respect of non-minor offences not being tried in the District Court. As such, it is said, the conduct of the District Court judge was impermissible and amounted to what could be categorised as acting in,

what is contended to be, a quasi-appellate role. The only time which that issue would become live and require further consideration, it is said, is:

(i) At any prospective trial of the offence;
(ii) If the accused indicated an intention to plead guilty and the judge was required to enter upon a hearing in that regard; or
(iii) If the prosecution wished to bring forward new or additional evidence not previously available which may have been relevant to the decision on the jurisdiction.

22. In these proceedings, none of these scenarios arose, it is said. As to the decision of the Court of Appeal, it is suggested that absent a distinction between the exercise of a "substantive or necessary" and a mere "procedural" jurisdiction, it appears that the issue of jurisdiction could theoretically be revisited at any stage in the proceedings; which is argued to be wrong in law. As a result, it is said that the operation of the District Court could descend into a cycle of "jurisdiction ping pong". This opens the possibility to a prosecutor, it is argued, who is dissatisfied with the previous decision to accept jurisdiction, to ask the District Court to reconsider the facts whenever a case may be listed for mention or where the Court is merely being asked to exercise its procedural jurisdiction. If such a state of affairs were allowed to exist, it would, it is said, in effect, unsatisfactorily lead to the issue of jurisdiction being a live one until such time as the person was sent forward for trial to the Circuit Court.

23. The Director of Public Prosecutions argues that a District Court judge is entitled, of his or her own volition or otherwise, to visit the question of jurisdiction notwithstanding that jurisdiction had apparently previously been accepted by a different District Court judge and this may occur either prior to or during the trial of an offence. As to the applicants' submission that a District Court judge can only consider jurisdiction again at the trial, if an accused indicated an intention to plead guilty and the judge is required to enter upon hearing on that, or if the prosecution wishes to bring forward new or additional information not previously available, it is contended that this position completely disregards the dicta in the case of *Reade*. The prosecution assert that the determination of Judge O'Shea on 28 October 2020 did not bind Judge Hughes on the question of whether the alleged offence was a minor offence fit to be tried summarily. Every case will depend on its own facts, it is submitted. The Director of Public Prosecutions also argues that the District Court was not *functus officio* as regards the question of jurisdiction. Issue is taken with the applicants' argument that a cycle of "ping-pong" could emerge form a subsequent judge displacing an earlier decision as to jurisdiction. The problem with this argument, it is said, is that it does not deal with the Court of Appeal's findings on the issue, nor does it deal with the judgment in *Reade*. It is alleged that re-visitation gives effect to the Constitutional imperative. A judge cannot stay silent, it is argued, if they are of the bona fide view that an alleged offence is non-minor.

24. The District Court, the DPP asserts, is under a continuing obligation to ensure that it only deals with minor offences fit to be tried summarily, it is alleged. The law, it is claimed, requires no new factor to be advanced and/or a change in the nature of the facts alleged and/or "new information" for there to be a lawful decision that an alleged offence is not a minor one fit to be tried summarily.

Fundamental principle

25. Emphasis on the fundamental principle that governs the constitutional imperative in Article 38.2 runs through the relevant decisions. While the Article is cast in enabling form that minor offences "may be tried in courts of summary jurisdiction", the list of exclusions from trial by jury make it clear that unless the case is one to be tried by a special court or under military law or is

minor, Article 38.5 applies in its conferring of jury trial rights on someone accused of a crime: "Ní cead duine a thriail in aon chúis choiriúil ach I láthair choiste tiomanta". That is the principle around which all the decisions revolve and which apply that imperative. Here the decision of Butler J in *The State (Nevin) v Tormey* [1976] IR 1, cited with approval and applied by O'Hanlon J in *State (O'Hagan) v Delap* [1982] IR 213, establishes the principle. To have jurisdiction, there must be an enquiry into jurisdiction; to exercise jurisdiction, that jurisdiction must be established. The conviction was quashed in *Tormey* because the District Court proceeded with a trial when no view had been formed that the alleged offence was a minor one fit to be tried summarily before the commencement of the trial, but during the course of the trial; and see *The State (Keohane) v Cork Circuit Judge* [1946] IR 364 at 373-374. Therefore, there was no jurisdiction to embark on the trial in those circumstances. In *Delap*, the judge of the District Court was faced with two separate charges, both of sexual assault on a male person. The first in time, the accused pleaded guilty to and was released on bail. Then came the second, before the same judge, to which the accused pleaded not guilty. Hearing the case that afternoon, the judge heard a summary of the facts and accepted jurisdiction, but the accused changed his mind and pleaded guilty. Discovering that the background to the second case was that it was committed on bail from the first offence, the judge declined jurisdiction. This was a case to which the 1951 Act applied, where both the accused and the prosecution had to consent to summary disposal. O' Hanlon J held that the action of Judge Delap had been correct:

> I am of opinion that when a District Justice has elected to try a case summarily, and has embarked on the trial, circumstances may arise which entitle him, or may even make it necessary for him, to reverse his previous decision and allow the case to go forward to the Circuit Court where a higher range of sentence may be imposed. The wording of the sub-section permits the District Justice to make his initial decision in reliance on a statement of the facts of the case given to him by the prosecution . . . Alternatively, the District Justice may rely on facts which have been proved, so that his acceptance of jurisdiction to try the case summarily may not arise until evidence has been taken in a formal manner: if he then agrees to a summary trial, there would be an obligation on him to commence the hearing afresh as though no evidence had been already given. However, if a District Justice embarks upon a summary trial and is then led to believe, by the evidence he hears, that the facts disclose a major rather than a minor offence, he would find himself in a situation where it would be constitutionally impossible for him to try the case summarily within his jurisdiction; in my opinion he would be bound to discontinue the summary trial and to allow the matter to be dealt with on the basis of a preliminary hearing intended to lead, in due course, to trial on indictment.

26. The decision in *The State (McEvitt) v Delap* [1981] IR 125, para 132 is to the same effect. Henchy J, agreeing with O'Higgins CJ, stated these unimpeachable reasons why a District Court judge should not hear a case which is not a minor offence. Where a judge starts to hear a case, whether he or she has previously decided it is minor, or a colleague, it would follow, they should disengage if the facts emerge as entitling, in fact constitutionally requiring, the accused have a trial by jury or be sentenced at Circuit Court level:

> It follows that a person who is charged with an offence under s. 3 of (The Prohibition of Forceful Entry and Occupation Act, 1971) will fall to be tried either similarly in the District Court or on indictment in the Circuit Court; the line of distinction between the one court and the other is necessarily the gravity of the offence.
>
> If, as is the case here, the circumstances of the offence charged plainly show it to be a minor offence, it must be assumed from the provision in the act of a penalty for a summary

conviction that the legislature intended that the District Justice will try the case summarily as part of the exercise of the constitutional jurisdiction of the District Court to try minor offences, rather than send it forward for trial as if it were not a minor offence.

If this were a case where it had not been agreed that the offence was a minor one, the Distinct Justice could make a provisional or *prima facie* ruling that it was a minor one, if the prosecution's opening statement of the circumstances justified such a tentative conclusion. But if, as the hearing proceeded, it appeared that the offence was not a minor one, the District Justice would have to desist from the summary hearing and, instead, take the necessary steps to allow a conversion of the case into the procedure laid down by the Criminal Procedure Act, 1967 for the preliminary examination of an indictable offence.

27. Similar to that analysis was that of the High Court in *Reade v Reilly* [2007] 1 ILRM 504, [2007] IEHC 44. There, a judge had accepted jurisdiction on the basis of an outline by the prosecution in a domestic violence case. Embarking on the trial of the offence, in effect, the full horror of the abuse suffered by the victim became apparent. The judge was then obliged to stop the hearing as he did not have jurisdiction; for the Supreme Court decision see [2009] IESC 66, [2010] 1 IR 295. This is not the same as disagreeing with the Oireachtas that a summary-only offence could be more serious than the worst case imagined by the framers of the legislation; *The People (DPP) v Joseph Dougan* [1996] 1 IR 544. There, there is no choice, since the decision has already been made that all such offences are minor in nature and the District Court has no power to declare a legislative decision unconstitutional. But, as in *Reade*, there is not just a choice but an imperative to adopt only the correct jurisdiction.

Endless mind-changing

28. For the applicants the spectre of endless mind-changing, one judge second-analysing the decision of another, chaos and administrative log-jam has been eloquently evoked. This is not to haunt the District Court, they suggest. It will not. Because this is not a case of "an iomarca cócairí a mhilleann an t-anraith" where a judge has a function beyond second-guessing a colleague.

29. Firstly, the constitutional imperative is before all judges of the District Court to only hear cases which are minor in nature; assessed by the gravity of the potential penalty, the moral turpitude of the offence itself rarely being an issue since the trial of particular crimes by particular courts is well bedded-in. If a colleague has made a decision, that is noted on the order that is put before another judge who comes to hear the case. There is no necessity for a judge coming new to a case to re-embark on a task that has already been undertaken. Where, however, as here, the task is to allot precious court time with trials or pleas of guilty and sentence, it is both possible and sensible to consider if that capturing of court resources is for the benefit of the administration of justice. Then, it is prudent, but not imperative or always desirable, to adopt caution and to ask if the allocation of time will in fact be a waste of time. Rather than, as the applicants assert, having no function once Judge O'Shea had decided to accept jurisdiction, a case-management decision where Judge Hughes was slated to manage the cases and to hear pleas of guilty, should they be forthcoming, gave him the authority to consider if this series of several cases were indeed minor in nature.

30. It might, secondly, be commented that there comes a point where a decision is made and where there is no going back. The decision in *Feeney v District Justice Clifford* [1989] IR 668, 678 cements the proposition that a judge who takes a plea of guilty on hearing an outline of a case and who then embarks on sentencing the accused cannot reverse his or her decision. There, the accused pleaded guilty to summary offences and the District Court assumed jurisdiction. The Supreme

Court, judgment of McCarthy J, held that it was wrong for the District Court to then decline jurisdiction, in that case because of the other convictions of the accused, not revealed with the outline of the case. Even though the judge thought the prior convictions required a more effective penalty than he could impose, his having embarked on sentencing the accused meant that the die had been cast:

> Once there has been a plea of guilty to what appears to be, on the facts alleged, a minor offence fit to be tried summarily, there can be no going back on the conviction that necessarily follows the plea of guilty; the District Justice cannot hold the plea in some form of forensic limbo until he had heard the evidence material to the penalty; yet there must be many such instances.

31. Other authorities are to the same effect; see *Sweeney v Judge Lindsay* [2013] IEHC 210 and *Taylor v DPP* [2017] IEHC 729, following that decision. It follows, therefore, that provided a judge has not embarked on sentencing an accused, having already heard an outline of the facts and accepted jurisdiction on the basis of the crime being a minor offence, if prior to or during the hearing of a trial, a District Court judge on reviewing the facts or on hearing evidence, comes to the conclusion that the gravity of the circumstances are such that a jury trial is required, or disposal according to the higher category of penalty applicable to indictable offences, under Article 38.5 of the Constitution, the process must stop and the case must be sent by the District Court to the Circuit Court for disposal. That remains the case whether, as is usual in our time with several judges in a district, it is or is not the same judge who accepted jurisdiction.

32. In summary, therefore, District Court Judge Hughes was entitled to conclude that the offences in question were not minor in character for the purposes of Article 38.2. He had jurisdiction so to conclude because he had been called upon to make a decision as to how long each of these cases would take and what amount of time on what dates might be assigned to each case. Quite obviously, Judge Hughes could not have made such a decision – even on a preliminary or provisional basis – without knowing whether the District Court had jurisdiction in the first place. It was accordingly necessary for him to make such a determination at that point. This he did and it has not been otherwise suggested (ie, apart from the fact that Judge O'Shea had apparently taken a different view) that he was not entitled to conclude that the offences were not minor in character. All of this means that Judge Hughes was entitled to decline jurisdiction in these present set of cases.

Result

33. In the result, and for the reasons given, the appeal should be dismissed.

Chronology

19 June 2019: Date of offence

28 October 2020: Judge O'Shea accepted jurisdiction to dispose of the matters summarily and adjourned the proceedings for a plea of guilty or to assign a hearing date

2 December 2020: Judge Hughes, without an application from the parties, requested to hear the alleged facts in relation to the matters.

25 January 2021: High Court (Simons J) grants leave for Kyle Rooney to seek judicial review

1 March 2021: High Court (Meenan J) grants leave for Edel Doherty to seek judicial review

1 March 2021: High Court (Hyland J) grants leave for Declan Corcoran to seek judicial review

23 February 2022: High Court (Meenan J) selects the cases of Corcoran, Doherty and Rooney to be heard

31 May 2022: High Court hearing before Phelan J.

8 July 2022: High Court (Phelan J) delivers judgment

25 July 2022: High Court (Phelan J) makes final orders

8 September 2022: Applicant files notice of appeal against judgment and order of the High Court

20 October 2022: First directions hearing before the Court of Appeal

1 May 2023: hearing of appeal before the Court of Appeal (Birmingham P, Edwards, Donnelly JJ.)

16 November 2023: Court of Appeal delivers judgment

1 March 2024: Appellant files notice of appeal

30 April 2024: Supreme Court grants leave to appeal

7 October 2024: Supreme Court hearing

5 November 2024: Supreme Court decision