

THE HIGH COURT

[Record No. 2021/1677SS]

**IN THE MATTER OF THE CASE STATED PURSUANT TO SECTION 52 OF THE COURTS
(SUPPLEMENTAL PROVISIONS) ACT 1961**

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

**AND
O'F**

DEFENDANT

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 11th day of July, 2022.

Issues

1. This matter comes before the Court by way of case stated from Judge Brendan Toale in the District Court pursuant to s.52(1) of the Courts (Supplemental Provisions) Act 1961. A notice of the prepared case statement was given on 30 November 2021, the case stated proper being on 29 November 2021.

Background

2. The accused was born on 26 December 2004 and will reach his majority this December 2022. He is charged before the courts with an offence of violent disorder which occurred on 17 November 2020. On 8 July 2021 the DPP recommended trial by indictment and because of that the provisions of s.75 of the Children Act 2001 (the 2001 Act) were engaged. The accused was first before the District Court on 19 December 2020.
3. In the case stated of the District Judge, at para. 56 the questions posed are:
 - (1) Does s.75 of the Children Act 2001 permit the Children Court to take account of previous convictions of an accused in determining whether to try or deal with a child charged with an indictable offence where the DPP has not directed or consented to summary disposal?
 - (2) If the answer to (1) is yes, can the Children Court request that the DPP furnish it with details of previous convictions of an accused?
 - (3) If the answer to (2) is yes, is it within the discretion of the DPP to refuse such a request?
4. By way of initial comment, it is suggested that these are general questions posed of the District Judge to this Court and so a general response is required. In fact, as interpreted by the courts the opinion or advice of the High Court is to enable the District Judge to deal with the matter before him (see DPP v Buckley [2007] IEHC 150). In a very carefully constructed case stated the details of the instant offence were set out and it appears to me that the response or the advisory to be furnished is in the context of the facts so presented.
5. In respect of those facts at para. 9 of the case stated it is mentioned that the accused's solicitor stated that the accused was "offering a plea of guilty". At para. 32 of the case stated it is recorded that the defence submissions state as follows:

"In the within case the accused has indicated a plea of guilty should the matters be retained in the District Court. This fact in and of itself does not mean that the accused has waived his presumption of innocence. The indication of a plea is conditional on the acceptance of jurisdiction. Section 75 of the 2001 Act provides for a preliminary procedure which is engaged in prior to any finding of guilt being made. The accused has not yet entered a plea and thus retains his presumption of innocence."

6. Thereafter the Judge goes on to state that:

"For the purposes of this case, the Court accepts the submission. It is the practice of this Court to proceed in this way when a child indicates that he, in the words of section 75, 'wishes to plead guilty'".

7. In my view, it is clear that the understanding of the Judge when presenting the case stated was to the effect that the plea indication was a conditional indication which is an entirely different matter to either pleading not guilty, guilty, or an intention to plead guilty.

The Children Act 2001

8. Section 75 (1) of the Children Act 2001 provides that:

"... 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."

9. In sub. (2) it is stated that:

"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."

10. The section goes on to state that a case can only be dealt with summarily with the child's consent. There is provision for assistance for the child when making a decision and under sub. 7(a) it is provided that "Where a child is sent forward for sentence under this section, he or she may withdraw the written plea and plead not guilty to the charge."

Jurisprudence

11. It appears to me from the submissions made and the details furnished that there are two significant cases, however, before I address those cases I will first refer to a number of other cases raised.

12. In DPP v. The Dublin Metropolitan District Court [2021] IEHC 705, a judgment of Ferriter J., it was held that under s.75(2)(b) the District Judge is entitled to take into account the fact that the accused is being charged with a second offence arising from the same facts.
13. In DPP v. Hannaway & Ors. [2021] IESC 31, a judgment of O'Malley J., it is stated that in interpreting the provisions of the statute it is necessary to consider the scheme of the Act as a whole to give a harmonious interpretation.
14. In DPP v. Farrell [1978] IR 13, a judgment of O'Higgins C.J. in the Supreme Court, it was said that when dealing with the ejusdem generis rule:

"It would not, however, in the Court's View, be proper to regard a vehicle as a convenient place. The application of the ejusdem (sic) generis rule of construction would indicate that the general term "other convenient place" ought to be construed in the same sense as the specifics, a Garda station or a prison and at least must mean a convenient building of some kind."
15. In LE v. DPP [2019] IEHC 471, Simons J. stated that when the Oireachtas makes an express provision for one situation and not another (under eighteen and over eighteen), weight should be given to this legislative preference.
16. In State (O'Hagan) v. Delap [1982] IR 213, O'Hanlon J. stated that where there was an indication of an intention to plead guilty, the presumption of innocence ceased to apply once that indication was given. In those circumstances there was no threat to the presumption.
17. In Sweeney v. District Judge Lindsey [2013] IEHC 210, Peart J. in the High Court stated obiter that evidence of prior convictions cannot be used to influence a decision on the mode of trial.
18. The accused relied on Arklow Shipping Unlimited Company & Ors. v. Drogheda Port Company DAC [2021] IEHC 601, a judgment of Mr. Justice McDonald of 17 September 2021, at para. 42, noting there was a differential between two acts, one of 1946, and one of 1996. The Court commented that "Had it been the intention of the Oireachtas to continue to impose a duty akin to that previously imposed under s.47 of the 1946 Act, one would expect that similar language would have been used in the 1996 Act."
19. In Feeney v. District Justice Clifford [1989] IR 668, in the Supreme Court, it was held that once the District Judge had embarked on an inquiry as to the appropriate penalty he was not entitled to change his mind on jurisdiction. In that matter it was recognised that there was a lacuna in the jurisdiction stage of the proceedings, in that it was not possible then to have regard to prior convictions which it was recognised would be of significance in regard to whether or not a matter could be appropriately dealt with as a summary matter. A solution was suggested and that solution was effectively implemented ten years later when the DPP was given the power to refuse consent for a matter to be dealt with summarily in the District Court. Thereafter, notwithstanding that prior convictions could

not be mentioned in the District Court when determining jurisdiction, the matter could proceed by way of indictment at the election of the DPP. That power is not available to the DPP under the Children Act 2001, although continues to be available in respect of adults.

20. In my view the two most significant cases are DPP v. O'Neill [1997] IEHC 152 and Gifford v. DPP [2017] IEHC 423.

21. In DPP v. O'Neill, the Children (Ireland) Act 1884 (the 1884 Act) was engaged. It is significant to look at the terms of that Act. Section 5(1) of the 1884 Act (as amended by Section 133 (6) of the Children Act 1908) provides that:

"Where a young person is charged before a court of summary jurisdiction with any indictable offence other than homicide, the Court, if they think it expedient so to do, having regard to the character and antecedents of the person charged, the nature of the offence and all the circumstance of the case, and if the young person charged with the offence, when informed by the Court of his right to be tried by a jury, consents to be dealt with summarily, may deal summarily with the offence..."

22. In that case there was an apprehension that the 1884 Act did not survive the Constitution of 1937 and at p.390 of the judgment of Smyth J. in the High Court it was stated that:

"The provision of the 1884 Act does not infringe the constitutional right or rights of the Accused and has survived the enactment of the Constitution. The submission by counsel on behalf of the Accused that an accused person may be the subject of a high penalty on the basis of their character and antecedents is in my view illfounded. The evidence of character and antecedents is only to be embarked upon so that the District Judge may be in a position to assess the quality of the consent that might be forthcoming by the person of tender age."

23. In the second significant case, Gifford v. DPP, before Ms. Justice Ní Raifeartaigh, the provision engaged was that of s.53 (1) of the Criminal Justice Theft and Fraud Offences Act 2001 which provides that:

"The District Court may try summarily a person charged with an indictable offence under this 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."

24. At para. 10 of the judgment in that matter it was noted that:

“(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.”

25. It is not clear as to why there was reference to a youth because the balance of the judgment does not deal with youths, but the intimation of a guilty plea or a change of mind is something that does appear later on in the judgment.
26. In my view, the reference to an adult and not a youth is most likely to do with s.75 (7) of the 2001 Act, namely, that although a youth might plead guilty in the District Court at the jurisdiction stage and be sent forward for trial, nevertheless, the youth can then change his mind and plead not guilty.
27. Ms. Justice Ní Raifeartaigh having reviewed the case law gave her conclusion commencing at para. 26. Para. 28 and a number of subsequent paragraphs are particularly relevant. At para. 28 Ní Raifeartaigh J. found that:

“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.”

28. At para. 29 the Court continued: “There can be no doubt that the presumption of innocence is a key principle of criminal due process under Article 38 of the Constitution ... 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.”
29. As to whether the previous record of an accused can be considered by the District Court Judge pre conviction, and insofar as there might have been ambiguities in previous cases,

Ms Justice Ní Raifeartaigh interpreted those ambiguities in a manner that is most consonant with the presumption of innocence which was explicitly referred to in O'Hanlon J.'s judgment of O'Hagan v. Delap.

30. In para. 30 the Court accepted that "the phrase 'fit to be tried summarily' must have some meaning over and above the term 'minor'", but stated:

"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. In para. 31 of Gifford the Judge stated:

"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."

32. In para. 35 of Gifford the Judge concluded that:

"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."

Discussion

33. In my view, the case law demonstrates that once there is an intention to plead guilty advised to the Court, or once a guilty plea has been made, then the presumption of innocence ceases and it is possible then to look at prior convictions.
34. In the instant matter, it was not a guilty plea, it was not a not guilty plea, it was not a plea of intention to plead guilty, but rather a plea where it was intended to plead guilty contingent on the District Court retaining jurisdiction. It is stated in the Court's case

stated that the submission that the presumption of innocence continues to apply to the instant accused has been accepted by the Court.

35. In the circumstances that are before me, circumstances where the presumption of innocence continues to prevail, it does appear to me that the case law identified by the parties demonstrates that for as long as that presumption continues, the constitutional requirement not to effectively contaminate the position or prejudice the accused by referring to previous convictions holds firm.
36. It would only be in circumstances where the accused has pleaded guilty or given an intention to plead guilty which is not a contingent, that the presumption of innocence would lapse and it would be permissible to take account of prior convictions in a determination as to the proper jurisdiction.
37. It is clear from the Supreme Court judgment in Feeney v. Clifford that by reason of the fact that the District Judge did not know of prior convictions of the relevant accused, there was a lapse or problem in that it may be more appropriate that an accused would be given a higher sentence, if in fact the accused had some relevant prior convictions.
38. In the DPP's submission it is argued that the DPP has a power to refer to prior convictions during the jurisdiction phase and it is within the privilege of the DPP to lead that evidence, and the safeguard within the legislation from the accused's point of view is that the court can determine whether or not to have regard to that evidence.
39. It appears to me that there is no foundation for such an argument. There is nothing within the Act which explicitly confers such a power. That argument is not particularly distant from the argument that was made to Ms Justice Ní Raifeartaigh in Gifford. Ní Raifeartaigh J. stated at para. 34 that she has considered the respondent's arguments that some sentencing authorities suggest that the previous record of an accused for similar offences is not merely relevant to sentence but can also be relevant to the assessment of the gravity of the offence itself. It is said by the same logic that it is argued that the question of previous convictions may be central to the assessment of the gravity of the offence at the jurisdictional stage in at least some cases. Again, according to Ms Justice Ní Raifeartaigh, the stumbling block for that argument seems to be that the fact that the presumption of innocence provides a protection at a pre-trial stage as distinct from sentencing stage.
40. The watershed as to dealing with prior convictions in the District Court would be the guilty plea or intention to plead guilty. That fact is clear from the recording in para. 10 of the judgment of Ní Raifeartaigh J. where she states that there has been no intimation of a guilty plea nor a guilty plea entered. It is also consistent with O'Hanlon J.'s judgment in Delap that once there is a guilty plea or an intention to plead guilty the presumption of innocence lapses. There is no reason why that procedure would not apply to children also.
41. I have considered para. 31 of the judgment of Ní Raifeartaigh J. when she says that such matters as the judicial oath, the fade factor or reporting restrictions would afford some

protection but the greater protection would be not to refer to prior convictions, and she felt thereafter that unless it was explicitly stated then a piece of legislation should be read as though not removing the prohibition on looking at prior convictions prior to either a conviction, or a plea of guilty.

42. The DPP also suggested that it would be necessary to have a harmonious interpretation of this Act together with a number of other Acts that were promulgated in 2001. The accused says that no such principle arises, and it does appear to me that the principle is to look to a harmonious interpretation of the instant Act rather than other Acts also.
43. In that regard does one have to trawl through the entirety of the legislation that was promulgated in 2001? Why wouldn't legislation in 2002 also be potentially relevant depending on what time of the year the Act became law? There is great difficulty in my view with the DPP's suggestion of the harmonious interpretation of several acts and the case law is to the effect that it is a harmonious interpretation of a given Act which guides interpretation (see DPP v. Hannaway).
44. The DPP suggests that if it is not read in or understood by the statute that the DPP has the ability to raise, at the DPP's election, prior convictions at jurisdiction phase, then a lacuna would be created.
45. As was pointed out by the Supreme Court in Feeney v. District Justice Clifford and by counsel on behalf of the applicant in this case, it is not the Court's obligation to interpret an Act so as to avoid the possibility of a lacuna.
46. In Feeney, the Supreme Court identified what they called a serious lapse by not having available the prior convictions when making a determination on whether to hold the matter in the District Court or send the matter on indictment to the Circuit Court, and suggested how that might be overcome, but the Court didn't fill that gap by assessing the Act as meaning something other than its plain meaning.
47. The accused says if one looks at the formulation in s.75, and specifically s.75(2)(b), it is so general that it is limited by the preceding paragraph, namely the age and maturity of the accused, as opposed to all else (the ejusdem generis principle).
48. I am more inclined to attribute a meaning to s.75(2)(b) in similar terms to what Ms Justice Ní Raifeartaigh found "fit to be tried summarily" which is a consideration of the age and maturity of the child, and also other matters, but excluding the previous convictions necessitated by the presumption of innocence (such meaning is consistent with DPP v The Dublin Metropolitan District Court, para.12 above).
49. When the 1884 Act was being considered, notwithstanding that it is set out in somewhat different terms to the instant Act, the court was entitled to take into account all the circumstances of the case as well as the character and antecedents of the person charged, however, it was not thought in that case that either of those sentences (namely, character and antecedents, or take account of all the circumstances of the case) either

looked at individually or collectively amounted to an entitlement to look at prior convictions.

50. When one bears that in mind, the principle of *eiusdem generis*, then it does seem to me that the provisions of s.75 cannot be construed as allowing, in a situation where there is no guilty plea or an intimation of guilt, prior convictions to be taken into account in a determination of jurisdiction. "Any other facts that it considers relevant" lacks the required specificity (see para. 31 Gilford). It would have to be explicit as Ní Raifeartaigh J. stated in her judgment and it has not been so.
51. In circumstances where there is a practice of allowing an indicative plea without prejudice to the presumption of innocence that is not enough to move the child within the arena of having pleaded guilty, or an intention to plead guilty, and I do not see the provisions of *in camera* or prohibiting publication, as grounds to suggest that that constitutional safeguard has been diminished. Rather, the *in camera* rule and the prohibition on publication are there as procedural safeguards rather than in lieu of the constitutional safeguard. The DPP acknowledges that there are enormous benefits afforded to children under the 2001 Act.
52. Furthermore, given that the 1884 Act which would on a superficial reading appear to be dealing with prior convictions, however, was interpreted constitutionally so that the presumption of innocence would continue and prior convictions were not to be considered.

Decision

53. On the basis of the foregoing, it appears to me that the questions posed by the District Judge, namely, "does s.75 of the 2001 Act permit the Court to take account of previous convictions of an accused in determining whether to try or deal with a child charged with an indictable offence, where the DPP has not directed or consented to summary disposal?", the answer would have to be "no" in the circumstances as presented in the case stated.
54. The two other questions raised are contingent on an answer to question number one being in the affirmative rather than the negative.