[2017] IEHC 423

THE HIGH COURT

RECORD NO: 2016/203 JR

Wendy Gifford

Applicant

AND

The Director of Public Prosecutions

Respondent

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on the 26th May, 2017

1. This case raises a net question as to 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, for the purpose of making the decision as to the appropriate mode of trial in respect of an indictable offence triable summarily, in this case, an offence under s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

2. For ease of reference, I will refer in this judgment to such a decision as the 'decision as to jurisdiction,' or the 'decision as to the mode of trial.' I intend these as merely short-hand descriptions of the decision that the District Judge has to make as to whether an offence is a minor offence fit to be tried summarily and therefore whether the case should be dealt with in the District Court or sent forward to be dealt with on indictment.

Factual and legal context

3. The applicant, aged approximately 29 years, was arrested and charged with an offence of theft contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 (the "2001 Act"). This section provides for trial on indictment with a maximum penalty of 10 years' imprisonment. Section 53 of the same Act provides that the District Court may try summarily a person charged with an indictable offence under the Act 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 or her 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 the offence.

4. The applicant was charged under s.4 of the 2001 Act in respect of an allegation that she stole clothing with a value of €689.70 from a shop. When she attended the District Court in Galway on the 14th March, 2016, before District Judge John Coughlan, the prosecuting officer informed the Court that there was consent to summary disposal of the case. It may be noted that there is a general DPP direction giving consent, without submission of a Garda file, to summary disposal of, *inter alia*, offences contrary to s. 4 of the 2001 Act where the property appropriated does not exceed €7,000 in value.

5. The District Judge then asked for a list of the applicant's convictions. This was at a stage where there was no plea of guilty or an indication that she might be pleading guilty. The prosecuting officer commenced a reading of the applicant's previous convictions and when he had reached a certain point in this process the District Judge stopped him, indicated that he was refusing jurisdiction and said to the applicant: "the party is over, it's five years in the Circuit Court."

6. The Judge's comments were reported in a local newspaper and an article was exhibited to the Court, reporting the Judge as having said "the party is over, it's five years in the Circuit Court" before repeating, "the party is over. I'm refusing jurisdiction and it's five years in the Circuit Court."

7. Leave to seek judicial review was granted by order of the High Court, perfected on the 6th April, 2016, in respect of the following reliefs:

> "(i) An order of *certiorari*, by way of application for judicial review, quashing the determination made on March 14th 2016 by District Judge John Coughlan that the offence charged on charge sheet 16542277 is not a minor offence fit to be tried summarily;
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> (ii) An order of prohibition, by way of application for judicial review, preventing the Respondent serving a book of evidence on the Applicant in order that she might be sent forward for trial on indictment;
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> (iii) A declaration, by way of application for judicial review, that a District Judge, in deciding whether a case is a minor offence fit to be tried summarily, is not entitled to have regard to the conviction history of an accused;
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> (iv) A stay on the criminal proceedings based on charge sheet 16542277 currently before Galway District Court pending the conclusion of these proceedings;
>
> (v) Costs."

The grounds upon which relief was sought were that the District Judge took into account an irrelevant consideration, received inadmissible evidence, and acted contrary to natural and constitutional justice, when he sought and heard evidence of the applicant's prior record before determining jurisdiction. The presumption of innocence was not explicitly pleaded on behalf of the applicant, but the respondent indicated at the oral hearing that no technical pleading point was being taken in relation to this because of the importance of the matter.

Submissions on behalf of the parties

8. The submissions on behalf of the parties can be summarised, in broad terms, as follows. It was submitted on behalf of the applicant: (1) that the question to be addressed is whether the *offence* is a minor offence fit to be tried summarily and not whether an *offender* is fit to be tried summarily; (2) that while there is no authority where the *ratio* deals directly with the point in issue in the present case, there are strong *dicta* in some authorities on this type of offence which suggest that previous convictions should *not* be taken into account by a District Judge deciding jurisdiction; and (3) to allow District Judges to take previous convictions into account in determining jurisdiction would present a serious threat to the principle of the presumption of innocence. In this regard, the applicant drew attention to some of the authorities on the presumption of innocence, including the leading cases of *The People (Attorney General) v O'Callaghan* [1966] I.R. 502; *King v. Attorney General* [1981] I.R. 233; and *DPP v Keogh* [1998] 4 I.R. 416, as well as the cases of *State (O'Reilly) v Windle* (unreported, High Court, Blaney J. 4th November, 1986) and *R v Bell* [1936] 70 I.L.T.R.

136. Counsel also pointed to the fact that under the Bail Act, 1997, there is a statutory prohibition on publication of previous convictions of an accused which have been referred to at a bail hearing. The absence of any such reference in the Criminal Justice (Theft and Fraud Offences) Act, 2001, it was argued, suggested that the 2001 Act did not envisage that reference would be made in open court to any previous record of an accused in the pre-trial phase when the decision as to jurisdiction is to be made. Counsel on behalf of the applicant also argued, (4), that the phrase "fit to be tried summarily" could be given meaning over and above the question of what is "minor" without opening the door to previous convictions; for example, there might be practical or technological reasons why the case might not be fit to be tried summarily even though the offence was "minor." This argument was in response to an argument made on behalf of the respondent, described in the next paragraph, at (2).

9. It was submitted on behalf of the respondent: (1) that the question of potential penalty has always been integral to the distinction between minor and non-minor offences, as described in authorities such as *Melling v Mathghamhna* [1962] 1 I.R. 1, and *Conroy v Attorney General* [1965] 1 I.R. 411; (2) that, even if the question of previous convictions is not relevant to the "minor/non-minor" distinction, it is integral to the phrase "fit to be tried summarily," a phrase which cannot be interpreted as mere surplusage and must have a meaning additional to or independent of the term "minor," and that its scope includes previous convictions; (3) that the *dicta* in the authorities support the proposition that previous convictions can be taken into account in deciding the issue of jurisdiction; and (4) that concerns related to the presumption of innocence can be overcome by a variety of methods, and in particular, that (a) the judicial oath, in a case where the District Judge proceeds to try the case, protects the accused person from potential prejudice; and (b) a period of time can be allowed to elapse before trial (the so-called 'fade' factor) if the case is sent for trial on indictment, and also restrictions can be placed on publication of the evidence given in the District Court, in order to prevent any prejudice occurring.

Relevant Authorities

10. Before addressing the authorities containing *dicta* of relevance to the present analysis, I note certain features of the facts presenting in the case before me: (1) there has been no plea of guilty by the applicant nor any intimation that a guilty plea will be forthcoming; (2) there is no issue concerning any "change of mind" on the part of the District Judge over the course of a hearing, as arose in some of the cases discussed below; and (3) the applicant is an adult and not a youth. The present case raises the question, simply and directly: can a District Judge take previous convictions into account when deciding the mode of trial (summary or on indictment), in circumstances where either there is to be a trial, or at least there has not at that point been any guilty plea or indication of an intention to enter a guilty plea, by an adult accused?

11. On behalf of the respondent, reference was made to the decisions in *Melling v Mathghamhna* [1962] 1 I.R. 1 and *Conroy v Attorney General* [1965] 1 I.R. 411 as indicative that the question of penalty has always been of fundamental importance to the "minor/non-minor" distinction under Article 38 of the Constitution. However, those cases deal with the maximum statutory penalty prescribed in the case of a specific offence, and do not address the question of how the previous criminal record of an accused might influence the actual penalty to be imposed upon him in a particular case. I therefore find this line of authority to be of limited value in the present context and, indeed, they were not dwelt upon by counsel. Of greater assistance were the authorities discussed below.

12. In *State (McEvitt) v Delap* [1981] 1 I.R. 125, the issue for decision was whether Mr. McEvitt ('the prosecutor' for the purpose of the High Court proceedings) was entitled to a jury trial in respect of a minor offence, where that was his preferred mode of trial. The answer was no. He had been charged in the District Court with an offence of forcible occupation of premises in Westmoreland Street in Dublin contrary to the Prohibition of Forcible Entry and Occupation Act, 1971. The State wished to have him tried summarily and the District Judge proposed to try the prosecutor summarily. However, he wanted a jury trial. He obtained a conditional, and then an absolute, order of prohibition in the High Court forbidding the further hearing of the complaint. An appeal to the Supreme Court was allowed. It had been accepted by the prosecutor that the offence was, on the facts, a minor offence. The Supreme Court held that since the offence was a minor offence, no right to trial by jury existed, because no such right arose by virtue of the Constitution and none had been conferred by statute. The applicant in the present case relies upon certain *dicta* of Henchy J. in the course of his judgment. Henchy J., at page 132, said that:

> "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 a minor offence." (emphasis added)

He also said that :

> "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." (emphasis added)

I agree that the language used by Henchy J. suggests that it is the facts of the offence which dictate whether or not the offence is a minor offence fit to be tried summarily. However, it does not appear that the issue of the relevance, if any, of an accused person's previous convictions to the decision on jurisdiction was directly raised in the case, and the passage must be read in that context.

13. Counsel on behalf of the applicant drew the Court's attention to the *State McDonagh v O'hUadhaigh* (unreported HC, McMahon J., 9th March, 1979), in which McMahon J. said:

"If *the facts proved* indicate that the offence is not a minor offence then clearly it is the duty of the Court to discontinue the trial. If *the statement of the facts* alleged made to the Justice indicate a minor offence he has jurisdiction to enter upon a summary trial of the offence but in my view if the evidence shows that in fact the offence is not a minor one he would be acting in excess of jurisdiction if he continued the trial." (emphasis added)

This was cited in the decision of *State (O'Hagan) v Delap* [1982] 1 I.R. 213, to which I now turn.

14. In *State (O'Hagan) v. Delap* [1982] 1 I.R. 213, the key issue for decision was whether a District Judge was entitled to change his mind as to jurisdiction after hearing that an accused had committed the offence while on bail for a previous offence. It is important to note that the accused had indicated that he intended to plead guilty at a point *before* the District Judge indicated his change of mind. The prosecutor sought an order of *certiorari* in the High Court. In respect of the District Judge's order returning him for trial on indictment, the prosecutor obtained a conditional order of *certiorari* quashing the District Judge's order, but O'Hanlon J. subsequently allowed the cause shown and discharged the conditional order. He held that the initial acceptance by the judge of jurisdiction to try

the prosecutor summarily, based upon facts disclosed to him at that point in time, was not a bar to his taking a different view when he was informed of additional relevant facts. At page 219, O'Hanlon J. said

> "The presumption of innocence ceased to apply to the prosecutor when he indicated his intention to plead guilty to both sets of offences. Consequently, the respondent District Justice was faced with a situation where the accused was admitting that, while released on bail pending sentence on a charge of indecent assault of a male person, he had committed a further similar offence against another male person. In my opinion, that is a circumstance which would entitle the sentencing court to regard the second offence as more serious and more reprehensible than it would otherwise have been, and a circumstance which could legitimately have a material bearing on the severity of the sentence which the court would impose for the later offence."

15. The respondent relies on the case as authority for the proposition that a District Judge is entitled to take into account matters relevant to sentence, in this case the aggravating factor of an offence having been committed while on bail, when making the decision as to mode of trial. If matters relating to sentence are relevant, it would follow that previous convictions are relevant. However, the applicant lays emphasis on the fact that the applicant or prosecutor in the case had indicated that he intended to plead guilty *before* the District Judge took the aggravating factor into account, and therefore there was no potential threat to the presumption of innocence in taking that factor into account at that stage. Indeed, there is an explicit reference to the presumption of innocence in the passage set out above. The situation is different, it is argued, where an accused intends to plead not guilty to the offence and the District Judge proceeds to hear evidence of previous convictions before deciding on jurisdiction. In such a situation, if the District Judge accepted jurisdiction, he or she would have heard about the accused person's previous convictions before embarking on the trial. Alternatively, if the matter were sent forward for trial on indictment, any publicity given to the previous record of the accused might, it is argued, prejudice the minds of a potential jury.

16. In *DPP (Stratford) v O'Neill* [1998] 2 I.R. 383, the defendant was charged with larceny before the Children's Court. In the presence of his father, and with the latter's agreement, he consented to summary disposal of the charge on a plea of not guilty. Pursuant to the provisions of s.5(1) of the Summary Jurisdiction over Children (Ireland) Act, 1884 (as amended by s.133(6) of the Children Act, 1908), the Court was obliged to consider "the character and antecedents of the person charged" before the Court could determine to try the case summarily. A question was raised as to whether s.5(1) was constitutional. The Attorney General was put on notice and an application made on his behalf, asking the Judge to state a case to the High Court. This was duly done. The High Court, Smyth J., held, *inter alia*, that the evidence of character and antecedents was to be embarked upon solely for the purpose of enabling the District Judge to assess the quality of the consent that might be forthcoming by the young person. At pages 386-7, he said:

> "The purpose of the section, in my opinion, is to afford an opportunity to the District Judge prior to embarking on the hearing of the charge (but knowing the nature of the offence) to be in a position to assess the capacity of the young person to appreciate and give an informed consent concerning any decision by such young person, when given the choice to be tried summarily or to be tried by a jury.
>
> The exercise is in the nature of a preliminary investigation. It is clearly not the trial of the offence. It ensures that if given the choice the young person has an appreciation of the possible legal course and consequences of making such choice. The exercise, far from infringing the principle of equality before the law, has inbuilt in it the constitutional concern to ensure that due regard to differences of capacity are observed. The exercise is consonant with the concept of 'in due course of law' which requires a fair and just balance between the exercise of individual freedom and the requirements of an ordered society. The freedom of the individual to make an informed decision as to which mode of trial he should elect for, is accorded by the section. The burden is cast upon the District Judge to ensure that the young person, if he consents to a summary trial, knows what he is about. The declaration provided for by the Constitution which is obligatory on a District Judge taking office to act 'without fear or malice or ill will towards anyone' is the bulwark against the adjudicator bringing into the trial a disposition towards evidence of character that may be introduced in the preliminary enquiry. The reference to character in the subsection is not the moral character but rather the degree of maturity and appreciation of correctness of choosing to proceed by way of summary trial or trial by jury. In my opinion, the reference to character and antecedents of the person charged in the section is in fact directed towards his legal character and antecedents.
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> The District Judge appears to have been concerned that if he came to know the legal character and antecedents of the accused person that he might embark upon a trial in a prejudiced position. In my opinion, his oath of office should be proof against this. Secondly, he was concerned that the accused should be considered innocent until proved guilty and the tendering of evidence of character at this stage was a wholly inappropriate proceeding in the light of the terms of the Constitution. While appreciating the strength of this argument, I nonetheless think it is ill founded. In the first instance this inquiry is to be undertaken if the court of summary jurisdiction think it expedient to do so. If the court does think it is not expedient to do so, then there is no necessity to embark on this inquiry. If the court thinks it is expedient to do so it may do so but ultimately it is the consent of the person charged with the offence who has the deciding as to whether the course to be adopted is to be one of summary trial or trial by jury."
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> He referred to the decision in *King v The Attorney General* [1981] I.R. 233 and the principle of equality before the law referred to therein and went on to say:
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> > "The argument advanced by the accused is that the section of the Act of 1884 obligates a District Judge in the case of a young person only to consider the character and antecedents of the person charged when deciding if the offence is fit to be tried summarily; because no such requirement is made under the Criminal Justice Act, 1951, young persons are being treated unequally in this regard. It is submitted that the distinction is not saved by the argument that the Act of 1884 allows greater scope for a court to deal summarily with offences concerning young persons as the consideration of the character and antecedents covers all indictable offences. It seems to me that the provisions of the Act are wholly consistent with the concept of having due regard to the differences of capacity. The judge was concerned as is clear from his case stated that having made such an inquiry he might have formed views concerning the accused. However, altogether from his oath of office, the position is somewhat unreal in the sense that the District Judge asserts in such case that the matter could not be embarked upon fairly by him as he might be possibly prejudiced. If that argument were to have any validity then every District Judge who is appointed, particularly in rural areas, where the District Judge comes to know the community in some detail would in the case of habitual offenders be ineligible to deal with them at all. It seems to me that the sub-section does have a due regard to differences of capacity."

17. The applicant in the present case argues that not only was this a situation where the legislation explicitly provided for the receiving of information about the accused person's antecedents, unlike the Criminal Justice (Theft and Fraud Offences) Act, 2001, but also that the legislation was upheld because it involved a young person and the receipt of the evidence was strictly linked to a particular purpose, namely the quality of his or her consent to summary disposal. This arguably implies that a consideration of antecedents is an exception to a general principle that consideration of antecedents is not relevant to the decision on jurisdiction. In contrast, the respondent argues that the Supreme Court clearly took the view that the District Judge's oath of office protected an accused person from any potential prejudice arising from learning about his or her previous convictions, and that the same logic applies whether the accused person is an adult or young person, and whether the purpose of the exercise is to assess the quality of consent or to decide on the gravity offence for the purpose of determining mode of trial.

18. In *Feeney v. Clifford* [1989] I.R. 668, the applicant had been charged with four offences which were scheduled to the Criminal Justice Act, 1951, for the purpose of section 2(2) of the same Act (malicious damage to a car and gate, and unlawful possession of a car). It may be noted that the prosecutor was not given the power, under that statute, to withhold consent to summary trial to those offences. On the basis of the facts outlined to the Judge by the prosecuting officer, the Judge decided that the offences were minor and fit to be tried summarily. The applicant pleaded guilty. Upon hearing that the defendant was serving a sentence which would not expire for another 17 months, the Judge said that he wanted to impose a sentence of two years and decided to decline jurisdiction and send the matter forward to the Circuit Court. The High Court (Barr J.) refused prohibition.

19. The Supreme Court (Finlay C.J., Hederman and McCarthy J.J.) allowed the appeal and granted prohibition. In essence, it was held that since the District Judge had embarked on a sentence hearing, the applicant was at that stage convicted, and the conviction could not be vacated because of additional evidence that was then heard. In the course of delivering the judgment of the Court, McCarthy J. quoted from *State (McEvitt) v. Delap* [1981] I.R. 125 to the effect that a district Judge could make a provisional or *prima facie* ruling that a case was a minor one, and later convert the case into the procedures for an indictable offence if, as the hearing proceeded, it appeared that the case was not a minor one. He also quoted from The *State (McDonagh) v O'hUadhaigh*, which in turn cited an extract from The *State (Holland) v Kennedy* [1977] I.R. 193, to the effect that a District Judge who embarks on a hearing within jurisdiction may, in the course of the hearing, cross the line into a lack of jurisdiction. He said that he endorsed those views but, importantly, said that they were confined "to cases where a district justice, having come to the immediate opinion that the facts alleged constitute a minor offence or minor offences, may later change his mind on hearing the facts in more detail." He went on to distinguish the case before him in the following passage:

> "If on the facts alleged, a district justice concludes that an offence is a minor offence fit to be tried summarily and the person accused pleads guilty, whether or not the district justice expressly records a conviction, orally or in writing, once he embarks upon an enquiry as to the penalty appropriate to the offence, in my judgment he is precluded from changing his mind. There is, in law, no such thing as a provisional conviction."

20. In a passage which was relied upon by both parties in the case before me, McCarthy J. went on to express sympathy for the predicament in which the District Justice found himself, and commented:

> "I cannot but sympathize with the learned respondent. Having heard 'all' the facts, including the criminal record of the appellants, he was well entitled to conclude that the maximum penalty he could lawfully impose fell short of what was appropriate, and he sought to remedy the situation. In doing so he has identified what seems to be a serious omission in criminal procedure. 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 has heard the evidence material to penalty; yet there must be many such instances."

He went on to refer to s.13 of the Criminal Procedure Act, 1967, and the role of the Attorney General under it, and continued:

> "I do not see any reason why the Director [i.e. the DPP] might not lawfully, by statute, be given a similarly unqualified right to object to a particular scheduled offence being tried summarily in any given case. If the power were granted it would seem to meet the situation where the prosecuting authority is aware of facts which make what would otherwise be a minor offence fit to be tried summarily rather than a minor offence not fit to be tried summarily – the facts constituting, for instance, the criminal record of the accused."

21. The respondent in the present case argues that the last sentence of the above quotation could not be stronger authority for the proposition that the criminal convictions of an accused person are facts which are relevant to the mode of trial decision. It is also argued that the "problem" identified by McCarthy J. was that the prior record of the accused had been drawn to the attention of the Court post-conviction, thus supporting the inference that there would have been no problem if it had been drawn to the attention of the Court pre-conviction. The applicant argues that this interpretation is utterly inconsistent with the 'solution' proposed by McCarthy J. in the same passages, namely that the DPP be given a role in the decision as to mode of trial. It is argued that the solution is precisely designed to avoid the problem which arises if District Judges are permitted to hear evidence as to previous convictions at the time of the mode of trial decision, namely the threat to the presumption of innocence. The 'solution' is that the DPP can refuse consent to summary trial if she has knowledge of significant previous convictions of an accused person, and the decision to send the accused forward for trial on indictment will then take place without any publicity having been given to those convictions before any trial.

22. I find it difficult to decide which of the two interpretations of the judgment of McCarthy J. is correct. Certainly, the language used, particularly in the last sentence of the quotation above, would appear to suggest on its face that previous convictions *are* relevant to the question of whether an offence is a minor offence fit to be tried summarily. However, if that is so, what is the purpose of the solution proposed, namely the giving of a role to the DPP in the decision as to mode of trial? What is the 'serious omission' in criminal procedure that he has in mind? Is the serious omission; (a) that previous convictions *cannot* be referred to until a conviction is recorded, at which point it is too late for a change of mode of trial; or (b) that previous convictions *may not have been* referred to in a particular case until the conviction was recorded, at which point it was too late for a change in mode of trial? And is the 'solution': (a) to address a general problem posed by the fact that previous convictions *cannot* be referred to prior to conviction; or (b) a narrower problem, which arose in that particular case, that a Judge, perhaps by happenstance, does not hear evidence of previous convictions until after an accused has pleaded guilty? Given the far-reaching nature of the legislative remedy proposed, it appears to me that the most likely interpretation is that McCarthy J. considered that previous convictions *could not* be referred to in open court at the pre-trial stage (including at the jurisdictional decision-making time). The only possible reason for taking the view that they *could not* be referred to in open court before conviction is the presumption of innocence.

23. It may be noted that s.8 of the Criminal Justice (Miscellaneous Provisions) Act, 1997, which post-dates the *Feeney* decision by

approximately a decade, conferred a role on the DPP with regard to consenting to summary trial in respect of the full sweep of offences scheduled under the 1951 Act. Prior to that, the prosecutor's consent was required in respect of only a limited number of specific scheduled offences, not including the offences in issue in the *Feeney*. Counsel for the respondent draws attention to this provision and argues that its purpose was to enable the DPP to choose trial on indictment for cases, *inter alia*, where an accused person had significant previous convictions which might influence sentence, without evidence of those convictions being tendered in open court pre-trial. The provisions of the Criminal Justice (Theft and Fraud) Offences Act, 2001, which arise in the present case, also give the DPP the power to withhold consent to summary trial. It was argued that such legislative provisions are designed to provide a practical solution to the problem posed by the prohibition on giving evidence of prior record at the pre-trial stage, which prohibition flows from the presumption of innocence.

24. The most recent case cited to the Court was the decision of the High Court in *Sweeney v Judge Lindsay* [2013] IEHC 210, where Peart J. clearly took the view, albeit in *obiter dicta*, that evidence of previous convictions *cannot* be tendered to influence the decision as to mode of trial. The applicant for judicial review had been charged with assault causing harm, along with a co-accused. When the case came before the District Judge, it was indicated that the applicant intended to plead guilty and that the co-accused was pleading not guilty. The respondent Judge heard the case of the co-accused first and acquitted him. In the course of that case, he was shown CCTV footage of the incident, and saw medical reports in respect of the injuries sustained by the victim of the assault. He then refused jurisdiction to deal with the applicant's case summarily based on the evidence he had received in the case of the co-accused. In the High Court, it was argued on behalf of the applicant that the Judge had acted capriciously and arbitrarily by determining that the applicant's case was not fit to be dealt with summarily, in circumstances where he had dealt with the case of the co-accused on a summary basis. It was also submitted that the decision was in breach of the principle of equal treatment. In the course of his judgment, Peart J. raised the question of how to reconcile the conclusions of McCarthy J. in the *Feeney* case (relied upon by the applicant before him) with that that of Henchy J. in *State (McEvitt) v Delap*, and that of Macken J. in *Read v Reilly* [2010] 1 I.R. 295 (relied on by the respondent before him). As regards *Feeney* and *McEvitt*, respectively, Peart J. took the view that there was no discord between them on the following basis:

> "So, there is no discord between those two judgments when their respective contexts are taken into account. The judgment of McCarthy J. in *Feeney* was in the context of an accused where the offence was a minor one and to which the accused pleaded guilty after the district judge had been given an outline of the facts of the case. It was subsequently only that the judge was informed that the accused was serving two sentences, and in those circumstances he changed his mind as to the minor nature of the offence and sent the accused forward so that what he considered an appropriate sentence could be imposed. It was in such circumstances that McCarthy J. concluded that it was too late and not possible for the judge to reconsider whether the offence was minor. *It is clear that the previous sentence history of the accused could not speak to whether or not the offence in question was a minor offence or one that should be dealt with on indictment.* He had been given an outline of the facts of the case and had then been satisfied on that basis that it was a minor offence. There is nothing in that judgment to indicate that in *Feeney* McCarthy J, was saying that if that accused had pleaded not guilty and his trial proceeded on a summary basis, the judge could not, having heard some or all of the evidence, concluded that he should change his mind about the minor nature of the offence, and send the accused forward on indictment. In fact it is clear from the passage which I have just quoted in paragraph 25 that he was in agreement that this was what the judge could and should do. So, there is no distinction on this point to be drawn between the *Feeney* case and the *State (McEvitt) v. Delap*." (emphasis added)

25. With regard to the case before him, Peart J. took the view that when the case was first called, the District Judge was told only that the applicant intended to plead guilty, and at that stage the Judge knew little if anything of the case. Accordingly, at that point in time he was not a position to make any decision on whether the case against the applicant was one that he could deal with summarily, and did not do so. It was therefore not a case in which the judgment of McCarthy J. in Feeney could assist the applicant. He found that there was no unfairness, arbitrariness or caprice in what then happened. At the conclusion of the case against the co-accused (acquittal), he asked the prosecution to give him an outline of the facts alleged against the applicant and decided it could not be dealt with summarily, having heard the CCTV and seen the medical reports in the course of the hearing of the co-accused. For him to have dealt with the case against the applicant in circumstances where he was of the opinion that the case was not minor or fit to be tried summarily would have been to act without jurisdiction. It was open to him to form the view that the involvement of each of the accused in the incident was different in degree, and to refuse jurisdiction, having had the facts alleged against the applicant outlined to him. Obviously, it was not part of the *ratio* whether previous convictions could be referred to when determining jurisdiction. Nonetheless, Peart J. expressed a clear view as to this matter in the sentence italicised in the above passage.

Conclusions

26. It is very surprising that there is no authority directly on the point raised before the Court in the present application, despite the existence of the minor/non-minor distinction in the Constitution since 1937, and indeed in its predecessor, Article 72 of the 1922 Constitution, the use of the phrase "fit to be tried summarily" as far back as s.77B of the Courts of Justice Act, 1924, and the fact that decisions about mode of trial in criminal cases take place on a daily basis through the jurisdiction.

27. The Court has been referred to a number of judgments given by judges of eminent authority, but the difficulty is that the comments on the particular issue raised in this case have not only been *obiter dicta*, but in some cases have been open to interpretations supporting both the applicant and the respondent in the present case.

28. The provisions of the Criminal Justice (Theft and Fraud) Offences Act, 2001, do not explicitly address the question of whether previous convictions can be taken into account when a District Judge is exercising the function of deciding whether or not a case is a minor one fit to be tried summarily under s.53 of the Act. There is neither explicit permission given to such a course of action (as there was in the legislation in issue in The *Director of Public Prosecutions (Stratford) v Fagan* [1993] 2 I.R. 95), nor an explicit prohibition. The case falls to be decided on whether the statute contains an implicit permission to take previous record into account, or whether, on the principle of the presumption of constitutionality described in *East Donegal Co-operative Livestock Mart Ltd. and Ors v The Attorney General* [1970] 1 I.R. 317, the statute should be read as not permitting this by reason of the constitutional principle of the presumption of innocence. If the latter is the correct position, then it would follow that the District Judge in the present case breached a principle of constitutional justice, and took into account an irrelevant consideration or received inadmissible evidence, when making the decision as to mode of trial.

29. There can be no doubt that the presumption of innocence is a key principle of criminal due process under Article 38 of the Constitution. Its importance has been emphasised in cases such as: *The People (Attorney General) v O'Callaghan* [1966] I.R. 502; *King v Attorney General* [1981] I.R. 233; *Heaney and Anor v Ireland and Anor* [1994] 3 I.R. 593; *DPP v Keogh* [1998] 4 I.R. 416; *State (O'Reilly) v Windle* (unreported, High Court, Blaney J., 4th November, 1986); and *R v Bell* [1936] 70 I.L.T.R. 136. It seems to me that even if the term "minor" or the phrase "fit to be tried summarily" are not confined *prima facie* or literally to the gravity of the offence, the 2001 Act should nonetheless be read subject to an implicit limitation created by the presumption of innocence which is a principle

of constitutional stature. If there are ambiguities in what was said in *O'Hagan v Delap* or *Feeney* as to whether the previous record of an accused can be considered by the District Judge pre-conviction, I interpret those ambiguities in a manner that is most consonant with the presumption of innocence, which was explicitly referred to by O'Hanlon J. in *O'Hagan*, and which must be considered to have underpinned the analysis in McCarthy J.'s judgment in *Feeney*, given the centrality of the principle to criminal procedure under the Irish Constitution. Further, in Feeney, it seems to me that the "solution" proposed by McCarthy J., which was that of giving a power to the DPP to withhold consent to summary trial, makes most sense if one interprets the 'problem' (or, as he described it, the "serious omission" in criminal procedure) as being the fact that evidence of prior record could not influence the question of jurisdiction, despite its relevance to the question of whether an offence is "fit to be tried summarily." Otherwise, a less far-reaching "solution" could have been proposed, such as placing an obligation on the prosecuting officers to inform the court or on the District Judge to inquire as to the previous record of the accused.

30. I accept that the phrase "fit to be tried summarily" must have some meaning over and above the term "minor," but I think that the phrase might encompass a variety of matters other than the previous record of an accused. It seems to me that the phrase "fit to be tried summarily" allows for a consideration of matters over and above the question of whether an offence is "minor," but with the particular exclusion of previous convictions, an exception necessitated by the presumption of innocence.

31. It is true that the judicial oath taken by the District Judge could afford protection to a degree against potential prejudice to an accused, as would the "fade factor" or potential reporting restrictions if the case is sent forward for trial on indictment. However, an even greater protection and the one giving the fullest effect to the presumption of innocence is 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. In the absence of explicit statutory authority allowing for evidence of previous convictions being given at the pre-trial phase for the purpose of determining jurisdiction, I do not see why the 2001 Act should be interpreted as affording the weaker rather than the greater protection for the presumption of innocence. It is true, also, that many District Judges will be well familiar with repeat offenders, whether in a rural area or not; however, this appears to be a matter arising from the practical necessities of having a court of local and limited jurisdiction which, to my mind, should not dictate the interpretation of the 2001 Act simply because of the inevitable realities which arise in certain cases.

32. 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 DPP to withhold consent to summary trial. This ensures that where an accused person has a significant criminal record which would ultimately affect any sentence imposed, the DPP can withhold consent to summary disposal and the case can be sent forward to be dealt with on indictment, without previous convictions having been referred to in open court. I appreciate that at present, the DPP's general direction in cases regarding theft relates only to the value of the goods allegedly stolen, but this is not to say that in an individual case, a serious previous record could not be taken account of in order to refuse consent to jurisdiction. Alternatively, the DPP could alter her direction to have prosecuting officers seek instructions from her office in cases where the prior record of an accused is sufficiently significant to potentially lift the case out of the category of one "fit to be tried summarily." Indeed, it might be argued that the problem in the present case arose from the fact that the prosecuting authority did not exercise the statutory power to withhold consent to summary disposal in light of the prior record of the applicant. Be that as it may, this is not a reason to interpret the 2001 Act as empowering all District Judges to hear evidence of previous convictions when deciding the issue of jurisdiction.

33. Further, I do not think that this interpretation of the statute conflicts with the general principle that the decision on whether an offence is minor and/or fit to be tried summarily is intrinsically a matter for the District Judge. That is a general principle, but it seems to me that an exception must be made if another constitutional principle requires it to be made. The District Judge sits in open court and may also be the person who ultimately tries the case; these are two features which distinguish him (for present purposes) from the DPP. I do not think it is illogical, as was argued, that the District Judge would not be informed of, or entitled to take into account, factors which the DPP may take into account when deciding mode of trial.

34. Finally, I have considered the argument made on behalf of the respondent that some sentencing authorities, including *The People (DPP) v Wall and Anor* [2016] IECA 319, and *The People (DPP) v G.K.* [2008] IECCA 110, suggest that the previous record of an accused for similar offences is not merely relevant to sentence in a general way but to an assessment of the gravity of the offence itself. By the same logic, it is argued, the question of previous convictions may be central to an assessment of the gravity of the offence at the jurisdictional stage in at least some cases. Again, the stumbling block for this argument seems to me to be the fact that the presumption of innocence provides a protection at the pre-trial, as distinct from the sentencing, stage. Indeed, in the *G.K.* case, Finnegan J. (as he then was) specifically addressed the presumption of innocence and referred to the *O'Callaghan* case, but said that the situation was different at the sentencing stage. As noted, the question before me is how the 2001 Act should be interpreted, and whether a constitutional interpretation having regard to the presumption of innocence requires an interpretation precluding the District Judge from hearing, and taking account of, the prior record of an accused when deciding on jurisdiction. A sentencing court is in a different position and in no way restricted from hearing evidence that might create certain risks of prejudice to the trial, if the evidence were given in the pre-trial phase.

35. Accordingly, having considered the authorities opened to me, I have reached the conclusion that a District Judge, when considering whether to deal with a case of theft under the Criminal Justice (Theft and Fraud Offences) Act, 2001 in a summary manner or to send it forward to be dealt with on indictment, may not hear evidence as to the previous convictions of the accused person, because the Act should be interpreted in a manner which is most consonant with the constitutional principle of the presumption of innocence enshrined within the guarantees of due process in Article 38 of the Constitution.

36. I therefore grant *certiorari* of the decision of the District Judge in the present case.