APPROVED JUDGMENT
NO REDACTION REQUIRED

THE COURT OF APPEAL

Record No: 228/2022

Record No. 229/2022

Record No. 230/2022

Birmingham P. **Neutral Citation Number [2023] IECA 315**

Donnelly J.

Edwards J.

Between/

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

V

EDEL DOHERTY

Respondent

Between/

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

V

DECLAN CORCORAN

Respondent

Between/

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

V

KYLE ROONEY

Respondent

JUDGMENT of the Court delivered by Mr. Justice Edwards on the 16th of November 2023

Introduction

1. The present appeals have been brought by the Director of Public Prosecutions (i.e. "the appellant" or "the Director") against the judgment of the High Court (Phelan J.) delivered on the 8th of July 2022 and consequent Orders of *certiorari* dated the 25th of July 2022 (perfected on the 26th of August 2022). By these Orders, the High Court had quashed certain orders of the District Court (District Court Judge Hughes) refusing jurisdiction to try the named respondents summarily in circumstances where the offences with which the respondents were accused of committing were deemed by that court not to be "minor" in nature.

Background

2. On the 18th of June 2019, two juvenile males were convicted of the murder of a Ms. Anastasia Kriégal in May 2018. Throughout the trial, and subsequent thereto, these children were referred to as "*Boy A*" and "*Boy B*", respectively. On the date of their conviction, it was ordered by the Central Criminal Court (McDermott J.) that no material, which may tend to identify either juvenile, could be published.

3. More generally, s. 252 of the Children Act 2001 (hereinafter "the Act of 2001") operates to the same effect and attaches criminal sanction to such publication. For the purposes of this judgment, the relevant provisions of this section (as in force at the time of the alleged offences) are as follows:

> "***Anonymity of child in court proceedings.***
>
> *252. (1) Subject to subsection (2), in relation to any proceedings for an offence against a child or where a child is a witness in any such proceedings—*
>
> *(a) no report which reveals the name, address or school of the child or includes any particulars likely to lead to his or her identification, and*
>
> *(b) no picture which purports to be or include a picture of the child or which is likely to lead to his or her identification,*
>
> *shall be published or included in a broadcast.*
>
> *[...]*

(4) Subsections (3) to (6) of section 51 shall apply, with the necessary modifications, for the purposes of this section."

4. For completeness, s. 51 of the Act of 2001 is also included:

"Protection of identity of children

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.

[...]

(3) If any matter is published or broadcast in contravention of subsection (1), each of the following persons, namely—

(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,

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.

[...]

(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."

5. On the 19th of June 2019, it came to the attention of members of An Garda Síochána, in particular a Detective Inspector Mark O'Neill (otherwise "D/Insp. O'Neill") who was the senior investigating officer in relation to the murder of Ms. Kriégal, that images were in circulation on social media that depicted and identified Boy A and Boy B. These images were further accompanied by comments, some of which referred to the juveniles by name, and others that stated the name of the school at which they previously attended. This discovery prompted the opening of a Garda investigation into alleged breaches of s. 252 of the Act of 2001 and of McDermott J.'s order barring publication of material identifying Boy A and Boy B. In the course of this investigation, several persons came to Garda attention as suspects. Among them, the three respondents: Mr. Kyle Rooney, Mr. Declan Corcoran, and Ms. Edel Doherty.

Kyle Rooney

6. The prosecution case against Mr. Rooney is summarised as follows. On the 19th of June 2019, at 10:34am, a "*tweet*" or post was published on social media site Twitter by a user operating under the name "*Kyle Rooney @KyleRooney08*". It included two photographs and an accompanying comment stating "*Boy and B ladies and gentleman! They deserve everything they're gona get, scumbags* (sic)". The first photograph depicted Boy A and was captioned "*Meet the horrible cunt that killed the 14-year-old on Leixlip*". The second photograph depicted a number of children together against the background of a school setting, Boy A and Boy B among them. The author of the tweet had crudely drawn over the children to conceal their visages, but they had retained the faces of two children which were encircled in red and labelled "*A*" and "*B*", respectively.

7. In his witness statement dated the 26th of June 2019, D/Insp. O'Neill averred that by the time he had accessed the post on Twitter, it had been "*retweeted*" or shared by some twenty-two other Twitter users. This would have been sometime within the space of two hours from the tweet's publication, as at 11:40am on the 19th of June 2019, D/Insp. O'Neill took a "*screenshot*" or print-screen of the tweet, which screenshot has been tendered in the Book of Evidence available to the court below and to this Court. In the High Court, the appellant submitted that this tweet marked the only instance that images of Boy A and Boy B were observed by the investigation to have been formatted as a collage.

8. Subsequent to the discovery of this tweet, gardaí made a number of enquiries in the hope of discovering the identity of the person behind user "*@KyleRooney08*". A Garda Sergeant Ronan Dunne (otherwise "Sgt. Dunne") was tasked with this responsibility. In the early afternoon of the 19th of June 2019, Sgt. Dunne contacted Mr. Rooney, the respondent, by way of telephone. As Sgt. Dunne averred in his statement of evidence, dated the 19th of July 2019, he informed Mr. Rooney that the tweets he had made, including the publication of the photographs depicting Boy A and Boy B, were in contravention of McDermott J.'s order, and further constituted an offence under s. 252 of the Act of 2001. Sgt. Dunne

averred that Mr. Rooney accepted that he had made the tweets in question but that he had done so not realising that this action amounted to a criminal offence. Mr. Rooney undertook to remove the tweets "*immediately*", which he did, and he further undertook to not engage in such behaviour again. At this time, Mr. Rooney was approximately 23 years of age.

9. On the 11th of July 2019, Mr. Rooney and his solicitor attended at Clontarf Garda Station for the purpose of participating in a voluntary cautioned recorded interview, conducted by a Detective Sergeant Michelle Gillick (otherwise "D/Sgt. Gillick") and a Detective Garda Allan McCarthy (otherwise "D/Garda McCarthy"). As D/Sgt. Gillick averred in her statement dated the 16th of July 2019, at this interview Mr. Rooney was presented with hard copy facsimiles of the twitter page of user "*@KyleRooney08*" and the tweets made containing the images of Boy A and Boy B and the accompanying captions. Mr. Rooney acknowledged that he owned the Twitter page in question, and he further took ownership of the tweets and accompanying images. This is confirmed in D/Garda McCarthy's statement of the 16th of July 2019; and a memorandum of interview compiled by D/Garda McCarthy was provided in evidence to the court below, and to this Court.

Declan Corcoran

10. In respect of Mr. Corcoran, the prosecution case alleges the following. At 2:14pm on the 19th of June 2019, a tweet posted by user "*Declan Corcoran @declan_corcoran*" on Twitter, in reply to other users, purported to specifically identify Boy A and Boy B by name. It stated:

> "[Names of Boy A and Boy B redacted] *for anyone who doesn't know their names... ... Sick murdering perverts".*

11. Garda Inspector Bróna O'Reilly (otherwise "Insp. O'Reilly"), in her statement dated the 30th of June 2019, averred that the names tweeted by user "*@declan_corcoran*" corresponded with the names of Boy A and Boy B, and that this user had acted in breach of McDermott J.'s order and contrary to s. 252 of the Act of 2001. She further averred that "*@declan_corcoran*" had replied to other tweets which identified Boy A.

12. In his statement dated the 10th of July 2019, a Garda Niall Carolan averred the following. Garda Carolan was a member involved in the investigation of alleged breaches of s. 252 of the Act of 2001 in the wake of the criminal trial for the murder of Ms. Kriégal. Garda Carolan was furnished with hard copy facsimiles of numerous tweets posted by user "*@declan_corcoran*", which he noted included identification of Boy A and Boy B by name. The user further posted a photograph of both juveniles, in which they were labelled "*A*" and "*B*", respectively. Having viewed this evidence, Garda Carolan formed the view that they constituted "*clear breaches*" of McDermott J.'s order and of s. 252 of the Act of 2001. These facsimiles were tendered in evidence to the court below and have been made available to this Court.

13. Following his viewing of this material, Garda Carolan set about discovering the identity of the person behind "*@declan_corcoran*". His efforts bore fruit, and the then 28-year-old respondent, Mr. Corcoran, was located. On the 10th of July 2019, Garda Carolan, accompanied by a Garda Sergeant Adrian Kildea (otherwise "Sgt. Kildea"), attended at Mountjoy Garda Station where they had an appointment to meet with Mr. Corcoran. Having already consulted with his solicitor, Mr. Corcoran indicated to the gardaí that he was willing to participate in a cautioned interview and to proceed in the absence of his solicitor. In his additional statement of evidence, dated the 10th of July 2019, Garda Carolan averred that he was satisfied, based on meeting Mr. Corcoran, on the profile picture of Twitter user "*@declan_corcoran*", and on opensource information associated with an amateur boxing club of which Mr. Corcoran was a member, that Mr. Corcoran was the person behind user "*@declan_corcoran*". In this interview, Mr. Corcoran gave a "no comment" account in reply to Garda questioning. A memorandum of this interview compiled by Garda Carolan was provided in evidence to the court below, and to this Court.

14. It should be stated that both Garda Carolan and Sgt. Kildea (in his statement of the 15th of July 2019) averred that after the interview had concluded, Mr. Corcoran had informed them that the tweets he had made were in fact "*quote*" tweets, and he explained this procedure to them by which a user may retweet an extant tweet made by another user and add an additional comment or caption thereto.

Edel Doherty

15. As regards Ms. Doherty, the prosecution makes the following case. In his statement dated the 28th of June 2019, D/Insp. O'Neill averred that among the various online postings in which Boy A and Boy B were identified, a post was made on Facebook under the username "*Edel Doherty Talbot*" publishing photographs depicting Boy A and Boy B and was captioned "*Well there yea go there A.. the scum And B.. THE SCUM* (sic)".

16. On the 21st of June 2019, D/Sgt. Gillick was tasked with contacting the person behind the user "*Edel Doherty Talbot*" and interviewing them as part of the Garda investigation into alleged breaches of McDermott J.'s order and of s. 252 of the Act of 2001. In her statement made on the 3rd of July 2019, D/Sgt. Gillick averred that she was furnished with hard copy facsimiles of the relevant Facebook account page, of that account's profile picture, and of the impugned post. D/Sgt. Gillick's enquiries led her to an address associated with the respondent, Ms. Doherty. Having attended at this address on two separate occasions, which visitations did not result in in-person contact with the third named respondent, D/Sgt. Gillick was subsequently contacted by Ms. Doherty by way of telephone call on the 25th of June 2019. In this phone call, D/Sgt. Gillick informed Ms. Doherty of the nature of her investigation and that she wished to conduct a voluntary cautioned interview.

17. This was ultimately arranged for the 28th of June 2019 on which date Ms. Doherty attended at Mountjoy Garda Station. She was approximately 45 years old at the time. D/Sgt. Gillick was joined by her colleague Detective Garda Allan McCarthy (otherwise

"D/Garda McCarthy") at interview. As D/Sgt. Gillick averred, gardaí presented Ms. Doherty with hard copy facsimiles of the Facebook account under investigation, the impugned post and the photograph published thereunder. Ms. Doherty acknowledged that she was the owner of this account, and further admitted to sharing the photograph of Boy A and Boy B and to writing the comment. She told interviewing gardaí that "*the minute*" she had learned that what she had done was a criminal offence, she removed the impugned post from her account.

District Court Proceedings (28th of October 2020)

18. Having outlined the basis of the prosecution case against each of the named respondents, attention now turns to proceedings before the District Court.

19. On the 28th of October 2020, the three named respondents' cases were among ten various matters before the District Court (District Court Judge O'Shea) relating to alleged breaches of s. 252(1)(b) and (4) of the Act of 2001 (and by extension, s. 51 (3)(b) of the same Act). Eight of the ten accused appeared on foot of summonses issued pursuant to s. 1 of the Courts (No. 3) Act 1986; the remaining two accused where represented in court by their solicitor. The context of these proceedings was thus a routine summons list, at which the Judge of the District Court heard an outline of the alleged facts in each case for the purpose of determining jurisdiction.

20. From a reading of the transcript of these proceedings, which was made available to the court below and to this Court, certain observations can be made. First, in respect of each of the ten matters, including the respondents' cases, the appellant's directions favoured summary disposal as opposed to trial on indictment. Second, the Judge of the District Court on that date did not determine jurisdiction on a collective basis, rather he considered each matter in turn and made individual rulings on the issue. Notwithstanding the great similarity the ten matters shared, the Judge of the District Court appeared not to be motivated to deal with them on a collective basis. The following exchange is somewhat illuminating in this regard, inasmuch as it shows that the Judge of the District Court's concern was with how long it would take to go through all ten cases rather than on the basis on which he dealt with the issue of jurisdiction in circumstances where the cases before him bore some similarity:

> *"JUDGE: Yes. Just in terms of timing, it seems to me there's 10 of these cases (sic); is that correct?*
>
> *COUNSEL FOR THE PROSECUTION: I think 11 maybe, 10 or 11.*
>
> *JUDGE: And the facts are similar in all of them?*
>
> *COUNSEL FOR THE PROSECUTION: Yes, but I think you do need to formally --*
>
> *JUDGE: Oh, no, I'm just -- in terms of the logistics of the court, how long the process is going to take.*
>
> *COUNSEL FOR THE PROSECUTION: Very, very similar.*

JUDGE: Okay."

(Emphasis added)

21. Third, while the court on that date was engaged in the exercise of determining jurisdiction, the Judge of the District Court was not disposed to refuse jurisdiction in respect of a particular accused in circumstances where that accused was absent. On this occasion, Mr. Rooney was not present in court, he having followed the advice of his solicitor who attended at the District Court on his behalf. This same solicitor was in court representing another client, who is not a named party to the herein appeal, who was also absent on account of a medical appointment. The Judge of the District Court having initially issued bench warrants for both accused persons' arrests for the purpose of being brought before the court, remarked, "*I wouldn't like to accept or reject jurisdiction without the accused knowing what was happening.*" Nevertheless, in Mr. Rooney's case, in circumstances where that accused had followed the advice of his solicitor, the Judge of the District Court was satisfied that he could determine jurisdiction in his absence.

22. Finally, in respect of each of the ten matters, the Judge of the District Court accepted jurisdiction, and adjourned each matter to the 2nd of December 2020 "*for plea or to assign a hearing date*" / "*for guilty plea or to take a hearing date*". While the wording of the District Court orders merely says, "for plea or date", the transcript of the 28th of October 2020 (from which the preceding quotations are taken) clarifies any ambiguity.

District Court Proceedings (2nd of December 2020)

23. When the ten matters came before the District Court on the 2nd of December 2020, they came before a different Judge of the District Court (District Court Judge Hughes) in what is described at the beginning of the transcript as "*the 11 o'clock summons list*".

24. It should be stated that one of the respondents, Mr. Rooney, was absent but was legally represented at these proceedings. His presence was not required, on account of the Covid-19 pandemic, except for the purposes of entering a plea or for being served a book of evidence. The other respondents were present in court and were legally represented.

25. At the outset of proceedings, the Judge of the District Court requested to hear the alleged facts of each case for the purposes of (re)determining jurisdiction. A precis of these alleged facts (in respect of Messrs. Kyle Rooney and Declan Corcoran) was given by Sgt. Kildea; and a precis of the alleged facts in Ms. Edel Doherty's case was given by a Garda Lorcan McNicholas (otherwise "Garda McNicholas"). The Judge of the District Court did not pause to consider whether to accept jurisdiction on an individual basis, but rather pressed on with hearing summaries of alleged facts for all ten cases before then acting on a collective basis. While counsel reminded the Judge of the District Court at the close of each facts summary that Judge O'Shea had accepted jurisdiction previously, Judge Hughes replied, observing:

"He did, he did, he did, but he hasn't retained seisin of the matter."

26. The Judge of the District Court then went on to refuse jurisdiction, ruling:

> "[...] *The venue and mode of trial for these defendants is a matter for the Director of Public Prosecutions and also for the District Court Judge. In these cases, the DPP has directed that the defendants be prosecuted summarily. The Court must now determine as to whether it will accept jurisdiction of these cases or, if it considers that the cases aren't fit to be tried summarily, the District Court Judge should refuse jurisdiction. And thereafter it will be a matter for the DPP to decide whether the Director consents to the accused being sent forward for trial on indictment before a judge and jury.*
>
> *Now, it's that in these cases the accused have been prosecuted with offences contrary to section 252 of the Children Act 2001 as amended. The penalties for the alleged offence are set out in section [51(3)] for the District Court and also for the Circuit Court. The maximum term of imprisonment is 12 months in the District Court together with a financial penalty and on indictment before a judge and jury on conviction a maximum sentence of three years together with a significant fine. Conroy v. the Attorney General [[1965] I.R. 411] set out (sic) that when determining whether or not an offence was considered to be fit to be tried summarily a Court should consider or may consider the severity of the punishment prescribed for the offence and the moral quality of the act constituting the offence.*
>
> *I have considered a broad outline of the alleged facts. I am satisfied that the offences before the Court are not, in my opinion, minor in nature and are unfit for trial in the District Court summarily. My order is that I am now refusing jurisdiction and I am adjourning these cases* [...]*".*
>
> (Emphasis added)

27. In response to the above ruling, counsel on behalf of each respective respondent made a number of submissions. These arose out of an unhappiness with the Judge of the District Court's redetermination of jurisdiction. As counsel for Mr. Rooney put it,

> *"The circumstances is (sic) that jurisdiction was previously accepted by your colleague on the first day, Judge. The Court has now embarked on a second hearing for jurisdiction. And I'd say that that decision to accept jurisdiction has been made already and there is not jurisdiction today to embark on a second hearing for jurisdiction. I accept that the matter was in for hearing, if there was a summary hearing before the Court and the Court was not satisfied after the hearing of the case, the Court could then refuse jurisdiction, Judge, at the summary hearing. I don't see how the Court can refuse jurisdiction in circumstances where an order has already been made accepting jurisdiction."*

28. Counsel for Ms. Doherty expressed a concern that it was unorthodox for the alleged facts to have been heard for the purpose of determining jurisdiction where they had already been heard for the same reason. Counsel expounded,

> *"I think had the matter proceeded to sentencing hearing or hearing indeed and if the Court, hearing the matter, considered that it wasn't a minor offence, then it would be legitimate to refuse jurisdiction. I think in these circumstances it is highly unusual for the facts to be heard, having been heard on the previous date in circumstances where the Director had directed summary disposal."*

29. Counsel for Mr. Corcoran adopted his colleagues' submissions.

30. Counsel for the Director in essence adopted the position that while the Director may have made her decision as to the venue and mode of trial, ultimately the final say rested with the Judge of the District Court determining jurisdiction. It was not for the Director to gainsay a decision of the District Court as to jurisdiction where that court was "*constitutionally mandated*" to decide whether an offence to be tried is minor or not. The only scenario counsel for the Director could imagine in which jurisdiction as an issue would be "*crystallised*" to such an extent that it could not be revisited would be where an accused had entered a guilty plea and the facts were being heard. However, such a scenario was not at play here.

31. Having heard the foregoing submissions, the Judge of the District Court ruled as follows:

> *"Okay, thank you. I have noted the objections that have been made on behalf of the various accused [...] to the Court's decision to refuse jurisdiction. This is in the back of the previous decision by Judge O'Shea to accept jurisdiction. Today the Court embarked on a hearing of the alleged facts in these various cases. I am of the view that the presiding Judge has jurisdiction in such matters to determine as to whether the cases are fit for trial in the District Court. And I have noted what my colleague, his previous order. The authority is not limited to, but I refer also to the case of the State (O'Hagan) v. Delap [1982] [I.R. 213] where Judge O'Hanlon held that a judge can at any stage decided that an offence is not minor in nature. Quite frankly, I don't share the views of the practitioners who have stated that I don't have jurisdiction in circumstances where another judge has already accepted jurisdiction. I don't share that view. I am not varying my order and I now going to adjourn the matters* [...]*".*

32. The Judge of the District Court then adjourned matters until the 20th of January 2021 for the appellant's directions as to consent to the matters being tried on indictment. He further indicated that should she not so consent, "*the appropriate order is that cases are struck out*".

Judicial Review Proceedings

33. Before the Director had indicated her consent to the matters being tried on indictment, respondents Ms. Doherty and Mr. Rooney had commenced judicial review proceedings, moving separate *ex parte* applications for leave to apply by way of judicial review against the orders of Judge Hughes. These applications for leave were granted by Simons J. on the 25th of January 2021 (in the case of Mr. Rooney) and by Meenan J. on the 1st of March 2021 (in the case of Ms. Doherty), respectively.

34. In the light of these developments, the Director wrote to Mr. Corcoran on the 27th of January 2021 seeking his consent to an adjournment of the criminal proceedings pending a determination of the judicial review proceedings. However, Mr. Corcoran's response to this correspondence was to instead, through his solicitor in a letter dated the 2nd of February 2021, advise that he too would seek to commence judicial review proceedings if the Director did not, within a 7-day period, confirm her intentions regarding consent to send his case forward for trial on indictment. Ultimately, Mr. Corcoran made an ex parte application for leave to apply by way of judicial review, which such leave was granted by Hyland J. on the 1st of March 2021.

35. The matters were listed for mention before the High Court on several occasions throughout 2021 and the first half of 2022, before finally assigned a hearing date of the 31st of May 2022, on which date Phelan J. reserved judgment. This judgment was later delivered on the 8th of July 2022 in which she acceded to the respondents' applications.

High Court Judgment

36. In her judgment, Phelan J. made the following observations based on a reading of the transcript of the 2nd of December 2020. In the first place, she noted that it appeared that the Judge of the District Court, of his own motion, requested to hear the alleged facts in each case for the purpose of determining jurisdiction. This determination was done on a collective, rather than individual, basis. Second, the High Court judge observed that when the Judge of the District Court was reminded that jurisdiction was an issue previously determined by his colleague Judge O'Shea, he responded by saying that Judge O'Shea had not "*retained seisin*" of the matters. She further acknowledged that, following the Judge of the District Court's ruling on jurisdiction, counsel on behalf of the various accused had made submissions objecting to the Judge of the District Court's determination, which such objections were rejected. Finally, the High Court judge observed that no new evidence was put before the Judge of the District Court on the 2nd of December 2020 that was not heard previously on the 28th of October 2020, and that while there was a "*degree of commonality*" among the alleged facts of each respective case there were also "*distinctions between the actions of the various accused person* (sic) *and their level of culpability*".

37. Phelan J. noted that the District Court's competency to determine whether an offence is fit for summary trial is rooted in the text of the Constitution, in particular Article 38.1 and 38.2 wherein it is provided:

> "***Article 38***
>
> *1. No person shall be tried on any criminal charge save in due course of law.*
>
> *2. Minor offences may be tried by courts of summary jurisdiction.*
>
> [...]"

38. It was further noted by the High Court judge that the constitutional position under Article 38.5 is that, save for the trial of minor offences, or the trial of offences before a Special

Court established by law pursuant to Article 38.3 or before a Military Tribunal established pursuant to Article 38.4, "*no person shall be tried on a criminal charge without a jury*".

39. She further observed that the District Court's summary jurisdiction under the Constitution originally found statutory basis in s. 77(B) of the Courts of Justice Act 1924 (which provision has since been repealed), and has now been expanded upon under s. 2(2) of the Criminal Justice Act 1951, as substituted by s. 8 of the Criminal Justice (Miscellaneous Provisions) Act 1997, which 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."*

40. The High Court judge then considered the submissions of the various applicants, which submissions she considered jointly on account of their similarity. In essence, the respondents submitted at first instance: (1) that the Judge of the District Court acted of his own volition in reopening the issue of jurisdiction and did so at an interlocutory stage during a procedural listing, and further that this was done in the absence of new material or information and where he was not required to revisit jurisdiction for summary trial; (2) that the Judge of the District Court had failed to comply with the requirements of fair procedures in circumstances where the parties had not been notified in advance that the matters were before the District Court for the purpose of determining jurisdiction, and; (3) that in approaching the issue on a collective, rather than on an individual basis, the Judge of the District Court had failed to elaborate upon his reasoning for concluding that none of the cases before him involved minor offences fit for summary trial, and thus he was in breach of his duty to give reasons.

41. The Director's response to the above, in the first place, simply asserted the entitlement of a District Court judge, of his or her own volition, to revisit the issue of jurisdiction notwithstanding its previous acceptance by a different Judge of the District Court and that this may occur either prior to or during the trial of an offence. The Director further submitted that the District Court "*is under a continuing and ongoing obligation to ensure that it only deals with minor offences fit to be tried summarily*" and that the law does not require a change in circumstances, a change in the nature of the facts, or the emergence of new material/information before a Judge of the District Court can exercise his discretion to refuse jurisdiction to try an offence summarily. The Director rejected the respondents' submissions regarding lack of notice and lack of individual treatment,

submitting that these issues could not be raised in the context of judicial review having not previously been raised in the District Court.

42. The curial part of the High Court judgment began by observing that in the context of so-called "*hybrid offences*" (that is, offences capable of being tried summarily or on indictment) a Judge of the District Court is not precluded from determining the issue of jurisdiction, notwithstanding its previous acceptance by a different Judge of the District Court. This "*common case*" position flows, the High Court judge observed, "*from the fact that a judge called upon to potentially convict and sentence an accused for the offence must be satisfied that the offence is minor and suitable for trial summarily.*"

43. The respondents sought to distinguish between what they regarded as "*substantive*" or "*necessary*" jurisdiction (that is, they submitted, jurisdiction exercised in order to accept a plea of guilty or by way of adjudicating at trial) and "*procedural*" jurisdiction. Phelan J., however, was not satisfied that this distinction was expressly made out in the case-law before the Court. While she agreed with the respondents that the facts of the present case materially differed from those in *The State (O'Hagan) v. Delap* [1981] I.R. 125 and *Reade v. Judge Reilly & DPP* [2010] I.R. 295, which distinction the respondents sought to rely upon in support of their argument that there was no constitutional imperative at play to necessitate the vindication of their right to trial by jury in the present cases, Phelan J. nevertheless observed that these cases make it clear: (i) that a Judge of the District Court is "*under a continuing obligation*" to be satisfied that what is before him is capable of being summarily disposed of as a minor offence, which entitles him to reconsider the issue of jurisdiction "*at any time*", and; (ii) that the exercise of this jurisdiction is not dependent upon the emergence of "*new information*".

44. Accordingly, Phelan J. regarded the respondents' position, that Judge Hughes was not exercising "*necessary*" jurisdiction and was thus removed from his obligation to be satisfied that the offence before him was minor, as incorrect. She further regarded it as not proper that the function of the District Court on the 2nd of December 2020, when the matters were listed "*for plea or date*", were characterised as "procedural" by the respondents, as before any plea could be accepted the Judge of the District Court had to be satisfied that if a guilty plea was entered the Court would be properly acting within jurisdiction in proceeding to convict and sentence the accused. The High Court judge further observed that *Sweeney v. District Court Judge Lindsay* [2013] IEHC 210 offered support for the proposition that previous acceptance of jurisdiction by one Judge of the District Court is not binding upon another.

45. The High Court judge was also referred to the case of *Ryan v. DPP* [2020] IEHC 53 by the respondents. This case, in which a decision of a Judge of the District Court refusing jurisdiction was quashed on account of a breach of rules of natural justice arising in circumstances where he had not been properly advised that he had previously accepted jurisdiction and that the Director had consented to summary disposal and where the accused was not in attendance. On the facts of the present case, it could not be said that Judge Hughes was not properly advised, the only similarity between *Ryan* and the present

cases related to the Judge of the District Court's lack of an enquiry as to whether Mr. Rooney was present in court and proceeding without ensuring his presence.

46. With respect to the respondents' submissions regarding a failure to furnish reasons, the High Court judge was referred to a number of authorities including *Oates v. Browne* [2016] 1 I.R. 481, *Lyndon v. Judge Collins* [2007] IEHC 487, *Sisk v. District Court Judge O'Neill* [2010] IEHC 96 and *Kenny v. Judge O'Coughlan* [2014] IESC 15. While the Director submitted to the High Court that the Judge of the District Court gave a clear and reasoned basis for his decision and was entitled to treat of the various matters before him in a single ruling on account of their similarity, and that he was not required to "*itemize*" each prosecution case against each accused, this argument was rejected by Phelan J. She held at para. 88 of her judgment:

> *"If the ruling made by the District Judge were made in respect of the facts of any one particular case having heard an outline of the alleged facts in that case, I would not consider there to be a requirement for any further expansion by the District Judge. A separate question arises, however, where the facts of some nine separate cases are heard together and then ruled on together as occurred in this case. In my view, it was not open to the Judge to form the view that every breach of s. 252(1) was not minor as this would not only breach the requirement of constitutional justice to give individual consideration to each case but would also frustrate the statutory interpretation in creating a hybrid offence. I am satisfied that the facts and circumstances of each of the cases before the District Court, while similar, were different and the question of jurisdiction required individual consideration in each case. The way in which individual consideration is demonstrated is through addressing cases on a case-by-case basis with reasoning referable to the facts and circumstances of that case, where appropriate. In this way, constitutional justice requires a level of reasoning in the communication of a lawful decision in each cade in a manner which demonstrates that the decision is made with regard to the particular circumstances of that case."*

47. Phelan J. went on to hold, at para. 89:

> *"Allowing for the fact that there is no requirement to give detailed reasons and acknowledging that there is a similarity of subject matter between the ten cases, it remains the case the offence of its nature is not automatically beyond the jurisdiction of the District Court and therefore each case requires individual consideration. It seems to me that by dealing with all cases in a single ruling without acknowledging, still less addressing differences between each of the ten cases, the requirement that justice not only be done but be seen to be done is not met in this case in that the Applicants cannot be satisfied from the reasons stated in the manner in which they were stated in a single ruling applied to all ten cases that the District Judge directed his mind adequately to the issue of jurisdiction in each individual case."*

48. The Director observed in the High Court that the respondents had not raised any point in the District Court regarding the absence of notice nor did they raise any point that reasons had not been given on an individual basis. She thus argued that it was not open to the respondents to advance these points in challenging the Judge of the District Court's decision. It was further submitted that these complaints rang "*hollow*" in the light of the presence of the respondents' respective legal representatives in the District Court who were in a position to make submissions on these very points. In this regard, reliance was placed by the Director on *DPP v. Dublin Metropolitan District Court & DA* [2021] IEHC 705, in which the High Court (Ferriter J.) held that where submissions on the legal rule against sequential trials were not made in the District Court, it could not then be taken in the High Court. The circumstances of that case concerned a single alleged incident out of which both a charge of sexual assault (in respect of which the District Court had previously accepted jurisdiction) and a charge of oral rape (which statutorily had to be tried on indictment before the Central Criminal Court) arose, and the District Court had to consider the question of jurisdiction on the sexual assault charge once more. Phelan J. readily distinguished this authority from the present cases on the basis that it was "*quite clear*" that Judge Hughes was aware from the representations made on the 2nd of December 2020 that the parties objected to his approach. As Phelan J. held at para. 92 of her judgment, this awareness gave rise to an onus on the Judge of the District Court's part "*to be satisfied as to the fairness of the process both as regards participation by the parties and as regards the reasoning of decisions as both are essential components of constitutional justice in decision-making*".

49. Nevertheless, Phelan J. did not regard the respondents' complaint of lack of notice to be well-founded. This was for a multiplicity of reasons, including: the attendance of their legal representatives in court; no claim to the effect that had they received notice they would have given evidence on the issue, still less what evidence they would have given if that was the case, and; the absence of at least one of the respondents on a previous occasion in circumstances where it was understood that the question of jurisdiction was likely to be considered. Moreover, the High Court judge took the view that as the District Court was under "*a continuing duty to be satisfied as to its jurisdiction*", this meant that the respondents should be taken to have been on notice that jurisdiction was a question liable to be revisited at any stage.

50. The High Court judge did, however, reject the Director's contention that the respondents should not be permitted to pursue their complaint that there was a lack of adequate reasoning in circumstances where, the Director submitted, the Judge of the District Court had not been requested to elaborate on the basis for his decision. Phelan J. regarded it as not realistic that legal representatives of accused persons should be required to engage with the Judge of the District Court in relation to the adequacy of his reasons given in respect of each individual case in circumstances where his decision was pronounced on a global or collective basis. Further, the High Court judge was not satisfied that the circumstances on the 2nd of December 2020 necessitated the provision of reasons at a later date, and she observed that the Judge of the District Court pronounced his decision without purporting any intention to later elaborate on its basis.

51. Having regard to the foregoing, Phelan J. concluded that the manner in which the Judge of the District Court approached the issue of jurisdiction on the 2nd of December 2020, by approaching it on a global basis rather than on an individual basis, or at the very least by reference to the differences existing between the cases, breached the respondents' rights to constitutional justice inasmuch as each respondent could not be satisfied "*that the decision taken had proper regard to the particular circumstances of his or her case*".

52. Accordingly, the High Court made orders of certiorari quashing the orders of the District Court made on the 2nd of December 2020. These orders were dated the 25th of July 2022 and were perfected on the 26th of August 2022.

Notices of Appeal

53. In a series of Notices of Appeal lodged on the 8th of September 2022, the Director now appeals against the judgment and consequent Orders of Phelan J. In these Notices of Appeal, she sets out the various grounds she advances. As these various grounds are, for the most part, common to the three Notices of Appeal, they are capable of being paraphrased together:

    (i) That the High Court judge erred in law in holding that the requirement that "*justice not only be done but be seen to be done*" had not been met in the present cases. It is further submitted that the argument that this requirement had not been met was not made out before the High Court.

    (ii) That the High Court judge erred in law in granting relief to the respondents in circumstances where no objections to a collective decision being taken by the Judge of the District Court were made by the respondents in the District Court. Further no argument was made at District Court level that each respondent's respective case was distinguishable from the rest of the matters before the court on that date.

    (iii) That the High Court judge erred in law in granting relief in circumstances where the respondents had not been granted leave to seek judicial review on the ground of a contended failure to furnish reasons, an argument which in any event, the Director submits, was not made out.

    (iv) That the High Court judge erred in law in holding that the respondents could not be satisfied from the reasons stated in a single ruling by the Judge of the District Court that he had not directed his mind adequately to the issue of jurisdiction in each case.

    (v) That the High Court judge erred in law in circumstances where the respondents (in particular Mr. Rooney) had not been granted leave to seek judicial review on the ground that the Judge of the District Court had operated a "*fixed policy*".

Parties' Submissions

Director's Submissions

54. The main thrust of the Director's submissions to this Court is that the High Court erred in holding that the Judge of the District Court's treatment of the ten matters in a single, global ruling was unlawful. It is observed that the similarities among the cases of *Rooney*, *Corcoran*, and *Doherty* are "*remarkable*" and "*striking*". With this in mind, the Director submits that it was appropriate and lawful to treat of these cases in the form of a single ruling.

55. The Director expands upon this. She submits that no point was made by any of the respondents before the District Court that reasons had not been given in individual cases. The Director thus maintains her position adopted in the High Court that it was not open to the respondents to have challenged the District Court's decision on matters not argued before that court, and she once again relies upon *DPP v. Dublin Metropolitan District Court & DA* [2021] IEHC 705 in this regard. The High Court's rejection of this argument was incorrect, the Director submits. She draws this Court's attention to certain key facts, specifically that each respondent was legally represented at District Court level and that their respective lawyers had made submissions on the question of jurisdiction. The High Court judge's rationale in distinguishing between *DPP v. Dublin Metropolitan District Court & DA* and the immediate cases (described at para. 48, above) was erroneous, it is submitted. The Director observes that the question of jurisdiction was related to the question of giving reasons, notwithstanding the separation between the two owing to the fact that the latter question pertained to rules of natural justice. The High Court treated of these two questions separately, but any distinction sought to be drawn with the judgment of Ferriter J. in *DPP v. Dublin Metropolitan District Court & DA* "*was not of significance*", it is submitted, as in any event the general principle applied by Ferriter J. applies to the present cases too, i.e. "*that a litigant cannot keep a point to him or herself only for it to be later deployed in judicial review proceedings.*" With this in mind, the Director has sought to remind this Court that in none of the ten matters before the District Court on the 2nd of December 2020 did the respective legal representatives of the various parties in court on that date take any issue with the process other than the revisiting of the question of jurisdiction. The Director thus submits that "*this shows that there was no question of anyone being in any doubt but that the Judge had considered each of the cases and came to a view that these were not minor offences fit to be tried summarily*".

56. The Director directs the Court's attention to the wording of the Judge of the District Court's ruling, which we have reviewed and is exhibited at para. 26 above. It is submitted that the wording of this ruling points to individual consideration having been "*clearly given*" to each case. It is contended that for the High Court to have held, as it did, that the Judge of the District Court failed to demonstrate individual consideration, is "*to simply disregard the words used by the Judge, and thereby err in effectively discharging some form of appellate function rather than judicial review*" (and to do so in circumstances where there was nothing to suggest that the Judge of the District Court did not afford each case individual consideration). The High Court stepped into this error, the Director argues, by holding that individual consideration had to be demonstrated "*by reference to itemised aspects of each case*", and that this ruling was made without reference to any specific authority that a Judge of the District Court must give separate rulings on cases of

"*such obviously related subject matter*". In so ruling, it is submitted that the High Court disturbed "*well-established authority that District Judges are not obliged to give detailed and discursive reasons in their judgments*."

57. Moreover, the Director observes that the High Court's ruling in this regard "*sits uneasily*" with its finding that the reasons the Judge of the District Court gave were "*sufficiently expansive*". As such, it is submitted that had there been just one case before the District Court on the 2nd of December 2020 the Director would have been successful in standing over the reasons given. The global treatment of the ten matters arose because of the "*very similar nature of the alleged facts*" / "*closeness of subject matter*" / "*the clear commonalities*" among all of them, which Director submits justified "*a collective decision*, *which itself was reasoned*".

58. Building upon the foregoing submissions, the Director observes that in the context of hybrid offences, a choice is given to the prosecutor as to venue of trial and that this choice is subject always to the rule that the District Court will only deal with offences it deems to be minor. To hold, as the Director submits the High Court judge did hold, that the giving of a single ruling frustrated the intention of the Oireachtas in creating a hybrid offence under s. 252(1) of the Act of 2001, is to step into error. The Director notes that the Judge of the District Court knew of the Director's preference for summary disposal, he had received evidence in each case, and his reasons were regarded by the High Court as "*sufficient and adequate*". The Director submits that the High Court took issue with the Judge of the District Court's approach only because it involved treating of the ten matters before him on a global basis in the form of a single ruling. The Director observes that the High Court regarded this single ruling as having failed to demonstrate individual consideration, notwithstanding that the Judge of the District Court had heard evidence in relation to each individual case moments beforehand.

59. As such, the Director submits that the High Court judge conflated the concepts of "*individual consideration*" and "*individual decision*", and that this marks a fundamental error in her judgment. She observes that the High Court judge remarked in her judgment that it was not open to the Judge of the District Court to decide that every alleged breach of s. 252 was not minor, but in the absence of individual decisions it is impossible to gauge the Judge of the District Court's view on each individual breach. The Director further submits that there is no authority requiring a Judge of the District Court to demonstrate individual consideration by way of individual decisions.

60. The Director submits that the effect of Phelan J.'s judgment, as requiring a Judge of the District Court to give separate rulings in respect of each individual in the context of several matters involving similar charges, would upset the "*essential*" balance "*that District Judges can administer justice fairly and properly without being obliged to engage in unnecessarily detailed and itemised judgments.*" It is argued that this effect could be particularly "*burdensome*" in the context of pre-trial issues and in circumstances where a separate or individual ruling has not been requested by an accused's legal representative.

61. A particular point of contention, on which the Director placed considerable emphasis at the oral hearing of the appeal, concerns the requirement that "*justice must not only be done but be seen to be done*". The Director's position is that any "*reasonable onlooker*" or "*objective bystander*" attending at the District Court on the 2nd of December 2020, having heard the evidence given and the pronouncement of a ruling moments later, would have been aware that the Judge of the District Court's ruling was one "*which obviously and clearly was a global ruling covering a number of highly similar cases*". The problem with the High Court judge's approach towards this particular issue, the Director submits, is that she applied the wrong test. While the test should have been objective in nature, it is submitted that what the High Court judge applied was subjective in nature, viewing the ruling from the standpoint of the respondents and asking whether they could be "*satisfied from the reasons stated in the manner in which they were stated in a single ruling applied to all ten cases that the District Judge directed his mind adequately to the issue of jurisdiction in each individual case*". This was erroneous, the Director argues.

62. The Director cites a number of authorities in support of this point, to which this Court has had regard. Among them, *Naisiúnta Léictreach Contraitheoir Éireann Coideachta Faoi Theorainn Ráthaoichta v. The Labour Court & Ors* [2021] IESC 36; *The State (Hegarty) v. Winters* [1956] I.R. 320, and; *Farrelly v. Judge Watkin* [2015] IEHC 117.

<u>*Submissions on behalf of Mr. Rooney*</u>

63. In respect of the issue of a duty to give reasons, the following is submitted on behalf of Mr. Rooney. In the first place, it is emphasised that the Judge of the District Court failed to deal with the merits of each prosecution case separately and did not refer to any of the specific alleged facts, the gravity of alleged offending or the moral culpability of any individual accused. Second, it is stressed that the Judge of the District Court did not give any indication as to why the question of jurisdiction was being revisited, and it is submitted that the manner in which the Judge of the District Court approached proceedings on the 2nd of December 2020 gave rise to "*a reasonable apprehension that he was dissatisfied with the previous determination of a colleague and wished to overturn and displace that determination with his own*". In such circumstances, it is contended that the requirement for the provision of adequate reasons was "*particularly acute*", and the manner in which the Judge of the District Court approached the matters, by re-hearing the alleged facts for the purposes of redetermining jurisdiction, introduced "*an unacceptable level of arbitrariness in respect of a matter of such significance to an accused person.*" The reasons for embarking on such a course and arriving at the decision made ought to have been "*readily discernible*". It is submitted that the making of a single, global ruling (described in submissions as a "'*blanket*' ruling") rendered it impossible for the respondent to gauge whether factors relating to other accused persons' offending, or the number of people charged with the same offence, "*tipped the balance in favour of refusing jurisdiction*". In support of his submissions, the respondent places reliance on the Supreme Court authority of *Mallak v. Minister for Justice* [2012] 3 I.R. 297, in particular a passage from p. 322 of the judgment of Fennelly J.:

> *"In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. [...]*
>
> *Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them."*

64. The respondent submits that the Director, in arguing that the High Court judgment went against the grain of established authority indicating that there is no requirement for the District Court to provide extensive or lengthy judgments or to engage in lengthy exposition of reasons, mischaracterises the meaning and effect of the High Court's decision. It is stressed that the High Court did not set out such a requirement, rather the court below was concerned with whether the respondent was afforded fair procedures in circumstances where it was not clear whether the Judge of the District Court had given individual consideration to his case in considering the issue of jurisdiction. It is submitted that the High Court's approach was consonant with well-established principles in the Mallak line of authority.

65. The respondent does not accept the Director's contention that relief had been granted on the basis of grounds in respect of which leave had not been granted. The respondent had obtained leave to argue that the Judge of the District Court's decision was made in breach of fair procedures and was fundamentally flawed, and it is submitted that the requirement that "*justice not only be done but be seen to be done*" falls squarely under that.

66. In response to the Director's submission that the respondents did not complain in respect of the single global ruling in the District Court and thus should have been debarred from raising this point in judicial review, the respondent argues that this "*incorrect and unfounded*". It is submitted that the respondent's solicitor did object to the manner in which the Judge of the District Court dealt with the issue of jurisdiction, and that the single, global ruling deprived the respondent's solicitor of the opportunity to indicate a view on the appropriateness of that approach. As the ruling had already been given, there was no requirement for the respondent's solicitor to comment on the Judge of the District Court's approach and it would have been inappropriate to do so when the ruling had been given in the context of an objection having already been taken. In any event, the Judge of the District Court did not invite parties to make submissions on the approach to be adopted. Thus, the respondent submits that the Director's reliance upon *DPP v. Dublin Metropolitan District Court & DA* is "*misplaced*" as the facts of the present case are distinguishable therefrom.

67. While the respondent accepts that a Judge of the District Court is not precluded from revisiting jurisdiction to try an offence summarily in circumstances where that issue has previously been determined, he submits that this is not the case where a Judge of the District Court is not called upon to adjudicate on a matter in any substantive way which requires him to be satisfied that the matter before him involves a minor offence. In this

regard, the respondent maintains the distinction he made in the High Court between "*substantive*" or "*necessary*" jurisdiction and "*procedural*" distinction, and that the High Court erred in finding against him and his fellow respondents on this point. He submits that the Judge of the District Court's reliance upon *The State (O'Hagan) v. Delap* was misplaced inasmuch as that authority concerned a Judge of the District Court who had already embarked on a summary trial at which stage certain facts (previously unknown to him) were disclosed, and following this disclosure the Judge of the District Court formed the view that the matter before him involved a major rather than a minor offence. Additionally, the respondent argues that *Reade v. Judge Reilly & DPP* is also distinguishable from the present case as in that case jurisdiction was refused following a plea of not guilty and the commencement of hearing evidence. In net, it is submitted that in the present case the Judge of the District Court was not called upon to exercise "substantive" jurisdiction such that he would be required to be satisfied that there was no constitutional imperative under Article 38.5 for the accused's right to a jury trial to be vindicated.

68. The respondent argues that the Judge of the District Court's refusal of jurisdiction amounted to a breach of the rules of natural justice sufficient to ground the quashing of his order. This was so not least because it followed what the respondent regards as a "*simple, unnecessary, 're-hearing' of the alleged facts which lead to a different conclusion than that previously arrived at*". The respondent places reliance upon *Ryan v. DPP* [2020] IEHC 53 in this regard, notwithstanding obvious points of distinction between that case and the present one. He notes that the Judge of the District Court, of his own motion, requested a re-hearing of the facts for the purpose of determining jurisdiction. Having heard an outline of these facts in relation to each of the matters before him, he then gave a "*blanket decision*" to refuse jurisdiction in respect of all of them. When reminded that jurisdiction had already been determined on a previous occasion, his response was to point out that the last Judge of the District Court had not retained seisin of the matters and to state that he had "*noted*" this reminder. In response to objections from the parties to the "*highly unusual*" approach the court had taken in requesting a rehearing of the facts for the purpose of determining jurisdiction in circumstances where it was a previously determined issue and where no "*substantive steps*" were being taken, the Judge of the District Court indicated that he did not share parties' views and maintained his position in respect of jurisdiction. The respondent submits that this interfered with his right to natural and constitutional justice, and argues:

> *"The District Judge was functus officio and acting in a quasi-judicial manner in simply substituting his own view for that of his colleague in the manner in which he did."*

69. The respondent stresses that the specific circumstances of the hearing on the 2nd of December 2020 were such that the Judge of the District Court was not invited to revisit the issue of jurisdiction (nor was it necessary for the proper exercise of his functions), and there was no introduction of new or distinguishing material not previously considered by or available to the District Court on the 28th of October 2020. The respondent submits

that, in such circumstances, the Judge of the District Court, in acting of his own volition, acted unlawfully. The manner of his approach towards his proceedings gave rise "*to a reasonable inference that he was not satisfied with the previous assessment of his colleague and wished to overturn and replace that determination with his own view of the offences alleged.*" To act as he did, absent the emergence of a new fact, gave rise to what the respondent terms a "*flip-fop effect*" such that while *O'Keefe v. Governor of St. Patrick's Institution* [2006] I.R. 228 makes clear that a decision to accept jurisdiction to try a hybrid offence summarily is not ascribed to any Judge of the District Court but to the District Court more generally, to consider this issue where it has been previously determined, and on the basis of the same facts, cannot "*reflect the judge having applied mature consideration to the issue, or dwelt upon the uncertainty of his or her own original jurisdiction*". The Judge of the District Court's ruling in this case thus constituted

> *"no less than an arbitrary setting aside of the first judge's decision, without deference to it, and displacing "the court's" properly made decision [not] preferred by that judge who has come second to the listing of the matter".*

70. It is submitted that the effect of this arbitrary action was to expose the respondent to trial on indictment and the potential infliction of penalties the severity of which is significantly greater than those that would otherwise be imposed upon summary conviction. This, thus, warranted the grant of relief where such consequences have resulted from "*manifestly unfair*" procedures adopted by the Judge of the District Court on the 2nd of December 2020.

Submission on behalf of Mr. Corcoran

71. The respondent opens the case of *The State (O'Hagan) v. Delap* and again notes the key distinction between that authority and the present case, namely being that in *Delap* it was the presence of new and additional factors impacting on the original decision to accept jurisdiction that justified the revisiting of the issue. The respondent submits that this view is supported by a decision of Ní Raifeartaigh J. in *Gifford v. DPP* [2017] 2 I.R. 761 wherein this important distinction was noted as allowing for the reconsideration of the previous decided jurisdictional question. It is also argued that this is further supported by *Feeney v. District Justice Clifford* [1989] I.R. 668 (referring to *The State (McDonagh) v. O'hUadhaigh* (Unreported, High Court, 9th of March 1979)) and *Reade v. Judge Reilly & DPP*, cited above, which authorities attach significance to the existence of evidence disclosing that an offence to be tried is not minor. The respondent submits that in the present case, no evidence was scheduled to be called before the Judge of the District Court, who was not assigned the trial, and the parties were in attendance on that occasion for the purpose of being assigned a date.

72. The respondent also submits that Reade is not applicable in the immediate case. While he accepts that a decision to refuse jurisdiction can be made prior to trial and in the circumstances identified, he argues that it can only occur in the context of what a Judge of the District Court is actually being called upon to determine. In the present case, there was no indication that any party intended to enter a guilty plea, nor was there any indication that any party intended to seek an adjournment or to canvas other issues

which might have had a bearing on how matters were to proceed. No "*substantive*" step was being taken in the proceedings by any of the parties. As such, the respondent submits that the High Court judge erred in holding that the hearing of the 2nd of December 2020 was not merely "*procedural*" and that the Judge of the District Court was thus permitted to act as he did.

73. The respondent "*firmly*" adopts the position that once jurisdiction as an issue is dealt with by one Judge of the District Court, it is not open to another to review or reconsider the issue at any stage "*until such time as the issue is properly before him or her*". He repeats the observation that the Judge of the District Court on the 2nd of December 2020 acted of his own volition, in circumstances where he was not required to receive evidence or revisit the question of jurisdiction, and that he reversed a previous decision of another Judge of the District Court in the absence of new or additional information that might have a bearing on whether the offences before him were minor. What the Judge of the District Court did, it is submitted, is he "*simply substituted his own view*" over that of the Judge of the District Court on the 28th of October 2020 in circumstances where the trial had not been assigned to him. The respondent argues that the only time jurisdiction would become a live issue once more would have been:

> *"a. At any prospective trial of the offence; or*
>
> *b. If the accused pleaded guilty with the intention of being sentenced by him; or*
>
> *c. If the prosecution wished to bring forward new or additional evidence not previously available which may have been relevant to the decision on jurisdiction."*

It is submitted that none of the above applied in the present case.

74. The respondent contents neither he nor his legal adviser were on notice of the Judge of the District Court's intention to revisit the issue of jurisdiction. This placed him at a clear disadvantage "*in the fundamental sense in circumstances where an accused person is entitled to be present, to be heard and to make submissions on the issue of jurisdiction in the ordinary course.*" While the respondent was indeed represented on the day, he submits that the lack of notice deprived him of furnishing his representative with instructions that extended beyond the procedural listing of the matter on that date. Thus, it is argued that the proceedings were "*manifestly unfair*" and were not in accordance with the *maxim audi alteram partem* and his entitlement to take part properly and effectively in the criminal process.

75. For the avoidance of any doubt, the respondent stresses that his solicitor supported the objections to the issue of jurisdiction being revisited in the circumstances of the proceedings on the 2nd of December 2020. He submits that the Director's claim that there was a failure on his solicitor's part to raise an objection to the making of a single ruling is without merit. In response, he replies: "*It would have been highly impertinent to continue to raise objections once the Judge had ruled given what had preceded his*

decision". He further submits, in a similar vein to Mr. Rooney, that the Director's reliance upon *DPP v. Dublin Metropolitan District Court & DA* is misplaced in the present case.

76. Similarly, again, to Mr. Rooney's submissions, the respondent submits that the Judge of the District Court's ruling was fundamentally flawed inasmuch as he had failed to furnish reasons as to why the respondent's individual alleged offending was not minor and thus not fit for summary trial. This failure was made all the more stark because the requirement for such reasons at that stage arose in circumstances where jurisdiction had previously been accepted. While it is conceded that there was similarity among the various matters before the Judge of the District Court on the 2nd of December 2020, it is nevertheless submitted the lack of differentiation between alleged facts in each case failed to make clear the important distinctions between the actions of the various accused persons and their respective levels of culpability. Moreover, it gave rise to a concern that aspects of some cases may have had a bearing on the Judge of the District Court's view on jurisdiction in respect of others; that they had a "*tipping point*" effect. In regard to this aspect of his submissions, the respondent relies, like Mr. Rooney, upon *Mallak* but also upon *Oates v. Browne* (cited above in the High Court judgment summary).

77. Finally, the respondent submits that he has been "*fundamentally and irredeemably prejudiced*" by the ruling of the 2nd of December 2020. In his submissions, he has helpfully spelt this prejudice out in bullet-point format which is quoted below:

> *"a. The Respondent is now exposed to trial on indictment and the resultant increase in severity of penalties both in terms of a potential custodial sentence and monetary fine;*
>
> *b. The Respondent may be deprived of availing of the provisions of the Spent Convictions Act 2016 within the meaning [of] ss.4 and 5 in the event that he receives an "excluded sentence" which would not have arisen had the matter remained in the District Court;*
>
> *c. The Respondent will be excluded from applying to the Circuit Court for an order under s.1(1) of the Probation of Offenders Act 1907 and being left without a criminal conviction;*
>
> *d. The Respondent will be excluded from applying to the Circuit Court for an order striking out the charge and being left without a criminal conviction (see, for example, DPP v. District Court Judge Ryan [2011] 3 I.R. 641)."*

78. In such circumstances, it is submitted that intervention on the part of the High Court was justified, having regard to the "quantum leap" in consequences faced as a result of the Judge of the District Court's refusal of jurisdiction.

<u>*Submissions on behalf of Ms. Doherty*</u>

79. It is submitted on behalf of Ms. Doherty that following the events of the 28th of October 2020 she was entitled to presume that until such time that the matter was next before

the District Court to deal substantively with the trial of the offence, or a guilty plea was being entered in order to be sent forward for sentencing, the issue of jurisdiction was not live. Repeating previous observations that the Judge of the District Court acted of his own volition and in the absence of new material in reconsidering the issue of jurisdiction, and ultimately refusing it, the respondent submits that he was not entitled to do so at "*an interlocutory stage*" and when the matter had not been assigned to him for anything other "*than the filling of hearing slots on a future date*".

80. Ms. Doherty's submissions repeat previous arguments advanced by her fellow respondents regarding the Judge of the District Court's lack of entitlement to reconsider jurisdiction in the absence of new material, and regarding *Delap*'s inapplicability to the present case.

81. It is further submitted, in a similar vein to the foregoing respondents, that the proceedings on the 2nd of December 2020 were "*procedural*" and not "*substantive*" in nature, and this distinction is also relied upon by Ms. Doherty in arguing that the *Reade* case is not supportive of the Judge of the District Court's actions on that date, and that the High Court judge erred in finding otherwise.

82. Ms. Doherty's submissions also advance a similar argument to that contended by Mr. Corcoran, namely that the Judge of the District Court on the 2nd of December 2020 was not entitled in the circumstances to revisit the question of jurisdiction, and that he merely did so because he was dissatisfied with his colleague's previous determination and sought to overturn it, and in its place substitute his own view. It is submitted that the fact that the Judge of the District Court, by his own volition, requested to hear the alleged facts for the purpose of determining jurisdiction supports this interpretation of events.

83. Ms. Doherty's written submissions in respect of the absence of notice point are identical to Mr. Corcoran's, as is her position in respect of the Director's complaint of lack of objection from the respondents and a supposed attempt to litigate issues not previously raised. Ms. Doherty's written submissions are also identical insofar as they are structured in a similar fashion to Mr. Corcoran's submissions on the point of the Judge of the District Court's failure to furnish reasons as to why her particular alleged offending was not fit to be tried summarily; and they are identical on the point of prejudice arising from the Judge of the District Court's ruling of the 2nd of December 2020.

The Court's Analysis and Decision

Relevant law and jurisprudence

84. It is convenient at the outset to consider the relevant law and jurisprudence. The starting point in terms of the issues that arise in this case is the Constitution of Ireland, and what it has to say concerning the right to trial by jury.

85. Article 38.5 of the Constitution provides:

"Save in the case of the trial of offences under section 2, section 3 or section 4 of this Article no person shall be tried on any criminal charge without a jury."

86. In the circumstances of this case we need not concern ourselves with section 3 or section 4 of Article 38, as they relate to special courts and military courts respectively. Of direct relevance, however, is section 2 of Article 38, which provides:

"Minor offences may be tried by courts of summary jurisdiction."

87. The District Court, a court of local and limited jurisdiction, is a court of summary jurisdiction. Unfortunately, the Constitution nowhere defines a minor offence. However, the Supreme Court has considered the issue in a number of cases, notably in *Melling v. Ó Mathghamhna* [1962] I.R. 1, *Cullen v. Attorney General* [1979] I.R. 394, *State (Wine) v. Clancy* [1980] I.R. 228, *The State (Pheasantry Ltd.) v. Donnelly* [1982] I.L.R.M. 512 and *L'Henreyenat v. Ireland* [1983] I.R. 193 amongst others, and it has been held that the severity of the punishment likely to be imposed, appraised from the standpoint of an ordinary citizen, is the primary criterion. As Charleton J. observed in *Reade v. O'Reilly* [2007] IEHC 44 at para. 10,

"the test which is applied is to look at the nature of the offence, the charge that is alleged, and the facts that the prosecution propose to attempt to prove against the accused, and to discover the effective penalty that is likely to be imposed".

88. The nature of summary jurisdiction was authoritatively stated by O'Higgins C.J. in *The State (McEvitt) v Delap* [1981] I.R. 125. The facts of the case were straightforward. Mr. McEvitt was charged in the District Court pursuant to a complaint that he and others had, on a specified date, committed an offence contrary to the provisions of s. 3 of the Prohibition of Forcible Entry and Occupation Act,1971. In the context of protest, he and his companions had engaged in a sit-in on the premises of the B + I (British and Irish) shipping line on Westmoreland Street in Dublin, and had refused to leave. Although he had accepted that the offence with which he was charged was a minor offence within the meaning of Article 38.2 of the Constitution, Mr. McEvitt maintained that he was entitled to be tried by a jury. The Judge of the District Court, District Court Judge Delap, however, was proposing to try him summarily as desired by the Director of Public Prosecutions. During an adjournment of the District Court proceedings, Mr. McEvitt went to the High Court and successfully obtained a conditional order of prohibition forbidding the District Court from continuing with the further hearing of the complaint, unless cause was shown to the contrary. He was later successful in obtaining an order absolute, notwithstanding the cause shown by the State who represented the respondent District Court Judge. The High Court's order was appealed to the Supreme Court and the appeal was allowed, that court holding that a defendant who is being prosecuted in the District Court in a summary manner in respect of an alleged offence (not being a minor offence) under the Act of 1971 was not entitled to be tried by a jury.

89. The leading judgment was given by the former Chief Justice who expressed the view that considerable confusion appeared to exist with regard to the exercise of summary

jurisdiction, and he stated that it would be helpful to look at the development and history of summary jurisdiction. In that regard, he went on to state (at pp. 129/130 of the report):

> *"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 (eg, 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) L.R. 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.*
>
> *Apart from the transferred jurisdiction of the former Justices of the Peace and the prescribed jurisdiction in relation to scheduled indictable offences under the Act of*

1951, other statutes create particular offences and provide for summary trial; these statutes, in so providing, confer additional jurisdiction on the District Court in relation to the new offences which are thereby created. When one of these statutes only provides for summary trial, the offence created by the statute is not indictable and cannot be tried by a jury."

90. On the specific issue before the Supreme Court the former Chief Justice held (at p.131):

"In this case we are […] dealing with a statutory offence; it is created by s 3 of the Prohibition of Forcible Entry and Occupation Act, 1971, and is being prosecuted in a summary manner under s 7 (a) of that Act. It is not even contended that an offence so prosecuted under this provision is other than a minor offence. The validity of the statute, or of any of its provisions, is not called into question. Since the offence being prosecuted is a minor offence, no right to trial by jury at the request of the accused exists unless such is conferred by the statute; and such is not conferred. In my view, the fact that the prosecution is given the right to proceed by indictment as an alternative to summary trial is irrelevant to the issues and considerations which arise in this appeal."

91. In a concurring judgment, Henchy J. offered the following further observations (at pp. 132/133):

"The offence in question here was created by s 3, sub-s 1, of the Act of 1971. Section 7 of the Act provides that every person who commits an offence under the Act shall suffer certain prescribed penalties on summary conviction, and certain other (more serious) prescribed penalties on conviction on indictment. It follows that a person who is charged with an offence under s 3 of the Act of 1971 will fall to be tried either summarily 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 District 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 procedures laid down by the Criminal Procedure Act, 1967, for the preliminary examination of an indictable offence.

I would hold that it is only when it is duly determined by the District Justice that the offence charged under s 3 of the Act of 1971 is not a minor one that the accused has a right to trial by jury. The contention to the contrary, put forward on behalf of the prosecutors, could be accepted only if a statutory option to be tried by jury in respect of a summary offence was vested in them – as was the case in England in regard to certain summary offences under s 17 of the Summary Jurisdiction Act, 1879 (which Act did not apply to Ireland). In the absence of such a statutory option, I would infer that it was the legislative intention that the trial of an offence under s 3 of the Act of 1971 is to be a summary one when the District Justice duly determines that the offence is a minor one, and that otherwise the trial is to be on indictment. Therefore, the decision as to the mode of trial lies with the District Justice on the due exercise of his judicial appraisal of the relevant factors. This means that when, as in this case, the circumstances plainly and by common consent show the offence charged to be a minor one, the District Justice had no option but to rule that it should be tried summarily."

92. The offence at issue in these proceedings is one that was triable 'either way' (i.e., summarily or on indictment). In the case of such offences the DPP gives a direction as to mode of trial, but, as is illustrated by the judgment of Henchy J. in *The State (McEvitt) v. Delap*, it has been held that the District Court has a duty to satisfy itself that the offences are minor in nature in order to allow the trial to proceed summarily. The issue received further consideration by Charleton J., in the High Court, in *Reade v. Judge Reilly* (cited previously), a decision subsequently upheld in the Supreme Court (see [2009] IESC 66, reported at [2010] 1 I.R. 295).

93. In *Reade v. Judge Reilly* the applicant, Mr. Reade, faced charges of false imprisonment, contrary to s. 15 of the Non-Fatal Offences against the Person Act 1997, and of assault causing harm, contrary to s. 3 of the same Act. The Judge of the District Court had initially accepted jurisdiction leaving them to be a minor offences and later, after he had embarked on a summary trial, indicated a change of mind and sought to abandon the summary trial. The applicant sought an order in the High Court compelling the Judge of the District Court to hear the case against him, and in effect to resume hearing the trial summarily.

94. The essential facts insofar as they bear relevance to the issue that arises in the present case are set out in para. 3 of Charleton J.'s judgment as follows:

"The applicant was summonsed to appear before Mount Bellew District Court on 3rd March, 2005. What happened on that day was that the learned District Judge was fixing a list of trial dates and it was therefore sensible of him to see whether or not this was a case in respect of which he could accept jurisdiction. He asked the prosecuting Garda whether he could look through the relevant statements. After a couple of minutes perusal he indicated that he would accept jurisdiction in the case. The defence solicitor then made an application for details of telephone logs between Mount Bellew Garda Station and Ballinasloe Garda Station. The matter was put in

for trial on 1st December, 2005. In the interim there was correspondence in relation to telephone records and photographs of the injuries to Ms. Gleeson. On 1st December, 2005, the trial commenced with the evidence of Karen Gleeson. After some minutes of her evidence the learned District Judge intervened and stated that he was sorry but he was stopping the trial because, as far as he was concerned, it did not fall within his jurisdiction. In other words, it was not a minor offence. The matter was adjourned to 5th January, 2006, for the service of a book of evidence, so that a trial could take place before a jury in Galway Circuit Court."

95. In considering the issue before him, Charleton J. commenced by considering the historical context whereby the District Court acquired jurisdiction to conduct summary trials. He noted the observations of O'Higgins C.J. in *The State (McEvitt) v. Delap* concerning the considerable confusion that sometimes exists with respect to the exercise of summary jurisdiction and, having quoted extensively from that case, observed that the case before him provided a good example of the sort of confusion which could arise. He went on to consider the various relevant legislative provisions governing the jurisdiction of the District Court including s. 2(2) of the Criminal Justice Act 1951, as substituted by s. 8 of the Criminal Justice (Miscellaneous Provisions) Act 1997, which made express provision for the assumption of jurisdiction by the District Court in proper cases. He added that in more modern times the framework provided by that legislation was sometimes bypassed in favour of a legislative formula which creates an offence and then provides a penalty that is within the jurisdiction of the District Court, if it is tried summarily, or a much larger penalty if the accused is found guilty on indictment before a jury, and instanced by way of example s. 7(a) of the Prohibition on Forcible Entry and Occupation Act 1971 (which had featured in the *Delap* case) and s. 3 and s. 15 respectively of the Act of 1997 (which were relevant in the case before him). He observed that the ordinary interpretation given to sections such as these is that the option of trial on indictment or summarily is with the DPP. Unlike under s. 2 of the Criminal Justice Act 1951, as amended, the accused has no say in the matter. He stated that:

"The reality of what happens is that an official in the Director of Public Prosecutions office looks at the file and makes an estimate of the maximum sentence the particular offence will attract and then directs a summary trial or a trial on indictment. The case is then processed in accordance with that direction. I infer that that is what happened here."

96. Turning to consider the law, Charleton J. referenced Article 38.5 of the Constitution and remarked that, *"[i]t is defining a minor offence that causes the problem".* He referenced *The State (Rollinson) v. Kelly* [1984] I.R. 248, and *Melling v. Ó Mathghamhna* [1962] I.R. 1 in observing that the test which is applied is to look at the nature of the offence, the charge that is alleged, and the facts that the prosecution propose to attempt to prove against the accused, and to discover the effective penalty that is likely to be imposed. While it is of no relevance in the present case, he discusses further the uncontroversial view that there are some offences where the moral turpitude attaching to their commission means that a summary trial must always be impossible.

97. Charleton J. stated that the duty of the District Court in dealing with offences which have a dual mode of trial necessarily involves the court in assessing the facts and the potential penalty that a conviction may attract. The only way to give effect to Article 38.5 is by the District Court assuming the jurisdiction to ensure that the accused has afforded his or her constitutional right to a trial by jury where, on the judicial assessment of the facts, the charge is not a minor one. He found support for this, placing the matter beyond doubt in his view, in three cases, namely *The State (McDonagh) v O'hUadhaigh* (Unreported, High Court, 9th March 1979); *The State (Holland) v Kennedy* [1977] I.R. 193, and *The State (McEvitt) v Delap* [1981] I.R. 125.

98. He referenced the Supreme Court's decision in *Feeney v. District Justice Clifford* [1989] I.R. 668, as being authority for the proposition that once an accused has pleaded guilty following an assumption of jurisdiction by the District Court there can be no going back on that. In his judgment in that case, McCarthy J. had observed:

> *"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."*

99. In *Reade v. Judge Reilly*, Charleton J. ultimately concluded and held:

> *"22. Article 38.5 of the Constitution provides that persons accused of criminal offences have a right to be tried by a jury, except where the case is one subject to military law, where it is within the jurisdiction of a Special Criminal Court or where it is a minor offence. In the first instance, modern statutes which create an offence and give an option of different penalties on summary disposal or disposal on indictment require the Director of Public Prosecutions to decide on the mode of trial. That decision is always subject to judicial scrutiny. The duty of insuring that Article 38 of the Constitution is implemented in the trial of offences rests with every judge sworn to try criminal cases. Even if a judge in the District Court takes a preliminary view that the papers he has before him or her discloses a minor offence, the court is still under a constitutional imperative to insure that the case is tried with a jury should it emerge on a further perusal of the facts, or on hearing the evidence at the actual trial itself, that the case involves a non-minor offence. That duty continues up to the point of conviction, at which time the power to decide that an offence being tried summarily is not a minor one is spent.*
>
> *23. In this case, the learned District Judge appraised himself of the facts and made a preliminary decision that it was a minor offence. In hearing the case, the evidence of the alleged injured party caused him to change his mind. In deciding to discontinue hearing the case and to send it forward for trial to the Circuit Court he acted both properly and in discharge of his constitutional duty to ensure the proper*

disposal of criminal offences under Article 38 of the Constitution. I do not equate a perusal of papers with a plea of guilty. The District Judge was not only at liberty, but was obliged, to change his mind on realising that what was before him could not be disposed of summarily as a minor offence. This did not require an additional hearing, or a change in the nature of the evidence. Whereas the applicant, as the accused in that case, may regard it as unfair that his trial was not disposed of when it was listed, the constitutional scheme requiring that non-minor offences be tried before a jury meant that the learned respondent was ensuring, as a judge, that his constitutional rights as a person accused of a crime were upheld."

100. Another case that merits mentioning is *Donovan v. The Governor of The Midlands Prison* [2016] IEHC 287. In that case, the High Court (Humphreys J.) was concerned, in the context of an inquiry under Article 40.4.2° of the Constitution, with the validity of a committal warrant which had been issued following the conviction of the applicant, upon a plea of guilty, in the District Court of an offence contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997, and his subsequent sentencing to imprisonment for a period of six months. The point being relied upon was that the warrant had failed to state expressly that there had been an express finding that the offence was a minor offence. It was ultimately unsuccessful, but in the course of Humphries J.'s judgment the following observations are made *obiter dictum* under the heading "*Is there an obligation on the district court in dealing with an offence to be satisfied that it is a minor offence?*":

"24. It seems to me that an obligation on the District Court to be satisfied that an offence being substantively dealt with is a minor offence must be regarded as a continuing and ongoing obligation of a jurisdictional nature by virtue of Article 38.2 of the Constitution. I do not find the argument advanced by Mr. Power that this is simply a veto to jurisdiction, as opposed to a threshold that must be met, to be a very convincing proposition. Whether an offence is major or minor is primarily determined by the penalty involved. Thus 'summary only' offences are inherently minor, given that by definition they cannot be visited with non-minor penalties. 'Either way' offences or even 'indictable only' offences may, depending on the circumstances, be either major or minor. Where the District Court is dealing with such offences, it must be positively satisfied that they are minor if the court is to go on to deal with such matters substantively. I appreciate that part of the common parlance of the situation is to speak of the District Court 'declining jurisdiction' as Macken J. did at in Reade v. Judge Reilly [2010] 1 I.R. 295 at 311. But in the absence of the court being of the view that the offence is minor, the court does not have jurisdiction under Article 38.2. Thus it is not really a question of 'declining jurisdiction' if the offence is non-minor but rather of the court only having jurisdiction in the case of minor offences."

101. It is also appropriate to reference *O'Keeffe v. Governor of St Patrick's Institution* [2006] 1 I.R. 228, alluded to by the High Court judge in this case at para. 58 of her judgment, in which it was held that the jurisdiction to try summarily an offence triable either way is vested in the District Court rather than an individual judge of the District Court, such that

it is not necessary for the trial judge to personally address the issue of whether or not the case involves a minor offence fit to be tried summarily where a decision as to jurisdiction has already been made. Once a judge of the District Court has determined that the offence is minor, any District Court judge is entitled to proceed with the case without revisiting the question of jurisdiction. However, it is accepted by the parties that the fact that summary jurisdiction was accepted by one District Court Judge does not *per se* prevent the same judge or another District Court Judge subsequently coming to the view that the offence is not 'minor' in the context of adjudicating on the matter at a future hearing. However, in the present case the respondents seek to make the case that unless some further or additional factors relevant to the issue of jurisdiction were before the second District Court Judge, he was, in the circumstances, *functus officio* in respect of the issue of jurisdiction.

102. Finally, it is necessary to reference *Sweeney v. District Court Judge Lindsay* [2013] IEHC 210, which was influential in the decision of the High Court judge in this case. The Sweeney case concerned an applicant against whom there was a criminal prosecution for assault causing harm in respect of which he was co-accused with another. Both accused had initially appeared before District Court Judge Fahy in Galway who had heard an outline of the facts and had been prepared to accept jurisdiction on the basis that the alleged offences were minor offences. The cases came on for trial before District Court Judge Lindsay. On the date of hearing, when the case was called, the applicant's solicitor indicated that his client intended pleading guilty. However, his plea was not entered at that time. Rather, as the co-accused had intimated an intention to plead not guilty, the Judge of the District Court proceeded to hear the case against the co-accused in the first instance. In the course of hearing that case the Judge of the District Court viewed CCTV footage and received medical reports concerning the injured party's injuries, neither of which had been seen by District Court Judge Fahy. In the course of the hearing the Judge of the District Court expressed concern that the case was too serious to be dealt with summarily and indicated that he proposed to refuse jurisdiction. In response to this, the DPP's representative advised the court that jurisdiction had already been considered and accepted by a different Judge of the District Court. District Court Judge Lindsay opted in the circumstances to continue with the trial, and ultimately acquitted the applicants co-accused.

103. The co-accused having been acquitted, the case against the applicant was called a second time. The Judge of the District Court asked the prosecuting inspector to outline the facts against the applicant. That having been done, the Judge of the District Court indicated that he was refusing jurisdiction and adjourned the case for a book of evidence. The applicant then applied to the High Court for various reliefs by way of judicial review, contending that District Court Judge Lindsay had acted without jurisdiction and contrary to natural and constitutional justice and fair procedures in refusing jurisdiction in the applicant's case in circumstances where, against the same factual background, and having been told that jurisdiction had been accepted by District Court Judge Fahy, he had proceeded with the trial of the co-accused notwithstanding having expressed reservations about whether he had jurisdiction.

104. In his judgment, Peart J. stated (*inter alia*):

> *"29. […] It is true that during the trial pf the co-accused he stated that the offence was a serious one and was then informed that Judge Fahy had already accepted jurisdiction, and he proceeded further with the trial, and in fact acquitted the co-accused on the evidence which he had seen and heard. But the fact that Judge Fahy had already accepted jurisdiction would not be sufficient to bind the first named respondent, either in the case of the co-accused or the applicant. He could decide that matter himself in the light of his own assessment. Neither in my view is the fact that he continued with the trial of the co-accused having been informed that jurisdiction had been accepted by Judge Fahy, sufficient to prevent the first named respondent from reaching a different decision in respect of the applicant when given an outline of the facts alleged against the applicant.*
>
> *30. I should add that simply because both accused are charged with the same offence does not mean that because it is considered a minor offence against one accused, a different view cannot be taken in respect of the other. The respective roles of each can be considered in relation to a consideration of the seriousness of the offence. Clearly the first named respondent having seen and heard the evidence against the co-accused concluded that he had a relatively low level of involvement, if any, since he acquitted him. Equally, he seems to have considered that the involvement of the applicant was significant and more serious, and in the light of the medical report in respect of the victim, that it was not a minor offence, hence he sent him forward on indictment, despite his plea of guilty.*
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> *31. The decision on the present application in my view turns on what occurred up to the time when the trial of the co-accused commenced. At paragraph 4 of her affidavit sworn to ground this application for leave to seek judicial review Ms. Corcoran avers that when both cases were first called at the District Court on the 3rd February 2012 she "advised the first respondent that the applicant intended to plead guilty to the charge ....." (my emphasis). She goes on in that paragraph to state that the first respondent then proceeded to hear the case against the co-accused, Mr Ward in respect of whom she had informed that he intended to enter a plea of not guilty.*
>
> *32. At paragraph 6 of the same affidavit, Ms. Corcoran then avers that having concluded the co-accused's case and having acquitted him of the charge, the first respondent then "took up the applicant's case", and that he called upon the prosecuting Inspector to outline the facts alleged in the applicant's case. She goes on to state that having heard those facts as outlined, the first named respondent refused jurisdiction. He had of course, as already stated, seen for himself the CCTV footage during the trial of Mr Ward, and the medical report on the victim. I have already stated that I do not consider that the first respondent was bound to accept jurisdiction because Judge Fahy had already made such a determination. The first named respondent was entitled to form his own view of the matter, since he is*

without any jurisdiction to hear the case summarily unless he considers that the case is a minor offence."

The Issues on Appeal:

Substantive or necessary jurisdiction v. procedural jurisdiction.

105. Turning to the issues that arise in the present case, we should say immediately that we do not recognise the distinction sought to be drawn by the respondents between the exercise by a Judge of the District Court of "*substantive*" or "*necessary*" jurisdiction on the one hand, and "*procedural*" jurisdiction on the other hand. The Constitution provides that in Article 34.1 that justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution. Whether a Judge of the District Court exercising his/her criminal jurisdiction is engaged upon determining the substantive issue of whether an accused be guilty or not guilty of a charge preferred against them in the course of a summary trial, or is merely concerned with determining some procedural issue or taking some procedural step along the road to the eventual trial of that accused whether by the District Court in exercise of its summary jurisdiction, or by another court at a trial on indictment, he/she is nonetheless exercising their constitutional remit and is administering justice. A judge is no less bound when engaged on the latter type of tasks to exercise judicial independence, or to decide any issue arising for decision, in the words of the declaration made by him/her upon assuming office, "*without fear or favour, affection or ill-will towards any man*", and to "*uphold the Constitution and the laws*". It is to be presumed, in the absence of evidence to the contrary, that such judge will have the Constitution at the forefront of their mind in whatever they are doing on the bench, whether it be substantive or procedural.

Was District Court Judge Hughes functus officio insofar as jurisdiction was concerned?

106. One very important Constitutional imperative to which regard must always be had by a Judge of the District Court in any criminal matter is an accused's right, save where the Constitution otherwise provides, to trial by jury under Article 38.5, and the need to be ever conscious that any jurisdiction vested in the District Court to try an accused summarily is contingent on the offence charged being a minor offence.

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.

108. We do not see how a judge of the District Court in such a position could be bound by the ruling of a colleague which was based on evidence that they have not personally heard, and in respect of which (it being the District Court) there will almost certainly be no transcript immediately available, so as to be functus officio on the issue of jurisdiction. Assuming an accused, having been placed on his election, has not himself/herself opted for trial by jury, then, up until the point of a decision in the course of a summary trial on whether the accused be guilty or not guilty of the charge, or the intimation by an accused that he/she is pleading guilty to the charge, the decision as to whether a case is or is not a minor offence is not a determination set in stone. It is always capable of being revisited, and should be revisited, by any judge of the District Court who has any doubt or concern about jurisdiction; and it is not, therefore, an issue to which, from the perspective of the parties, concepts like *res judicata* or *issue estoppel* can apply. An order or determination of a court which is not final and conclusive creates no estoppel. A judicial decision which is not absolute will not ground a plea of *res judicata*. From the perspective of a judge, his/her primary concern must be to faithfully comply with their declaration to uphold the Constitution and the law. Any concern about not being seen to afford curial deference to the decision of a colleague on an issue as fundamental as jurisdiction must yield to that primary concern. A second or subsequent judge on coming into a case previously being managed by a colleague, and concerned to be personally satisfied that the case does involve a non-minor offence, is entitled to ask to have evidence relevant to jurisdiction adduced again before them, as occurred here, and to satisfy himself/herself on the issue of jurisdiction. We do not accept that further or additional factors are required to justify such a request, or indeed to justify the taking of a different view by the second District Court judge from that taken by the first District Court judge. For all anyone may know, the decision by the first District Court judge could well have been a finely balanced one, resulting in that judge opting by a narrow margin to come down on one side of the jurisdictional line. However, a second or subsequent judge, hearing the same evidence, might perfectly legitimately opt to come down on the other side of that line. A conscientious judge may therefore occasionally find himself/herself in the position of being obliged to differ with the earlier conclusion of a colleague as to jurisdiction, and the fact that he/she does so should not reflect adversely on either of them.

109. In conclusion on this issue, we agree with the finding by the High Court judge in para. 77 of her judgement that the fact that District Court Judge O'Shea had accepted jurisdiction on the previous occasion did not in any way bind District Court Judge Hughes on the same issue. District Court Judge Hughes was not *functus officio* insofar as the issue of jurisdiction was concerned and was entitled to ask for evidence as to the facts and to make his own decision as to whether or not the offences were minor offences.

110. For the reasons that we have given, we expressly reject any suggestion such as that made in the Statements of Grounds on behalf of the respondents that District Court Judge Hughes must be regarded as having unlawfully acted in a quasi-appellate role with regard to the earlier decision of District Court Judge O'Shea concerning jurisdiction.

111. Moreover, we must also expressly reject the pleas made in parts of the Statement of Grounds to the effect that the manner by which District Court Judge Hughes dealt with the proceedings gave rise to a reasonable apprehension that he was dissatisfied with the previous determination of a colleague, such that he wished to overturn and displace that determination with his own views on the offences, even if he was never assigned or allocated the task of conducting a summary trial of the offences. There is simply no evidence whatever to justify such an apprehension, which far from being a reasonable one appears to us to have been put forward on an entirely speculative basis. On the contrary, we have been provided with no reason to believe that District Court Judge Hughes was motivated other than to conscientiously fulfil his constitutional duties.

The High Court's finding of insufficient reasons

112. We propose to address, under this heading, the complaint that the High Court judge erred in holding that the requirement that "*justice must not only be done but be seen to be done*" was not met in the circumstances of this case; and further the complaint that the High Court judge erred in granting relief to the respondents in circumstances where no objections were raised in the District Court on the 2nd of December 2020 to a collective ruling being given by the Judge of the District Court. A further facet to this is the contention that the High Court judge erred in law in holding that the respondents could not be satisfied from the reasons stated by the Judge of the District Court that he had directed his mind adequately to the issue of jurisdiction in each case. Further, we will address the complaint that the High Court judge erred in granting relief to the respondents in circumstances where they had not been expressly granted leave to seek judicial review on the ground of a contended failure to furnish reasons.

The Pleading Point

113. Dealing with the last point first, the orders granting leave in each instance followed the standard formula for granting leave to apply for the reliefs set forth at paragraph D in each respondent's Statement of Grounds, upon the grounds set forth at paragraph E therein. It is therefore necessary to consider the respondents' respective Statements of Grounds.

114. In the case of Ms. Doherty, it is expressly pleaded at E (xxix) that:

> "[…] *the manner by which the determination was made was fundamentally flawed in that the district judge failed to furnish reasons as to why the offence alleged to have been committed by this applicant was not minor and fit to be tried summarily. The requirement for reasons in the decision-making process in this case was critical in circumstances where a previous determination on jurisdiction had been made*

and was now being reversed. The District Court Judge entirely failed to deal with each prosecution separately and, furthermore, did not distinguish the reasons as to why the offence alleged against this applicant and the specific alleged facts, meant his conduct was of a severity and or moral culpability necessitating jurisdiction to be refused".

115. In the case of Mr. Corcoran, a plea in identical terms to that just quoted is made at E (xxx) of his Statement of Grounds.

116. In the case of Mr. Rooney, it is expressly pleaded at E.12 of his Statement of Grounds that "*the District Court did not give a separate decision in respect of each of the prosecutions but rather, heard an outline of alleged facts in each case, and at the end of the last case, determined that the offences were not minor and unfit for summary trial.*" It is further expressly pleaded at E.14 that "*the court failed to deal with each prosecution separately on its own merits and did not distinguish between any of the cases before him in terms of the specific alleged facts, level of severity and/or moral culpability*".

117. We are satisfied on the basis of these pleas that issues of an alleged failure to give reasons, alternatively an alleged failure to give individual reasons, alternatively an alleged failure to give adequate reasons, have been properly and adequately raised in the pleadings. We would uphold the ruling of the High Court judge that the respondents were not debarred from pursuing a complaint regarding a lack of adequate reasoning.

The failure to give reasons in each case individually.

118. At para. 85 of her judgment, the High Court judge quoted from the judgement of Hardiman J. in *Oates v. Browne* [2016] 1 I.R 481, where he stated at pp. 524/525 of the report:

> *"It is a practical necessity that reasons be stated with sufficient clarity that if the losing party exercises his or her right to have the decision reviewed by the Superior Courts, those Courts have the material before them on which to conduct such a review. Secondly, and perhaps more fundamentally, it is an aspect of the requirement that justice must not only be done but be seen to be done that the reasons stated must "satisfy the persons having recourse to the tribunal, that it has directed its mind adequately to the issue before it."*

119. The issue with which the High Court judge was concerned was whether such reasons as were given by District Court Judge Hughes for refusing jurisdiction were sufficient to satisfy the respondents that he had directed his mind adequately to the issue before him. If not, then it was a case of justice not being seen to be done. It is relevant in our view that no objection was raised in the District Court to the manner in which the Judge of the District Court gave his ruling. We have been provided with a transcript of the proceedings on the 2nd of December 2020. After the Judge of the District Court had indicated that he wished to hear the alleged facts of each case to determine whether it was appropriate to accept jurisdiction in the cases before him evidence was called from relevant gardaí.

Garda McNicholas gave evidence of the facts insofar as they related to Ms. Doherty, while Sgt. Kildea gave such evidence insofar as it related to Mr. Corcoran and Mr. Rooney, respectively. Individual evidence was given in respect of the respondents. At the end of this, the Judge of the District Court addressed the parties in court and gave the ruling previously quoted at paragraph 26 of this judgment. Following this, the legal representatives for each of the respondents raised objections with the Judge of the District Court concerning his re-visitation of the issue of jurisdiction, in circumstances where a judicial colleague had earlier accepted jurisdiction. There was a complaint that what had occurred was unusual, and indeed unexpected, and it was submitted that District Court Judge Hughes had lacked jurisdiction to embark on a reconsideration of whether the offences at issue were minor offences in circumstances where an order had already been made by another judge accepting jurisdiction. Significantly, however, nobody complained (a) about the fact that a collective ruling had been given, or (b) about a lack of clarity as to the judge's reasons for his determinations.

120. In her judgment, the High Court judge held that it would have been unrealistic, in the circumstances of these cases, to have required the legal representatives for the accused persons to engage with the judge in relation to the adequacy of the reasons given in respect of his determinations after he had pronounced his decision. We disagree with her view in that respect. Objecting to the revisiting of jurisdiction is not the same thing as articulating a complaint that the reasons for a decision on jurisdiction are opaque, or even absent. The legal representatives of the respondents would have been perfectly entitled, and arguably obliged if they felt they did not understand the basis on which the judge had arrived at the decision in respect of their client that he had arrived at, to ask him to elaborate on such reasons as he had given. They did not do so, and ostensibly the reason for this was that they were universally of the belief that he was not entitled, or at the very least seriously doubted that he had an entitlement, to revisit jurisdiction in circumstances where a judicial colleague of his had accepted jurisdiction having heard essentially the same evidence. However, that is to have disagreed with what he did, not a failure to comprehend his stated reasons for doing it.

121. We are strongly in agreement with the submission made by the appellant to the effect that the mere fact that the Judge of the District Court ruled on jurisdiction in a single collective or rolled up ruling does not imply a failure on his part to give individual consideration to each of the respondents' respective cases. He had listened to evidence as to the facts insofar as they related to each of the respondents individually. In circumstances where, having done so, he was of the view in all cases that the offences were not minor offences, he was perfectly entitled to give a collective or rolled-up ruling. We are not persuaded, having considered the transcript, that any of the respondents could have been of the view that because a collective ruling was given there had been a failure by the Judge of the District Court to adequately consider the circumstances of their individual case from the point of view of assessing jurisdiction. No submissions were made to the effect that one or more of the respondents' cases was so different from the others as to have required a different or differentiated ruling, and we see nothing in the evidence that was before the District Court that would have justified the making of

different or differentiated rulings. It strongly comes across from the transcript that the presiding Judge of the District Court on the 2nd of December 2020 carefully and conscientiously approached the issue of whether or not he could properly assume jurisdiction in each case, and with concern at the forefront of his mind to be personally satisfied that the offences in question were properly ones that could be tried summarily.

122. As to the further complaint that such reasons as were in fact given were too sparse to enable the respondents to know that the judge had adequately directed his mind to each individual case, we reject that complaint. It is well established that in a forum such as the District Court, short reasons will in most cases be sufficient. It is neither required, nor desirable, that elaborate reasons should be set out. In this particular instance the respondents each knew that the judge had heard a broad outline of the facts insofar as they related to each of them individually, and as to what had been said. In his ruling he expressly confirmed that he had considered this evidence. Further, he made clear that, in the light of having done so, he was "*satisfied that the offences before the court are not, in my opinion, minor in nature and are unfit for trial in the district court summarily. My order is that I am now refusing jurisdiction and I am adjourning these cases* […]". In our assessment, these, admittedly terse and brief, reasons were sufficient for the respondents to know why jurisdiction was being refused. There was no requirement on the Judge of the District Court to elaborate further, and in that regard, we disagree with the High Court judge on that issue and would allow the appeal in consequence thereof.

123. In our assessment, in regard to the issue of jurisdiction, there was no failure to meet the requirement that not only should justice be done but that it should be seen to be done.

124. In conclusion, we do not consider that there was any unfairness to the respondents, or breach of their rights to constitutional justice, in the manner in which the Judge of the District Court conducted the proceedings on the 2nd of December 2020. *The orders of certiorari* granted by the High Court, and the consequential orders remitting these matters to the District Court for a plea or a date in each case, and the High Court's orders in regard to costs, are hereby vacated.

125. We will instead remit these matters to the District Court to ascertain whether, in light of this judgment, the DPP is consenting to the respondents being sent forward for trial on indictment, and, if so, for service upon them of a book of evidence and the taking of such further procedural steps as may be required in the matter.

Costs

126. We propose to adjourn any issues as to costs or possible recommendations under the Legal Aid (Custody Issues) Scheme to a case management list some weeks hence (the exact date of which will be notified to the parties), at which directions will be given in regard to progression and finalisation of those matters.