

**THE HIGH COURT**

[2021] IEHC 359  
[2020 No. 234 JR]

**BETWEEN**

**SEÁN THACKABERRY**

**APPLICANT**

**- AND -**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**JUDGMENT of Mr Justice Max Barrett delivered on 18th May 2021.**

**SUMMARY**

The key question arising in this application is whether at the jurisdiction hearing conducted by a District Judge in circumstances where a person is accused of a so-called 'hybrid' offence (one triable summarily or on indictment) of which the accused can only be guilty if he has committed a previous 'trigger' offence, the trial judge (who will unavoidably be aware of the existence of at least one previous trigger offence) is entitled to proceed to enquire into the facts and details of same. The court concludes by reference to relevant authority that the District Judge is not so entitled and must not so proceed.

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1. A sex offender within the meaning of the Sex Offenders Act 2001 must, under s.10 of that Act, keep the Gardaí notified of certain details about his life. If he does not do this, he can be prosecuted and convicted of an offence under s.12 of the Act. A s.12 offence is an example of what is known as a 'hybrid' offence, i.e. one that that can be prosecuted summarily or on indictment.
  2. In General Direction No.3 of 8th November 2011 to members of An Garda Síochána, the DPP indicates, at section 4(1) of same, that she "*elects for summary disposal in the following category of cases without submission of a Garda file...(i) a breach of section 12 of the Sex Offenders Act 2001, as amended*". However, she notes at section 4(2) that:

*"The Garda having carriage of the case should consider forwarding the file to the Director...in any case where, although the offence or offences are captured by the above election, the multiplicity of the offences or the previous record of the accused or other aggravating circumstances suggest that summary disposal would be inappropriate or that a 12 month sentence (or in the case of more than one offence a 24 month sentence) would be inadequate",*

and adds, at section 6, that:

*"The Garda Síochána are encouraged to seek directions in any case, even of a summary nature, where there is an unusual question of law involved, where the charge is without fairly recent Irish precedent or where the matter has aroused unusual public interest or is likely to do so".*

3. By virtue of the DPP's General Direction No. 3, a s.12 offence will generally proceed summarily, though the potential exists, where a particular issue/concern is perceived to present, for it to proceed on indictment.
4. When an alleged s.12 offence comes before the District Court, the District Judge has to decide whether the facts of the alleged offence are such that he should refuse jurisdiction essentially because of the seriousness of the offence presenting. Typically at jurisdiction hearings, a District Judge will not be told about any criminal record of the accused, as it is a pre-trial hearing and the presumption of innocence applies in its entirety. However, when greeted with a sex offender accused of a s.12 offence, a District Judge will necessarily know that the accused has a previous criminal record embracing at least one sexual offence. This is unavoidable; however, the District Judge does not unavoidably know anything else concerning that previous sexual offence, and proportionality requires that there should not be what counsel for Mr Thackaberry referred to at hearing as "*an exposé of that offence*" in the context of a decision as to jurisdiction.
5. The question that arises in this application is whether, in deciding on jurisdiction, the District Judge, to contextualise what he is dealing with, can enquire into the facts of the previous sexual offence/s that have brought an accused within the scope of ss.10 and 12 of the Act of 2001. As will be seen, previous case-law points to this being something that the District Judge cannot ask about. This is because it involves straying into irrelevant considerations and would yield a reasonable apprehension of bias. A follow-on question that immediately arises is what if, in the concern for the presumption of innocence, there is something which, unknown to the District Judge, makes a matter unsuitable for summary trial. This question is answered by Ní Raifeartaigh J. in *Gifford v. DPP* [2017] 2 I.R. 761, where she observes as follows, at p.780:

*"As to any practical disadvantages arising from a prohibition on references being made to previous convictions during the jurisdiction decision-making part of the process in open court, this can be, and has been, dealt with by conferring a statutory power upon the Director of Public Prosecutions to withhold consent summary trial".*

6. I turn below to consider the case at hand in more detail. Before proceeding, however, one general point might usefully be made. That point is as follows. This application is concerned with a pre-trial process. Hence cases such as *Corporation of Dublin v. Flynn* [1980] I.R. 357 and *State (O'Hagan) v. Delap* [1982] I.R. 213 that go to a trial process are concerned with a different limb of the criminal process and so are not considered hereafter. The court notes in passing that it was referred by counsel for the DPP to a consideration of *Flynn* and also of *Clifford v. DPP* [2013] IESC 43 in McGrath, D. and E. Egan McGrath, McGrath on Evidence, 3rd ed. (Dublin: Round Hall, 2020). With respect, however, that consideration, at paras. 13-34 et seq. is expressly concerned with proof of conviction during a trial, which rather reinforces the point just made by the court, viz. that care has to be taken when approaching case-law and commentary that one is

treating the case-law and commentary concerned with the limb of the criminal process with which this application is concerned, i.e. a pre-trial determination as to jurisdiction.

7. Turning then to the case at hand, Mr Thackaberry has been charged with an offence contrary to s.12 of the Sex Offenders Act 2001. When his case was called before the District Court on 19th November 2019, a garda sergeant informed the court that the DPP had directed *summary* disposal of the charge (as per General Direction No.3). The District Judge queried if the alleged offence was indictable, counsel for the State sought time to confirm if this was so, the District Judge granted the adjournment sought and also directed that the State provide details of the underlying offence which had led to the s.12 charge.
8. On 26th February 2020, when Mr Thackaberry's case was again called, another garda sergeant informed the court that the DPP had directed *summary* disposal of the charge (as per General Direction No.3). The garda sergeant also provided an outline of the offence which had resulted in Mr Thackaberry becoming subject to the requirements of the Sex Offenders Act. Having heard these details the learned District Judge refused jurisdiction. A transcript of the exchanges on the 26th has been furnished to the court and reads, amongst other matters, as follows:

*"DEFENCE COUNSEL: I appear on behalf of Seán Thackaberry, Judge....This matter is listed for the purpose of jurisdiction, Judge.*

*DISTRICT JUDGE: Okay. DPP summary?*

*GARDA SERGEANT: DPP direct summary, Judge. There was a question whether this charge was simply summary or indictable. It is indictable, Judge.*

*DISTRICT JUDGE: Okay, and what are the allegations?*

*GARDA SERGEANT.... [F]ailing to comply with Sex Offenders Register, Judge.*

*DISTRICT JUDGE... [I]s this on foot of a conviction in the higher courts..?*

*GARDA SERGEANT: Yes Judge....[T]he conviction relates to a matter which came before the Central Criminal Court, Judge.*

*DISTRICT JUDGE: The Central Criminal Court?*

*GARDA SERGEANT.... [A]t the Central Criminal Court on the 8th of May 2013, aggravated sexual assault contrary to section 3. That's...the triggering offence...for the registering under the Sex Offenders Act.*

*DISTRICT JUDGE: That's what he was convicted of?*

*GARDA SERGEANT: Yes, Judge....*

*DISTRICT JUDGE... What [were]...the penalties?*

*GARDA SERGEANT: He received a 7½ year conviction on that, Judge.*

*DISTRICT JUDGE: Okay. This conviction was [before] the Central Criminal Court. I am satisfied this is not a minor allegation. I'm going to refuse jurisdiction. The date's the –*

[Court Note: It is striking that notwithstanding that he has just refused jurisdiction, the learned District Judge to this point has had no express regard whatsoever to the details of the alleged offence that is actually before him.]

*DEFENCE COUNSEL: Can I just ask on what basis the court is refusing jurisdiction? I appreciate that the offence that the sergeant has outlined is in respect of a matter that he [Mr Thackaberry] has been convicted of previously.*

*DISTRICT JUDGE... I know that.*

*DEFENCE COUNSEL: The allegation was simply in respect of not –*

*DISTRICT JUDGE: Not registering, exactly, but the Court would have to take the wider picture. I've asked a few questions. It's failure to comply with – it's basically saying...he has to comply with the Sex Offenders Act 2001....[A]s it's a non-minor allegation, I'm refusing jurisdiction.*

*DEFENCE COUNSEL: May it please the Court."*

9. Mr Thackaberry claims that the learned District Judge (i) erred in law in (a) taking into consideration and/or attaching undue weight to irrelevant considerations (the nature of Mr Thackaberry's original sexual offence), and (b) failing to take into consideration adequately or at all relevant considerations, namely the circumstances of the offence actually alleged against Mr Thackaberry, (ii) acted without, or in excess of, jurisdiction in determining that the facts alleged did not constitute a minor offence and were not fit to be tried summarily. The principal reliefs now sought by Mr Thackaberry are an order (a) quashing the order refusing jurisdiction and (b) remitting matters to the District Court for fresh consideration.
10. By way of relevant law the court has been referred to Article 38.2 of the Bunreacht ("*Minor offences may be tried by courts of summary jurisdiction*"), as well as to, amongst other provisions, ss.10 and 12 of the Act of 2001 (considered in detail later below).
11. Before proceeding further, the court notes, and respectfully rejects, the DPP's contention that the within proceedings seek to usurp the jurisdiction of the District Judge by seeking to compel the District Judge to accept jurisdiction. This contention involves a fundamental misapprehension as to the nature of an order of judicial review proceedings, for

notwithstanding that the requested order of *certiorari* may be granted and matters remitted to a decisionmaker for fresh consideration, it is open to that decisionmaker to reach whatever decision he considers appropriate to reach in accordance with law. In this way the jurisdiction of a decisionmaker is respected, not usurped, by a reviewing court.

12. Was there anything objectionable in how the learned District Judge proceeded? Yes, for the reasons that follow.
13. First, when it comes to so-called 'hybrid' offences, the court's attention has been drawn to James Woods' *District Court Practice and Procedure in Criminal Proceedings* (Limerick, 2010), at p.432, where the learned author observes as follows:

*"[T]he District Court judge must decline jurisdiction to try summarily if he or she forms the opinion that the offence is of a non-minor nature. A District Court judge is entitled to reach an opinion as to whether the offence constitutes a minor offence fit to be tried summarily either on the facts as proved or on the facts as alleged against the accused and the High Court will not interfere with that determination on judicial review unless it is established that it was irrational or was unsupported by the evidence....[I]n relation to any matter the judge decides is not within his jurisdiction, he is entitled to enter on a hearing sufficient to make that decision".*

14. Here the information that the learned District Judge proceeded on, at least in part, was neither *"facts as proved or...facts as alleged against the accused"*.
15. Second, the court has been referred by counsel to the decision of the Supreme Court in *Melling v. O'Mathghamhna* [1962] I.R. 1, a case that sprang from alleged instances of the (hardly horrific) crime of butter smuggling. Mr Melling claimed that the charges against him were not of a minor nature and so fell to be tried before judge and jury. The Supreme Court held that the alleged smuggling offences were minor and could be tried summarily. Kingsmill Moore J. observed, at p.34 that *"[T]he question of what is a 'minor' offence must be considered primarily from the point of view of the person to be safeguarded and not from the point of view of executive convenience. That does not, however, mean that the general interest of the State is to be ignored."* This last-quoted sentence is of note, for it can sometimes be possible in the rightful emphasis on individual rights in criminal proceedings to overlook the collective interest also presenting, *"the general interest of the State"*, or, to use more contemporary parlance, the 'public interest', here the twin public interests that (i) the presumption of innocence, *"an axiomatic and indispensable aspect of our legal system, not lightly to be treated with or abrogated"* (*Murphy v. The Commissioner of An Garda Síochána* (Unreported, High Court, Barrett J., 11th May 2021), para.12), should be duly safeguarded, and (ii) someone alleged to have committed a 'hybrid' offence should not be proceeded against summarily when he ought to be proceeded against on indictment.
16. As mentioned above, the criminal justice system has been carefully constructed to ensure that the just-mentioned twin public interests receive protection. When it comes to the presumption of innocence, the District Judge must focus on the facts of the case before

him, not an accused's criminal record (if any). When it comes to ensuring that a situation does not arise in which someone alleged to have committed a 'hybrid' offence is proceeded against summarily when he ought to have been proceeded against on indictment, this potential glitch is resolved by the mechanism whereby the DPP can refuse to consent to a matter proceeding summarily. There is nothing in case-law to suggest that to ensure that an accused does not face summary trial when he ought to face trial on indictment, a District Judge should explore the previous criminal record of the accused at a jurisdiction hearing. Case-law tilts in the opposite direction.

17. Third, the court has been referred to the decision of the Supreme Court in *Conroy v. Attorney General* [1965] I.R. 411. There, the Supreme Court held that the provision for summary trial of a particular road traffic offence was not repugnant to the *Bunreacht*. Walsh J., at pp.435-36, observes as follows:

*"In Melling...[t]he distinction between a minor offence and offences which should be regarded as non-minor was there stated to depend on the following points:-*

1. *The punishment prescribed for the offence.*

[Court Note: The court notes in passing that this Point 1 offers zero assistance in the present case where one penalty applies if a matter is proceeded with summarily and another penalty applies if the matter is proceeded with on indictment.]

2. *The moral guilt involved.*
3. *The state of the law when the Constitution was enacted; and*
4. *Public opinion at the time of that enactment.*

*It is convenient to deal firstly with the question of the moral quality of the offence...The fact that in many or even most cases the circumstances under which the offence is committed are of a character to create a considerable moral guilt is not relevant when those aggravating circumstances are not the necessary ingredients of the offence. But the moral quality of the acts necessary to constitute the offence as defined by law is a relevant consideration."*

18. For present purposes what is notable about the just-quoted text is that Walsh J. directs attention to the "*necessary ingredients of the offence*" at hand. What is "*the offence*" here? It is the s.12 offence. And what are the necessary ingredients of a s.12 offence? Section 12(1) provides as follows:

*"A person who-(a) fails, without reasonable excuse, to comply with subsection (1), (2), (3) or (4) of section 10 or (b) notifies to the Garda Síochána, in purported compliance with that subsection (1), (2), (3) or (4), any information which he or she knows to be false or misleading in any respect, shall be guilty of an offence."*

19. Given the wording of s.12(1), one must turn to see what the mentioned subsections of s.10 provide. Section 10(1)-(5) provides as follows:
- "(1) A person who is subject to the requirements of this Part shall, before the end of the period of 7 days beginning with the relevant date, or, if that date is prior to the commencement of this Part, that commencement, notify to the Garda Síochána – (a) his or her name and, where he or she also uses one or more other names, each of those names, and (b) his or her home address.*
- (2) A person who is subject to these requirements shall also, before the end of the period of 7 days beginning with–(a) the person's using a name which is not the name, or one of the names, last previously notified by him or her to the Garda Síochána under this section, (b) any change of his or her home address, (c) the person's having resided or stayed for a qualifying period, at any place in the State, the address of which has not been notified to the Garda Síochána under this section as being his or her current home address, or (d) the person's returning to an address in the State, having immediately prior to such return, been outside the State for a continuous period of seven days or more, notify that name, the effect of that change, the address of that place or, as the case may be, the fact of that return to the Garda Síochána.*
- (3) If a person who is subject to the requirements of this Part intends to leave the State for a continuous period of 7 days or more he or she shall notify the Garda Síochána of that intention and, if known, the address of the place outside the State he or she intends to reside or stay at.*
- (4) If a person who is subject to the requirements of this Part is outside the State for a continuous period of 7 days or more and did not intend, on leaving the State, to be outside the State for such a continuous period, the person shall, subject to subsection (5), notify the Garda Síochána, before the expiry of a further period of 7 days, reckoned from the 7th day that he or she is so outside the State, of that fact and the address of the place at which he or she is residing or staying outside the State.*
- (5) Subsection (4) shall not apply if the person concerned has returned to the State before the expiry of the further period of 7 days mentioned in that subsection."*
20. Pursuant to s.7 of the Act and the provisions referred to therein, a person is typically subject to the Act if s/he is a sex offender (or the subject of a sex offender order).
21. When it comes to (to use the phrase deployed by Walsh J. in *Conroy*) the "necessary ingredients" of a s.12 offence, a District Judge will be aware of the occurrence of the trigger offence by virtue of the charge sheet before him. This is unavoidable. However, the fact that an individual comes within Part 2 of the Act of 2001 is not an ingredient in itself that needs to be proved to the satisfaction of the District Judge at the time of the jurisdiction decision. It is of course an ingredient that will have to be proved during the

course of the trial (in whatever forum that trial takes place) but it does not need to be proved at the time of the jurisdiction decision.

22. Fourth, the court has been referred to the decision of the Supreme Court in *State (McEvitt) v. Delap* [1981] I.R. 125. That was a case in which the Supreme Court decided that a person being prosecuted summarily before the District Court in respect of a minor offence was not entitled to trial by jury. In his judgment, Henchy J. observes, as follows, at pp.132-33:

*"[A] person who is charged with [the offence in issue in that case]...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 provisions in the Act of a penalty for a summary conviction that the District Justice will try the case summarily...rather than send it forward for trial as if it were not a minor offence."*

23. This general principle is apposite even in the present case where there is a specific choice by virtue of the legislation providing for a 'hybrid' offence. Consistent with the just-considered earlier Supreme Court authorities, *McEvitt* points to the fact that any proper assessment of whether an offence is minor and fit to be tried summarily must necessarily focus on the nature of the offence that is alleged to have been committed and on the circumstances in which that offence is alleged to have been committed, not on some other offence.
24. In truth, given the clarity and consistency of the just-discussed Supreme Court authorities, authorities that are binding on this Court and relevant to the facts at hand, the court does not, with all respect, see especial merit in considering case-law from the lower courts. Admittedly, none of the Supreme Court authorities are concerned with 'hybrid' offences (counsel have been unable to locate any case that this deals with this exact issue); however all of those authorities, individually and collectively, give the clearest of indications as to the general principles presenting and also to where the court's answer in the within application must lie.
25. Fifth, there was some discussion between the parties as to the relevance of *Gifford v. DPP* [2017] 2 I.R. 761, given that *Gifford* was concerned with a theft offence, not a s.12 offence. The court respectfully does not see that this difference has any bearing on matters: it is not as if the presumption of innocence applies differently in the context of a s.12 offence than it does, for example, in the context of a theft offence – one need merely state this possibility to see that, with all respect, it must be and is wrong. It follows that the court considers that *Gifford*, the most recent case of significance on the presumption of innocence and its operation and impact, is directly relevant to the case at hand. It is also a case which buttresses the sense of this Court as to where the proper resolution of the within application lies following on the above-mentioned Supreme Court authorities. In truth, were it not for those authorities, the judgment in *Gifford* would be enough to resolve this application; and even if *Gifford* was not binding on this Court (and it is) the

court would in any event have respectfully adopted its reasoning on the basis that it is patently correct.

26. The facts in *Gifford* are somewhat colourful. Ms Gifford was being charged with theft before the District Court. At the jurisdiction hearing, the District Judge was listening to what seems to have been a string of previous offences. Then, at some point, he appears to have halted the prosecuting garda from reading out of the list of offences, refused jurisdiction, and announced to the applicant "*The party is over, it's five years in the Circuit Court*", repeating for the avoidance of doubt "*The party is over. I'm refusing jurisdiction and it's five years in the Circuit Court*". This conclusion as to jurisdiction, as can be seen, was clearly based solely on the fact of previous convictions. The net question for the High Court in that case was whether a District Judge is entitled to take into account a person's previous criminal record when deciding if an offence is a minor offence fit to be tried summarily. In her judgment in the High Court, Ní Raifeartaigh J. held that a District Judge was not so entitled, pointing, towards the end of her exhaustive and helpful analysis, at p.780, to the process that gives "*fullest effect to the presumption of innocence [being]...that the previous convictions not be referred to at all before the decision on jurisdiction is made or before an accused person has indicated or entered a plea of guilty or not guilty*", this can only buttress the court in its sense that the learned District Judge regrettably erred in the case at hand in proceeding as he did.

### **Conclusion**

27. District Judges are faced with a remarkably challenging task. Every working day, they are required to get through a huge volume of cases at short speed. Their actions then get pored over by solicitors and counsel and reviewed in forensic detail by one or more higher courts. Inevitably, error will sometimes be concluded to present. Here, given the error presenting in how the learned District Judge proceeded, the court will grant an order quashing his decision declining jurisdiction and will remit the matter to a different District Judge for fresh consideration. If the DPP considers that there is something in this case which suggests to her that the prosecution should proceed on indictment she is free to act as she deems appropriate.