

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 705
Record No. 2021/535JR

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

-AND-

**THE DUBLIN METROPOLITAN DISTRICT COURT
SITTING AS THE CHILDREN COURT AND DA**

RESPONDENTS

Judgment of Mr Justice Cian Ferriter delivered this 12th day of November 2021

Introduction

1. In these proceedings, the DPP seeks relief by way of judicial review against decisions of the Dublin Metropolitan District Court sitting as the Children Court ("the District Court" or "the Children Court", as appropriate) made under, or relating to, Section 75 Children Act, 2001 ("s.75"). s.75 is a provision which empowers a District Judge sitting as the Children Court to deal summarily with indictable offences subject to being satisfied as to various criteria specified in the section.

Background

2. The material background is as follows. The Second Named Respondent ("DA") came before the Dublin Metropolitan District Court, sitting as the Children Court, on 8th March, 2021 in respect of two charges arising out of the same incident which occurred on the night of 17th January/early morning of 18th January, 2020. DA was charged with one offence of rape contrary to Section 4 of the Criminal Law (Rape) (Amendment) Act, 1990 ("the s.4 rape offence") and one offence of sexual assault contrary to Section 2 of the same Act ("the s.2 offence"). He was 15 at the date of the alleged offences and on the date he first appeared before the Children Court; the alleged victim was 16 at the date of the alleged offences. The matter was adjourned back to 19th April, 2021 to deal with a hearing on the question of the District Court's jurisdiction under s.75.

s.75

3. As the terms of s.75 are central to the issues in these proceedings, I propose to set out the relevant parts of the section at this juncture:-

"75. (1) Subject to sub-section (3), the Court may deal summarily with a child charged with any indictable offence, other than an offence which is required to be tried by the Central Criminal Court or manslaughter, unless the Court is of opinion that the offence does not constitute a minor offence fit to be tried summarily or, where the child wishes to plead guilty, to be dealt with summarily.

(2) In deciding whether to try or deal with a child summarily for an indictable offence, the Court shall also take account of –

(a) the age and level of maturity of the child concerned, and

(b) any other facts that it considers relevant.

- (3) *The Court shall not deal summarily with an indictable offence where the child, on being informed by the Court of his or her right to be tried by a jury, does not consent to the case being so dealt with.*
- (4) *In deciding whether or not to consent under sub-section (3), a child may obtain –*
- (a) *the assistance of his or her parent or guardian or, if the child is married to an adult, his or her spouse, or*
 - (b) *where the parent or guardian or adult spouse of the child does not for any reason attend the relevant proceedings, the assistance of any adult relative of the child or other adult who is accompanying the child at the proceedings”.*

[(5) and (6) not relevant to the issues in this case.]

The 19th April 2021 Hearing

4. At the hearing before the Children Court on 19th April, 2021, the DPP was represented by a solicitor with extensive experience of appearing for the DPP before the Children Court. Likewise, DA was represented by a solicitor with extensive experience of appearing for accused children before the Children Court. At the hearing, DA was accompanied by his mother who sat beside him. Both DA and his mother contributed at various points in the hearing consistent with the degree of informality which normally obtains at such hearings.
5. A full transcript of the hearing before the Children Court on 19th April, 2021 has been put before this Court. There is accordingly no dispute as to precisely what transpired before the Children Court on that date.
6. The hearing commenced with the Registrar introducing the hearing as a s.75 hearing “*under Section 2*”, i.e. a s.75 hearing dealing with the question of whether the s.2 sexual assault offence should be dealt with summarily before the Children Court.
7. The presiding District Judge introduced matters by stating that “*this seems to be in for a Section 75 matter, a hearing in relation to a Section 2 matterand for the Book in relation to the other matter*” (the latter being a reference to the s.4 rape offence charge which was statutorily required to be dealt with before a jury in the Central Criminal Court). The DPP’s solicitor indicated that “*the book had not been finalised as we are awaiting the outcome of the Section 75 hearing to know whether a sexual assault is going to form a part of a book*”.
8. The prosecuting Garda then gave evidence of the incident as alleged by the complainant on the date of the offence. Following the prosecuting Garda’s summary of the detail of the complaints, there was an interjection by DA. The District Judge responded for the benefit of DA and his mother to say that “*all I’m doing is hearing the alleged facts at the moment and deciding whether this Court or the Circuit Court should deal with the matter*” and made clear that she was not hearing the case itself. Following further exchanges with DA’s mother, the District Judge again stated that she was “*only deciding whether it’s an appropriate case to remain in this Courtor go to the higher Court*”.

9. At that point, DA interjected to say that "*I don't need to go to a higher Court man*".
10. The prosecuting Garda was then cross-examined by Mr. Keenan, solicitor for DA. During the course of this cross-examination, Mr. Keenan put to the prosecuting Garda that the accused in his prepared statement to the investigating Gardaí had accepted that there was sexual activity between himself and the alleged injured party but maintained that it was consensual. He also put to the prosecuting Garda that the accused was a young person that suffered with autism, that he had no previous convictions and that there were significant delays in securing trial dates in the Circuit Court and Central Criminal Court as a result of Covid-related delays, all of which was accepted by the prosecuting Garda.
11. Mr. Keenan then made a brief submission on behalf of DA emphasising that the accused was a 15 year old suffering from autism at the time of the alleged incident. He emphasised the fact that the accused suffered from anxiety and depression which had been heightened as a result of having the charges hanging over him. He submitted that that state of affairs could be heightened further if the matter was sent forward with the potential of a trial date being pushed beyond his 18th birthday in light of the significant delays before the Courts because of Covid-19. He submitted that the Court should keep the s.2 charge in the Children Court in all the circumstances.
12. Mr. Michael Murphy, a solicitor in the Office of the Chief Prosecution Solicitor, then made submissions on behalf of the DPP. His principal submission was that the alleged incident giving rise to the charges was a traumatic event for the complainant as well as for the accused, and that for there to be two trials arising from the two charges would be a duplication of that trauma for both parties. He submitted that the two matters arise from the same events and submitted there was an inter-dependence between the two offences on the basis that if the complainant's evidence was accepted, the s.2 sexual assault took place in order for the accused to be in a position to commit the alleged s.4 rape offence. Mr. Murphy also made submissions as to the gravity of the circumstances of commission of the alleged offences, if true, on the basis that the accused was alleged to have known that the complainant was intoxicated and believed, because of her intoxication, he could get away with it. He concluded his submission by advocating that "*the two matters should travel together*".

The District Judge's 19th April 2021 Ruling and Order

13. The District Judge then made her ruling on the s.75 hearing as follows:-

"This Court will retain jurisdiction of the matter and you reserved your position obviously in relation to the book. So, I'm keeping the Section 2 matter in this Court. It's a matter for the Director to decide what she wants to do on the Section 4. I'll put the matter back for a number of weeks".

14. The District Judge then put the matter back for four weeks on the basis that on that occasion, it would hopefully be to indicate a plea or get a date on that occasion. The District Judge also extended time if necessary for service of the book of evidence in respect of the s.4 matter.

15. The Court Order of 19th April, 2021 was perfected on 8th June, 2021. That Order reads, in material part, that:-

"At the sitting of the Court at Court No. 55, Metropolitan Children's Court, Smithfield, Dublin 7 in the Dublin Metropolitan District on the 19-Apr-2021, the above entitled proceedings having appeared in the Court's List in respect of a complaint that the above named accused of [address set out] on the 17-Jan-2020 - 18-Jan-2020 at [locus of alleged incident] in the said District Court Area of Dublin Metropolitan District did sexually assault one [complainant's name]

Contrary to Section 2 of the Criminal Law (Rape) (Amendment) Act, 1990 as amended by Section 37 of the Sex Offenders Act, 2001.

It was adjudged that the said accused, a child within the meaning of the Children's [sic] Act, 2001, and above the age of 11 years, be remanded on continuing bail, to appear before a sitting of the Dublin Metropolitan District Court sitting at Court No. 55 on 13-May-2021 at 10.30, [and inserted in handwriting] District Court will retain jurisdiction".

Conduct of s.75 hearings in practice

16. I will interpose in the chronology of material events at this point the evidence of Mr. Brian Keenan, of Keenan & Company Solicitors (DA's solicitor) on affidavit in the judicial review proceedings as to his experience as to the conduct of s.75 hearings in the Children Court in practice. Mr Keenan avers, based on his extensive experience as a solicitor specialising in the defence of children accused of criminal offences before the Children Court, that:-

"Section 75 hearings (as they are known) are frequently conducted with a level of informality required by the nature of proceedings before the Children Court. As a matter of practice, formally putting a child on his or her election never occurs during a Section 75 hearing. The Court and the Prosecution invariably operate on the presumption that the accused is electing for summary trial. This is implicit in the fact that the defence advocate is invariably arguing for the case to be kept in the District Court. This presumption has also been the practice in the Children Court and is well known to defence and prosecution practitioners alike. This case was no different as is clear from the manner in which the hearing was conducted and the fact that Mr. Murphy [solicitor for the DPP] at no stage suggested that there was any doubt about the fact that the Respondent wished for his case to be dealt with summarily or invited him to formally elect. The only difference in this case from other cases is that the accused himself made it clear to the Court that he wished the case to be tried summarily".

Post 19th April 2021 Ruling Correspondence

17. On 28th April, 2021 (one week after the s.75 hearing), Mr. Keenan wrote on behalf of DA to the DPP's Office calling upon the DPP to withdraw one of the charges against DA on the basis that "exposing him to two trials for the same incident is unfair and unlawful".

18. At the hearing of the judicial review, counsel for DA fairly accepted that it was neither in the interests of DA or of the alleged victim (or indeed in the wider interests of effective use of Court time and resources) to have two trials arising from the one incident. Rather, it was submitted on behalf of DA that, the District Court having validly exercised its discretion under s.75, the cure for any resulting unfairness of there now being two trials lay in the hands of the DPP who could either drop one of the charges or convert the s.4 rape offence charge to a sexual assault charge which could then also be dealt with along with the s.2 offence charge.
19. The Chief Prosecution Solicitor's Office ("CPS") replied by letter of 11th May, 2021 to Mr. Keenan's letter of 28th April, 2021. In this letter, the CPS agreed that two trials would be undesirable *"for a number of reasons including but, not limited to the fair trial rights of the accused, the rights of the complainant under the Criminal Justice (Victims of Crime) Act, 2017 and the efficient administration of justice"*.
20. The letter then proceeded to state:-
- "However, given the nature and seriousness of the facts alleged in this case in respect of the charge of sexual assault contrary to common law, and as provided for by Section 2 of the Criminal Law (Rape) (Amendment) Act, 1990, the Director cannot accede to your request to strike out that charge. Furthermore, it is the Director's considered view that this is not a minor offence fit to be tried summarily.*
- It would appear that neither the Prosecution nor the Defence addressed the Court in relation to the implications of the decision to accept jurisdiction in respect of the sexual assault charge, in circumstances where the related charge of rape contrary to Section 4 of the Criminal Law (Rape) (Amendment) Act, 1990 must be returned for trial to the Central Criminal Court.*
- In light of the foregoing, the Director intends to request the Court to reconsider jurisdiction in relation to the charge of sexual assault in this case"*.
21. The letter then invited DA's consent to the matter either being considered by the Judge sitting in the Children Court on the adjourned date (13th May, 2021) or to have the matter re-opened before the District Judge who had dealt with the matter on 19th April, 2021 when she was next available in Dublin.
22. Mr. Keenan replied by letter of 12th May, 2021 noting the intention of DA to object to the Director's application to the Children Court to reconsider jurisdiction on the basis that *"in circumstances where a hearing took place under s.75and a determination was made by [the presiding District Judge], the Court has functus officio. The Court does not enjoy jurisdiction to exercise an appellate jurisdiction against itself"*.
23. It appears that the matter was raised before a different District Judge who was taking the Children Court on 13th May, 2021. That District Judge refused to re-open the s.75 hearing.

24. Following the rejection by the District Judge presiding on 13th May, 2021 of the DPP's application to have the question of jurisdiction in respect of the s.2 offence revisited, the CPS wrote to Mr. Keenan on 24th May, 2021 notifying him of an intention to mention the matter before the District Judge who had originally dealt with the s.75 matter on 19th April, 2021 to seek a reconsideration of the question of jurisdiction in respect of the s.2 offence. Mr. Keenan replied by letter of 28th May, 2021 objecting to any further attempt by the DPP to seek to re-visit the Order made on 19th April, 2021.

The District Court's Decision of 1st June 2021

25. It is common case that the matter then came back to the Children Court on 1st June, 2021 before the same District Judge who had dealt with the s.75 hearing on 19th April, 2021, and that the said District Judge refused to fix a date for a reconsideration of jurisdiction in respect of the s.2 offence charge stating that she considered matters once and once only, and that she could not act as an appellate court against herself.

Relief sought on this Judicial Review

26. Arising from the foregoing sequence of events, the DPP seeks Orders of *Certiorari* in respect of the Orders made by the District Court on 19th April, 2021 purporting to "retain" jurisdiction under s.75 of the 2001 Act and also of the Order of the District Court of 1st June, 2021 refusing to fix a date for reconsideration of jurisdiction in respect of the s.2 sexual assault charge. In the event that this Court grants either or both of those reliefs, the DPP seeks remittal of the question of whether the District Court should assume jurisdiction in respect of the s.2 offence charge pursuant to s.75, to be dealt with by a different District Judge.

Present status of the two criminal proceedings

27. At the date of hearing of the judicial review application (10th October, 2021), I was told that the trial of the s.4 rape offence was listed in the Central Criminal Court for next January (i.e. January 2022). There is no stay on the Central Criminal Court trial. A stay was imposed on the District Court proceedings at the time of grant to the DPP of leave to apply for judicial review against the impugned decisions of the District Court.

Summary of Grounds of challenge to the Impugned Decisions and DA's response to same

28. The DPP challenges the lawfulness of the District Court's Ruling and Order of 19th April, 2021 on a wide variety of grounds which can be summarised as follows:

- (i) the District Judge fell into error in failing to deal with (or to demonstrate that she had dealt with) the statutory pre-conditions to the lawful exercise of the jurisdiction to deal with an indictable offence summarily under s.75, as set out in s.75(2);
- (ii) the District Judge fell into error in not complying with the mandatory obligation contained in s.75(3) of informing DA of his right to be tried by a jury and receiving his consent to the matter not being so dealt with;
- (iii) the District Judge fell into error in her ruling in proceeding on the legally incorrect premise that the DPP retained a discretion as to how the s.4 rape offence would be tried;

- (iv) the District Court's Order of 19th April, 2021 was bad by reason of error on the face of the record for failing to record the Court's assumption of jurisdiction under s.75(1) and (2) and for failing to record compliance with the s.75(3) requirements of informing DA of his right to be tried by a jury and DA's election re same;
 - (v) the District Judge failed to give any reasons (or at least any lawful reasons) for her order in breach of the duty to give reasons;
 - (vi) the District Judge erred in law in failing to have due regard to the interests of the victim in arriving at her decision.
29. In relation to the 1st June decision, the DPP contends that the District Judge was wrong in law to refuse to re-visit her s.75 decision of 19th April, 2021 in circumstances where it is contended that as a matter of law a District Judge has both a power and indeed an obligation to revisit the question of its assumption of jurisdiction over an indictable offence that can be tried summarily if the circumstances so warrant, it being contended that the circumstance of the need to avoid sequential trials arising from the same facts warranted a re-visitation of the 19th April, 2021 decision.
30. DA for his part seeks to stand over the lawfulness of the two impugned decisions, contending that:
- (i) the District Judge acted within jurisdiction; nothing within s.75 prevented the District Judge from deciding as she did;
 - (ii) that it was not for the High Court on a Judicial Review to plug an apparent lacuna in s.75 in that, even though it might have been a legitimate matter for the Oireachtas to provide for, the section does not expressly prohibit the Children Court from assuming jurisdiction over an indictable offence which is a minor offence fit to be tried summarily when the accused child is also charged with a separate offence arising from the same facts which offence must be sent forward for trial before a jury in a higher court;
 - (iii) that the record of the hearing, the ruling and the order was not such as to leave the experienced practitioners involved in the hearing at a loss as to what had been decided and why;
 - (iv) that questions of error on the face of the record and alleged failure of the duty to give reasons need to be more liberally approached in the Children Court in light of the desirable informality of proceedings in the Children Court and the approach contended for by the DPP would place an undue burden on the Children Court and District Court more generally;
 - (v) that it is within the gift of the DPP to cure the unpalatable outcome of the s.75 decision that DA (and the alleged victim) faced two separate trials arising from the same facts e.g. by dropping one of the charges or modifying the s.4 rape charge to a s.2 sexual assault charge;

- (vi) that the District Court did not have jurisdiction to re-visit the s.75 decision and that the District Court was accordingly correct in law in the approach taken by it on 1st June.

Discussion

31. In the ordinary course, when an accused is charged with an indictable offence and is before the District Court for same, the accused must be sent forward for trial unless the case is being dealt with summarily (s.4A, Criminal Procedure Act, 1967). The general rule is that in the case of indictable offences, the DPP can elect as between trial on indictment and summary disposal. By virtue of the provisions of Article 38.2 and 38.5 of the Constitution, the District Court only has jurisdiction to try offences that are minor and fit to be tried summarily.
32. A significant feature of s.75 is that it does not provide for the DPP to elect as between trial on indictment or summary disposal when the accused is a "child" within the meaning of the Children Act, 2001. Rather, the District Court sitting as the Children Court is effectively conferred with the statutory power to make that election, subject to the informed consent of the accused child and subject to satisfaction of the criteria specified in the section.
33. As explained by McMahon J. in *DPP v. Judge Hunt & Anor.* [2011] IEHC 56, at paragraph 28:-
- "Reading that section, one clearly sees that it only comes into play if the court has indictable offences before it. The section gives the District Judge jurisdiction to deal with the matter summarily if certain conditions are fulfilled. The whole purpose of the section is to give the District Judge some discretion to proceed summarily in the case of a child facing an indictable charge if circumstances warrant it. It is a jurisdiction which enables the District Judge to avoid sending the matter forward in certain circumstances. Understandably, it only arises, however, if indictable offences are at issue in the first instance."*
34. s.75 has been recently characterised by the Court of Appeal (in its Judgment in *DPP v. E* [2020] IECA 101) as conferring a significant procedural benefit on an accused child:-
- "one of the most important procedural benefits under the Children Act, 2001, is the potential of a hearing under Section 75. This provision allows the District Court to deal summarily with a "child" charged with any indictable offence unless the court is of opinion that the offence does not constitute a minor offence fit to be tried or dealt with summarily. This allows for the possibility of an indictable offence to be disposed of on a summary basis."*
35. It is clear from a consideration of the terms of s.75 that the District Judge, when exercising his or her discretion pursuant to s.75 as to whether to deal summarily with a child before it charged with any indictable offence, must address the following matters:-

- (i) Firstly, consider whether the offence is required to be tried by the Central Criminal Court or is the offence of manslaughter. If the indictable offence is in one of these categories, the Children Court cannot deal with that offence summarily.
- (ii) Secondly, if the offence is one which is not required to be tried by the Central Criminal Court and is not the offence of manslaughter, the Court must form an opinion as to whether the offence constitutes a minor offence fit to be tried summarily. If the Court is of the opinion that the offence does not constitute a minor offence fit to be tried summarily, it cannot assume jurisdiction under s.75.
- (iii) Thirdly, if the offence is not one which is required to be tried by the Central Criminal Court or manslaughter, and the Court is of the opinion that the offence is a minor offence fit to be tried summarily, the Court in deciding whether to try or deal with the child summarily in the Children Court for that offence, is obliged to take account of the age and level of maturity of the child concerned, and any other facts that it considers relevant.

s.75(2)(b) is not prescriptive as to the “facts” which may be taken into account by the District Court in deciding whether to try or deal with a child summarily for an indictable offence. For the avoidance of doubt, the Court would clearly be entitled to take into account the fact that the child is being charged with a second offence, arising from the same factual circumstances as the first offence, where the child is required by law to be sent forward to be tried by the Central Criminal Court (or other higher court) for the second offence.

- (iv) Fourthly, having formed the view, in accordance with the foregoing steps, that the indictable offence is one which can be dealt with summarily by the Children Court, the Court is obliged to inform the child of his or her right to be tried by a jury, and ascertain whether the child consents to the case not being dealt with by a jury. In that regard, in order for the child’s consent under s.75(3) to be a valid one, the child must be permitted, if he or she wishes, to obtain the assistance of his or her parent or guardian (or, if the child is married to an adult, his or her spouse) or, where the parent or guardian or adult spouse of the child does not for any reason attend the relevant proceedings, the assistance of any adult relative of the child or other child who is accompanying the child at the proceedings.

Failure to apply s.75(3)?

- 36. The first question that arises is whether the failure by the District Judge to comply with the s.75(3) obligation to inform DA of his right to trial by jury of the s.2 offence deprived the Children Court of jurisdiction on 19th April, 2021.
- 37. It is clear from the authorities that where a statutory provision imposes an obligation on the District Court to inform an accused of his or her entitlement to trial by jury and to obtain the accused’s consent to the case being dealt with summarily, a failure by the District Court to comply with those statutory conditions precedent to the exercise by the District Court of the jurisdiction conferred by the relevant provision deprives the Court of

jurisdiction to otherwise proceed to deal with the indictable offence on a summary basis: see Judgment of Hogan J. in *Cirpaci v. The Governor of Mountjoy Prison* [2014] 2 IR 471 (“*Cirpaci*”) and authorities considered therein.

38. In *Cirpaci*, Hogan J. said as follows:-

"[28] In The State (Hastings) v. Reddin [1953] I.R. 134 the applicant had been convicted by the District Court of the offence of occasioning actual bodily harm. This, however, was a scheduled offence for the purpose of the Act of 1951 and the District Judge was empowered to try the offence in a summary fashion only where the Court had informed the applicant of his entitlement to jury trial and he or she elected not to avail of that right. As Davitt P. observed at p. 138:-

"Both the conveying of the information to the accused by the Court of his right to a jury and the absence of objection on his part to being tried summarily appear to me to be statutory conditions precedent to the exercise by the District Court of the jurisdiction conferred by statute.

The District Court has no jurisdiction to try a scheduled offence apart from the statute. It gets the jurisdiction subject to the conditions imposed by the statute. If it does not comply with the conditions it has not got the jurisdiction."

[29] Davitt P. went on to stress the absolute nature of the obligation imposed personally by statute on the District Judge (The State (Hastings) v. Reddin [1953] I.R. 134, at p. 141): -

"I do not think it matters whether the accused is aware of his right or not, or whether, if he is represented by counsel or solicitor, he is presumed to be aware of it. The duty imposed by statute on the Court is not to assume, or presume, or be satisfied - it is to make certain, by itself imparting the necessary knowledge to the accused... [The Oireachtas] fastened upon the matter that was really essential and ensured that the accused shall be informed in the most authoritative way possible, namely, by the Court itself, of his constitutional right to be tried with a jury."

[30] The decisions in both Hastings and Vozza accordingly stress the mandatory nature of the obligation which is imposed on the District Judge with regard to informing the accused of his or her right to elect for jury trial before any summary disposal can take place. Since this did not occur in the present case, it is obvious that the District Court lacked any jurisdiction to hear and determine the charge in the manner in which it did."

39. It was submitted on behalf of DA that to adopt such an approach in respect of s.75 proceedings before the Children Court would be to impose an undue burden on District Judges running the Children Court. As noted earlier, the affidavit of Mr. Keenan sets out

the informality which typically prevails in s.75 hearings before the Children Court and his experience that accused children are never formally put on their election under s.75(3) in practice. Such informality is argued to be manifestly in the interests of children and in keeping with the ethos of the Children Court, where the Court is encouraged to operate in such a manner as to make the administration of justice as accessible and understandable as possible for accused children coming before the Court. It was submitted that *Cirpaci* was readily distinguishable on that basis, and further on the basis that, in contrast to *Cirpaci*, the Court here was not being asked by a convicted person to overturn a conviction or committal to detention that had been arrived through invalid assumption of jurisdiction by the District Court.

40. I accept that s.75 proceedings before the Court are conducted on an informal basis and I agree that it is important that the District Court can run s.75 hearings in as informal a manner as is consistent with the important power conferred on the District Court by s.75. However, I do not see that there is any necessary tension between running Children Court proceedings with a degree of informality whilst also ensuring that the statutory conditions essential to the assumption by the District Court sitting as the Children Court of jurisdiction to try indictable offences summarily are complied with.
41. I accept that both sides appear to have operated in fact at the s.75 hearing on 19 April, 2021 on the basis that it was understood that DA did not wish to exercise his right to trial by jury and to have the s.2 offence tried before a jury in a higher court. However, I am compelled by the line of authority culminating in *Cirpaci* to hold that the failure by the District Judge to formally inform DA of his right to be tried by jury and to formally receive his election on that issue, resulted in the District Judge falling into legal error and not lawfully assuming jurisdiction to deal with the s.2 offence summarily. S.75(3) is a mandatory statutory requirement which exists for the protection of accused children. It seems to me that it would not place an undue burden on District Judges sitting in the Children Court when conducting s.75 hearings to ensure that the accused child is formally informed of his or her right to a trial by jury for the offence under consideration (and for the legal representative of the DPP to remind the Judge of that obligation in the event that it might have been overlooked).

Failure of Duty to give reasons?

42. It is well established that District Courts are under a duty to give at least some reason for their decisions on contested matters: see analysis by Hardiman J in *Oates v. Judge Browne* [2016] 1 IR 481 (“Oates”) of the corpus of jurisprudence on this issue.
43. In my view, the District Judge fell into legal error on 19th April, 2021 in failing to identify, in however brief a form, her reasons for deciding to deal with the s.2 offence summarily in the Children Court in circumstances where there was a contested hearing on that issue. The point is well made on behalf of the DPP that it is simply not possible to divine from the terms of the very brief ruling given by the District the basis upon which the District Judge was satisfied that the statutory pre-conditions to the assumption of jurisdiction set put in s.75(1) and 75(2) were met on the facts of the case.

44. Contrary to the requirements of the case law on the duty to give reasons, the DPP was simply not in a position to understand from the ruling why her submission, that it would be inappropriate to keep the s.2 offence in the Children Court where the related offence arising from the same underlying incident had to be sent forward for trial in the Central Criminal Court, was rejected and how the District Judge had otherwise satisfied herself that the statutory criteria in s.75(1) or (2) had been complied with. Some reasons were needed but none was provided.
45. Given the potential gravity of a decision under s.75, and given that a decision under s.75 is a decision *prima facie* amenable to judicial review, it is clear from the Supreme Court's Judgment in *Oates* that there is an obligation on the District Judge to give some reasons (however concisely they might be expressed) for its decision under s.75 particularly on a contested application such as the one in this case.
46. It is worth noting that the facts in this matter were exceptional. A child, who was aged 15 at the date of the alleged offence, was being charged with a very serious offence (s.4 rape) which, as a matter of law, could only be tried on indictment in the Central Criminal Court. The child was also being charged with a lesser charge arising from the same incident and same factual matrix. As noted by counsel for the DPP at the hearing of this judicial review, it is difficult to imagine that a more serious matter came before the Children Court on the date in question. Given the primary submission made to the District Judge on behalf of the DPP that it would not be appropriate to have two trials arising from the same set of facts, in my view, it behoved the District Judge to give some reasons, however brief, for rejecting that submission and for explaining why the District Judge believed the statutory criteria under s.75(1) and (2), for determining that summary disposal of the s.2 offence was appropriate, were met.

A further Error of Law

47. Counsel for DA very fairly accepted that it was not in DA's best interests, or in the interests of the alleged victim (or indeed in the interests of the efficient administration of justice and effective use of court resources) to have two separate trials arising out of the same factual events. However, he submitted that this was a matter within the gift of the DPP to address, e.g. by dropping one of the charges or by modifying the s.4 rape offence charge to a lesser charge. In my view, the point is well made on behalf of the DPP, in reply, that the DPP's decisions in this matter (including the decision to continue to prosecute the s.4 offence given the DPP's view on the gravity of the circumstances of the alleged commission of the offence) have not been subject to challenge by DA and were not under challenge at the time of the 19th April 2021 hearing.
48. In those circumstances, in my view, the District Court fell into error in ruling that "*it's a matter for the Director to decide what she wants to do on the s.4*". I appreciate that it is not entirely clear as to what the District Judge was seeking to convey with that statement. However, it seems to me that there are two meanings of the statement reasonably open, neither of which reveals a legally appropriate position.

49. The first is that, in light of the District Judge's ruling on the retention of the s.2 offence charge in the District Court, it was then up to the DPP to avoid two separate trials by dropping or modifying the s.4 rape offence charge. If this is what the District Judge intended, it would represent a clear error of law (by having regard to an impermissible and irrelevant consideration) as it was not for the District Court to trespass on the DPP's exclusive statutory jurisdiction to decide whether to proceed with the prosecution of an indictable offence. The second meaning reasonably open was that District Judge was operating on the basis that the DPP had some discretion as to how the trial of the s.4 charge would proceed; however, such an approach would also be wrong in law where statute clearly provided that the s.4 charge could only be tried in the Central Criminal Court.

Rule against Sequential Trials

50. At the judicial review hearing, the DPP advanced arguments to the effect that the District Judge erred in law in deciding to "*retain*" jurisdiction of the s.2 charge in circumstances where the s.4 rape offence could only be sent forward for trial to the Central Criminal Court, on the basis that the District Judge failed to take account of the relevant consideration of the general rule against sequential trials. This rule is the general common law rule that two trials arising out of the same or substantially the same facts should not occur absent special circumstances (see *Cosgrave v. DPP* [2012] 3 IR 666 at 737 and 738 (O'Donnell J., as he then was) and *Ross v. DPP* [2020] IECA 264 (at paragraph 51 per Donnelly J.)).
51. In my view, it was unfair to the District Judge to advance this submission in circumstances where no submission in relation to the legal rule against sequential trials was advanced to her in the District Court at the hearing on 19 April, 2021. Indeed, as set out earlier in this judgment, one of the reasons advanced by the DPP in correspondence subsequent to 19th April, 2021 for the proposal to invite the District Court to revisit its Order was that the Court had not considered that rule (CPS letter of 11th May, 2021).
52. It is not open to the DPP to seek to challenge the lawfulness of the District Court's decision of 19th April, 2021 on a ground not advanced to the Court at that time. That said, it may be of assistance to District Judges sitting in the Children Court who have to deal with s.75 hearings in the future where two indictable offence charges have been preferred against an accused child and where one of those is an offence which must be tried on indictment in a higher court, to be aware that the rule against sequential trials would be a highly relevant fact for the District Court to take into account in determining whether or not to exercise its power under s.75 to assume jurisdiction in respect of a separate indictable offence arising from the same facts which can be disposed of summarily. It is difficult to see how, absent very exceptional circumstances, it would be an appropriate exercise of the District Court's power under s.75 to assume jurisdiction in respect of one offence where the outcome of that would be to lead to two separate trials arising from the same facts.

Rights of Victim

53. A submission was also made on behalf of the DPP, to the effect that the District Judge erred in law in failing to take into account the significant prejudice to the rights of the victim which would inevitably result from the District Court's ruling of 19 April, **2021**, in circumstances where the alleged victim would be facing two trials arising from the same set of facts. The point is made on behalf of the DPP that the solicitor for the DPP had specifically submitted that the incident was traumatic for the victim and that two trials would be "*a duplication of that trauma*".
54. I am conscious of the relatively nascent state of the developing jurisprudence on the rights of victims in the criminal law sphere. In light of the views I have expressed on the other legal infirmities in the District Court's ruling, I do not believe it is either necessary or desirable for me to express a view on the extent to which the rights of victims are required as a matter of law to be expressly addressed on contested s.75 applications before the Children Court.

Error on the face of the record of the District Court order?

55. A related question to that of whether the District Court complied with the statutory pre-conditions to the assumption of jurisdiction to deal with the s.2 offence summarily on the facts of this case is whether the District Court's Order demonstrates errors on the face of the record and/or fails to show jurisdiction.
56. It will be recalled that the District Court Order as perfected arising from the 19th April, 2021 decision of the Court simply stated that the District Court had "*retained*" jurisdiction in respect of the s.2 offence. The Order made no reference at all to s.75, still less to s.75(1), (2) or (3). I have already held that the failure to comply with s.75(3) involved the District Court falling into error and that the failure to give any reasons which would demonstrate how the District Judge was satisfied that the statutory pre-conditions for assumption of jurisdiction under s.75(1) and (2) were met was also a legal error. The further question that arises is whether the failure of the District Court Order to formally recite compliance with the statutory pre-conditions for assumption of jurisdiction under s.75(1), (2) and (3) constitutes a self-standing legal error viz. whether the Court's Order is bad for failing to show jurisdiction on its face?
57. It is well established that the District Court is a court of record and speaks through its Order. s.14 of the Courts of Justice Act, 1971 (as amended) provides: -
- "In any legal proceedings, regard shall not be had to any record relating to a decision of a judge of the District Court in any case of summary jurisdiction, other than an Order which, when an Order is required, shall be drawn up by the District Court Clerk".*
58. The DPP submits that, in reliance on the hallowed authority of *State (Browne) v. Fearon* [1967] IR 147, the District Court Order in this case is clearly bad on its face for not demonstrating compliance with the statutory pre-conditions set out in s.75. DA submits that the s.75 order was not an order for a conviction or committal and that therefore the *State (Browne) v. Fearon* line of authority is simply not applicable. Furthermore recent

authority, such as the Court of Appeal's decision in *Freeman v The Governor of Wheatfield Place of Detention* [2016] IECA 177, may signal a relaxation of the strict requirement as to demonstration of jurisdiction on the face of a District Court order in criminal matters. In the latter case, the absence of a reference in the District Court's order of committal to the DPP having directed that the trial of the offence proceed summarily, along with the absence of an express recital in the Order that the District Court had determined that the offence was a minor offence fit to be tried summarily, were held not to be fatal to the lawfulness of the Order.

59. *De Blacam* in the third edition of his textbook *Judicial Review* notes (at paragraph [12.01]) that "error of law on the face of the record has had a chequered history" while going on to express the view, nonetheless, that it has continued viability as a doctrine in this jurisdiction.
60. The fifth edition of *Hogan, Morgan and Daly's Administrative Law in Ireland* states as follows, in the introduction to the discussion of the concept of error on the face of the record (at paragraph [10-139]):

"The jurisdiction to review for error on the face of the record is an anomalous one since the power to review is not based on jurisdiction or ultra vires. Nevertheless, this power of review enables the High Court to quash a decision, otherwise within jurisdiction, if that decision contains an error of law, provided that error appears on the face of the record. It has fallen out of use in England, since all errors of law are now reviewable there regardless of where they appeared, but it nonetheless remains a principle which clearly applies in this jurisdiction, because of the tenacious grip the distinction between jurisdictional and non-jurisdictional errors of law maintains on some parts of the Irish judicial psyche."

61. It should be noted that (as with *de Blacam*) *Hogan, Morgan and Daly* also record a continued role for the concept of error of law in the face of the record in Irish law.
62. Given the infirmities in the District Court's ruling and Order which I have already identified in this judgement, I do not believe that it is necessary for me to pronounce on the applicability of the doctrine of error of law on the face of the record to the novel circumstances presented here of the exercise by the District Court of a statutory power to assume jurisdiction where the Order in question is not one which results in a conviction of an accused or does not otherwise result in the committal or detention of the accused. Consideration of the potentially important issues that arise in relation to such arguments in a section 75 context should be left to a case where resolution of that issue is essential to the outcome.

Was the District Judge wrong to refuse to re-visit the s.75 decision?

63. In support of her separate challenge to the decision of the District Court of 1st June, 2021 refusing to fix a date for a reconsideration of its 19th April, 2021 s.75 decision, the DPP maintains that the District Court retains an ongoing jurisdiction to revisit the question of whether or not an alleged offence is a minor offence that is fit to be tried summarily, and

that the District Court is perfectly entitled to revisit that decision up to and including the trial itself, although the DPP accepted that the authorities relied by her in this regard (including *State (McKevitt) v. Delap* [1981] 1 IR 215, *Read v. Judge Reilly* [2010] 1 IR 295 and *Feeney v. Judge Clifford* [1989] 1 IR 668) do not specifically govern a situation where a decision had been made under s.75 of the 2001 Act.

64. Given the findings I have made earlier in this judgement as to the legal infirmities in the District Court's ruling and Order of 19th April, 2021, I propose to remit the question of the assumption of jurisdiction under s.75 to the District Court for a hearing by a different District Judge. In the circumstances, it is not necessary for me to express a view on whether or not the District Judge acted in error in ruling that she was *functus officio* and could not entertain an application subsequent to 19 April, 2020 one to revisit the question of assumption of jurisdiction under s.75.
65. While it is, of course, well established that the District Judge retains an ongoing jurisdiction up and until the end of the trial of an offence over which it has assumed jurisdiction to determine summarily as a minor offence, different considerations may apply in respect of the respect of s.75 which involves a discrete statutory discretion conferred on the District Court where only one element of the exercise of that discretion involves a determination as to whether the indictable offence in question is one fit to be tried summarily as a minor offence, and where the section mandates the District Court to have regard to other factors. Resolution of the proper limits of the Court's jurisdiction to re-visit an order under s.75 should be left to a case in which that issue may be dispositive.

Conclusion

66. In light of the foregoing analysis, I will make an Order of *certiorari* quashing the District Court's decision and Order of 19th April, 2021 and an Order remitting the s.75 matter to the District Court sitting as the Children Court to be dealt with in accordance with law by another District Court Judge.