

## THE SUMMARY TRIAL OF INDICTABLE OFFENCES

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## I. INTRODUCTION

This paper is concerned with the summary trial of indictable offences, that is, those indictable offences which, provided they may be regarded as minor, can be tried in the District Court. I propose to examine a number of problems, including the question of when the accused should have a right to elect for a jury trial. What criteria should the judge adopt in deciding whether an offence is minor? What criteria should the prosecutor adopt in electing either for summary trial or trial on indictment?

Article 38.2 of the Constitution of Ireland provides that “minor offences may be tried by courts of summary jurisdiction”. The Constitution goes on to provide that, with the exception of minor offences and offences tried by special courts and military tribunals, no person may be tried on any criminal charge without a jury.

As a general rule the only court with a summary jurisdiction at first instance in criminal matters is the District Court.<sup>1</sup> The reasons of legal policy which underlie the concept of summary jurisdiction were stated in *Clune v. D.P.P.*<sup>2</sup> by Gannon J.

A summary trial is a trial which could be undertaken with some degree of expedition and informality without departing from the principles of justice. The purpose of summary procedures for minor offences is to ensure that such offences are tried as soon as reasonably possible after their alleged commission so that the recollection of witnesses may still be reasonably clear, that the attendance of witnesses and presentation of evidence may be procured and presented without great difficulty or complexity, and

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<sup>1</sup> Certain other courts have a power to punish contempts summarily. Where a person is tried on indictment the indictment may also contain any count for a summary offence arising from the same facts: section 6 of the Criminal Justice Act, 1951.

<sup>2</sup> *Clune v. D.P.P.* [1981] I.L.R.M. 17 (H.C.).

that there should be minimal delay in the disposal of the work load of minor offences.<sup>3</sup>

To these, Hogan and Whyte add the following comment:

It would be a sufficient reason for summary trial to say that the multiple disruption of jurors' private affairs, the expense, the delay, and the general panoply of a jury trial render this form of justice completely impractical for the mass of minor offences with which the State has to deal, and that the defendant's interest, where only a minor punishment can be imposed, is insufficient to outweigh those public considerations.<sup>4</sup>

Generally, offences may fall into three categories:

1. Minor offences created by statute where the only penalty provided for is on summary conviction.
2. Indictable offences that cannot be tried or otherwise disposed of in the District Court, *e.g.* murder or rape.
3. Indictable offences which, provided the particular offence can be considered minor in nature, may be dealt with in the District Court (each-way offences).

It is with that third category of offences that this paper is concerned.

It is important to note that no offence may ever be tried by a court of summary jurisdiction if the court considers that it is not a minor offence. References subsequently in this paper to the option of either the prosecutor, the defendant, or both, to elect for summary trial, are subject always to the qualification that the judge of the District Court may not accept jurisdiction unless of the opinion that the offence is a minor one fit to be tried summarily. The decision of the prosecutor to opt for a summary trial is never a final one and is

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<sup>3</sup> *Clune v. D.P.P.* [1981] I.L.R.M. 17 at 19 (H.C.).

<sup>4</sup> Hogan, G. and Whyte, G., (ed.) *J.M. Kelly: The Irish Constitution* (3rd ed., Butterworths, Dublin, 1994), p. 627.

always subject to the judge being persuaded of the minor nature of the offence.

The procedure which should be adopted by a judge in deciding whether the facts proved or alleged constitute a minor offence fit to be tried summarily was set out by Butler J. in the *State (Nevin) v. Tormey*.<sup>5</sup> In that case the District Court had embarked on a summary trial after being informed that the accused had no objection to a summary trial but without having itself formed an opinion on whether the facts disclosed a minor offence. Section 2 of the Criminal Justice Act, 1951, gave the District Court jurisdiction if “the Court is of opinion that the facts proved or alleged constitute a minor offence fit to be tried summarily”. Butler J. held that the Court had no jurisdiction to embark on a trial until it had formed the necessary opinion. This it could do by getting a general statement of the facts of the case from the prosecution on which it could then form the necessary opinion.

Where the District Court judge accepts jurisdiction that decision may be changed during the course of the trial if it emerges that the offence is not minor. *The State (O’Hagan) v. Delap*<sup>6</sup> held that where a District Court judge has elected to try a case summarily, and has embarked on the trial, circumstances may arise which permit, or may even make it necessary, to reverse the previous decision and send the case forward for trial on indictment. O’Hanlon J. said:

If a District Court Justice embarks upon a summary trial and is then led to believe, by the evidence he hears, that the facts disclose a major rather than a minor offence, he would find himself in a situation where it would be constitutionally impossible for him to try the case summarily within his jurisdiction; in my opinion he would be bound to discontinue the summary trial ...<sup>7</sup>

O’Hanlon J. further held that, in answering the question “Do the facts alleged or proved constitute a minor offence fit to be tried summarily?” the judge was entitled, in words used in *Clune’s* case,

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<sup>5</sup> *The State (Nevin) v. Tormey* [1976] I.R.1 (H.C.).

<sup>6</sup> *The State (O’Hagan) v. Delap* [1982] I.R. 213 (H.C.).

<sup>7</sup> *The State (O’Hagan) v. Delap* [1982] I.R. 213 at 217 (H.C.).

to consider “the consequences ... of conviction of the indictable offences in terms of possible punishment determined upon proper principles of sentencing taking into account the public interest, deterrent factors, the personal circumstances of, and consequences for, the convicted persons”.<sup>8</sup> These circumstances could properly include the accused admitting that the offences in question had been committed while he was on bail.

However, in the subsequent case of *Feeney v. District Justice Clifford*<sup>9</sup> the Supreme Court held that once the District Court had accepted jurisdiction and convicted the applicant it could no longer decline jurisdiction even if facts emerged at the sentencing stage which indicated that the sentencing options were inadequate (in that case the fact that the accused was already serving a sentence which still had 17 months to run). This case presents a difficulty for the District Court judge who cannot know of such factors until after conviction. The duty on the prosecutor to take account of such factors when deciding which venue to opt for may help to resolve this problem but does not provide a solution where the judge forms a different view to that of the prosecutor.

## II. THE JURISDICTION OF THE DISTRICT COURT TO TRY INDICTABLE OFFENCES SUMMARILY

The jurisdiction of the District Court to deal summarily with indictable offences arises under four broad headings:<sup>10</sup>

1. Offences triable summarily or on indictment at the option of the prosecutor. These offences typically cover a wide range of seriousness.
2. Minor offences triable summarily with the consent of both the accused and the Director of Public Prosecutions by virtue of section 2 of the Criminal Justice Act, 1951, as amended, or by

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<sup>8</sup> [1981] I.L.R.M. 17 at 18 (H.C.).

<sup>9</sup> *Feeney v. District Justice Clifford* [1989] I.R. 668 (H.C. & S.C.).

<sup>10</sup> Contempt of court and criminal libel are also indictable offences which may be dealt with summarily. It is not intended to deal with these in this paper. It may be noted that summary trials for contempt of court are not confined to the District Court. Section 10 of the Defamation Act, 1961, provides a mechanism for the summary disposal of certain libels published in newspapers which are “of a trivial character” with the consent of the accused. The prosecutor’s consent to summary disposal is not required.

- virtue of a specific statutory provision.<sup>11</sup>
3. Certain indictable offences committed by children and young persons.
  4. Offences that may be dealt with on a plea of guilty under section 13 of the Criminal Procedure Act, 1967.

In relation to the four categories that will be discussed in this paper, the prosecutor must decide whether to consent to, or elect for, summary trial. This decision depends on whether the offence is minor in nature. If a decision is taken by the prosecutor to proceed summarily, this will be subject to the District Court judge accepting that the offence alleged is indeed a minor offence.

### III. OFFENCES TRIABLE SUMMARILY OR ON INDICTMENT AT THE OPTION OF THE PROSECUTOR

There are a considerable number of statutory offences for which an offender can be prosecuted either summarily or on indictment where the statute itself does not indicate the circumstances under which one option should be chosen rather than the other.<sup>12</sup> With such offences the accused has no right to elect which court should try him. It is the prerogative of the prosecutor to determine whether the charge will be prosecuted summarily or on indictment,<sup>13</sup> subject to the right of a District Court judge who decides that the offence is of a non-minor nature to refuse jurisdiction to try the matter summarily. The prosecutor's decision to elect for trial on indictment is not open to challenge.

### IV. MINOR OFFENCES TRIABLE SUMMARILY WITH THE CONSENT OF BOTH THE ACCUSED AND THE DIRECTOR OF PUBLIC PROSECUTIONS

The Courts of Justice Act, 1924 provided that six categories of

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<sup>11</sup> Effectively these are the same as scheduled offences under the 1951 Act as there is no practical distinction from the point of view of jurisdiction, for example assault on a Garda, or certain theft and fraud offences.

<sup>12</sup> For example assault causing harm contrary to section 3 of the Non-Fatal Offences Against the Person Act, 1997, offences under the Criminal Damage Act, 1991, and unauthorized taking contrary to section 112 of the Road Traffic Acts.

<sup>13</sup> See *The State (McKevitt) v. Delap* [1981] I.R.125 (S.C.).

indictable offences could be tried summarily in certain circumstances, subject to the accused's right to object to summary trial. Section 2 of the Criminal Justice Act, 1951 re-enacted this regime with reference to a schedule of 21 offences. This provision has been further amended by section 8 of the Criminal Justice (Miscellaneous Provisions) Act, 1997. The conditions for a summary trial under this provision are that:

- (a) the Court is of the opinion that the facts proved or alleged constitute a minor offence fit to be tried summarily,
- (b) the accused, on being informed of his right to be tried by a jury, does not object to being tried summarily, and
- (c) the Director of Public Prosecutions consents to the accused being tried summarily for such offence.

The maximum penalty on conviction is 12 months imprisonment or a £1,000 fine (€1,269.74) or both. In addition, there are a number of other Acts,<sup>14</sup> which confer jurisdiction on the District Court to try summarily offences created by those Acts under the same conditions. A recent and important example of such a provision is section 53 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, which provides for the summary trial of indictable offences under that Act. The maximum penalty in such cases is 12 months imprisonment or a £1,500 (€1,904.61) fine or both. Essentially, the procedures in these specific Acts are the same as those provided in section 2 of the Criminal Justice Act, 1951.

Certain indictable offences committed by children and young persons pursuant to section 75 of the Children Act, 2001, the District Court has jurisdiction to deal summarily with a child or young person charged with any indictable offence, other than manslaughter, or those offences which are required to be tried by the Central Criminal Court. The preconditions to the exercise of this jurisdiction are that the court is of the opinion that the offence is a

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<sup>14</sup> For example Section 2(2) the Fisheries (Amendment) Act, 1978, as amended by section 75 of the Fisheries Act, 1980. Section 2(3) of the Trading Stamps Act, 1980, provides for an each-way offence where the court's opinion has to be based on "the facts proved" rather than merely alleged. This repeats a formula which was used before the 1951 Act was passed. For a discussion of the very cumbersome procedures which would have to be followed to give effect to this procedure see *The State (Nevin) v. Tormey* [1967] I.R. 1 at 4-5 (S.C.).

minor offence fit to be tried or dealt with summarily, and that the child, on being informed of his or her right to be tried with a jury, consents to the case being tried summarily. In deciding whether to try or deal with the child summarily for an indictable offence the court shall also take account of the age and level of maturity of the child concerned and any other facts that it considers relevant.

#### V. OFFENCES DEALT WITH ON A PLEA OF GUILTY

Section 13 of the Criminal Procedure Act, 1967 (as amended), applies to all indictable offences except the following:

An offence under the Treason Act, 1939, murder, attempt to murder, conspiracy to murder, piracy, genocide or a grave breach such as is referred to in section 3(1)(i) of the Geneva Conventions Act, 1962, including an offence by an accessory before or after the fact.

This section provides that where the District Court ascertains that a person who is charged with an offence to which the section applies wishes to plead guilty and the court is satisfied that that person understands the nature of the offence and the facts alleged, the court may, with the consent of the Director of Public Prosecutions, deal with the offence summarily. In such a case the accused is liable to a fine not exceeding £1,000 (€1,269.74) or, at the discretion of the court, to imprisonment for a term not exceeding 12 months or to both such fine and imprisonment. Additionally, there are restrictions on dealing with rape or aggravated sexual assault on a plea of guilty, and section 13(2)(a) does not apply in relation to rape, rape under section 4 or aggravated sexual assault.<sup>15</sup> Also, section 13 does not affect the jurisdiction of the court under section 2 of the Criminal Justice Act, 1951, as amended.

It is important to note that the District Court judge “may” accept jurisdiction. While there appears to be no case law on this

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<sup>15</sup> Pursuant to section 20 of the Criminal Law (Rape) (Amendment) Act, 1990.

point, it is suggested that the judge is entitled, and may be obliged, to decline jurisdiction where the judge considers that the sentencing powers of the District Court are inadequate to deal with the case properly.

The common thread running through all of these categories of offence is that the District Court judge must be of the opinion that the facts proved or alleged constitute a minor offence fit to be tried summarily; and if not of such an opinion then should refuse jurisdiction.

## VI. THE ACCUSED'S RIGHT OF ELECTION

It has been argued that all accused should have the right to elect for trial on indictment in relation to any indictable offence that is triable summarily. In principle, however, it may be asked why this should apply to an offence which is clearly minor, as the offence must be if the District Court Judge has accepted jurisdiction. The prosecutor can never insist on summary trial if the offence is not minor. Why should the accused be entitled to trial on indictment for an offence which is a minor one?

In practice, the administration of justice could be seriously impeded if those accused of each-way offences which in fact are minor were entitled in all cases to a jury trial as of right. One recalls the situation that applied to casual trading offences when the option of trial on indictment was available to the accused. Many defendants elected for trial on indictment, and until it was amended this effectively rendered the Casual Trading Act, 1980 unworkable.

One possible way to avoid creating "each-way" offences is for the legislature to create separate summary and indictable offences in relation to the same conduct, with the distinction between the two related to the value of the property or the nature of the harm caused. That was the situation with malicious damage prior to 1981, when IR£50 was the threshold. It may be objected, however, that such limits are necessarily arbitrary. They take no account of the accused's moral culpability. The value of property affected is only one element in evaluating the seriousness of an offence, and is not always the most important element. Furthermore, if a limit is established this



may present difficulties of proof. It also gives rise to the problem of whether separate indictable and summary offences are to be mutually exclusive. If they are this could create serious problems. It should not, for example, be open to an accused to make the defence that property stolen was in fact more valuable than is charged. If the offences are not mutually exclusive, the prosecutor will still have an option where the value of the property is above the threshold whether to charge the more serious or the lesser offence. Thus prosecutors will still be able to decide whether the defendant is to have a jury trial. The more common provision allowing the prosecution to choose subject to the District Court judge's right to decline to deal with a non-minor offence is, in my view, both fairer and more workable.

In the case of certain offences, such as theft, the Oireachtas has provided that the accused should always have the right to a jury trial. The rationale for such a provision would seem to be that such offences are regarded as potentially very serious even where the amount of loss or damage caused by the offence is trivial. Thus a conviction for an offence involving an element of dishonesty may have serious consequences unrelated to the value of the property stolen. It is obvious that a conviction for an offence involving dishonesty, even for a trivial amount, would have consequences for a person in a position of trust, which would be more serious than for many other people. Attempts in other jurisdictions to distinguish between different classes of defendants for the purpose of deciding on entitlement to a jury trial have not met with success, and in the Irish context could be of doubtful constitutional validity.

It may be that in the past the Oireachtas has not always addressed its collective mind to the question whether, when an each-way offence was being created, the accused should have a right of election. It is suggested that in the future the Oireachtas should address this question in relation to each specific offence but that it is unnecessary and inappropriate to provide for a right to trial by jury in relation to all each-way offences. There is no reason to apply the principle of "one size fits all" when drafting criminal offence provisions. Instead each provision should be tailored to the nature of the offence.

## VII. THE CRITERIA FOR DETERMINING WHETHER AN OFFENCE IS MINOR

While the Constitution of Ireland permits the trial of minor offences in courts of summary jurisdiction, the statutes which lay down a test for the judge to apply in forming an opinion as to whether an offence is minor generally require that opinion to be formed with respect to “the facts proved or alleged” in the particular case.<sup>16</sup>

The cases of *Melling v. Ó'Mathghabhna*<sup>17</sup> and *Conroy v. The Attorney General*<sup>18</sup> decided that the following matters are to be considered in determining whether an offence is a minor offence or not:

1. The severity of the punishment prescribed for the offence.
2. The moral quality of the act constituting the offence.

In addition, two further matters, the state of the law when the Constitution was enacted and public opinion at the time of the enactment were considered to be relevant, since it was assumed that the electorate in 1937 intended “minor offences” to cover those matters which were triable summarily immediately before the Constitution was enacted.

The courts have refined, expanded upon, and explained these criteria in cases that have subsequently arisen. Public opinion and the state of the law when the Constitution was enacted have now been discounted as having no particular relevance to the question.<sup>19</sup>

## VIII. SEVERITY OF PENALTY

The case-law on the distinction between minor and non-minor offences establishes that the principal criterion for determining on which side of the line a particular offence falls is the penalty attaching to the offence. In *Melling's* case, Kingsmill-Moore J. reasoned that since one of the main objectives of Article 38 is to

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<sup>16</sup> For example section 2 of the Criminal Justice Act, 1951; Criminal Justice (Theft and Fraud Offences) Act, 2001. Section 75 of the Children Act, 2001, merely provides that the court has jurisdiction unless of opinion that the offence does not constitute a minor offence fit to be tried summarily, but without giving guidance as to how the court should form its opinion.

<sup>17</sup> *Melling v. Ó Mathghabhna* [1962] I.R. 1 (S.C.).

<sup>18</sup> *Conroy v. Attorney General* [1965] I.R. 411 (H.C. & S.C.).

<sup>19</sup> See *The State (Rollinson) v. Kelly* [1984] I.R. 248 (S.C.).

guarantee trial by jury, and since individuals have traditionally regarded the jury as a guarantee against executive abuses, the question of what is a minor offence ought to be approached from this perspective. He stated that:

Regarded from the point of view of the citizen offender the difference between a minor offence and a major offence depends chiefly on the punishment which is meted out to the convicted criminal. It is this, which stamps an offence as serious or not serious in his eyes.<sup>20</sup>

This view has been subsequently endorsed in a number of cases but there has been some divergence of opinion about how severe a particular penalty must be in order to bring the crime into the non-minor category.

#### IX. RANGE OF POSSIBLE PENALTIES

Firstly, what is meant by the severity of the penalty prescribed for the offence? Is it the sentence that the District Court judge deems appropriate (in the event of a conviction) or the maximum penalty authorized by law? Usually the Act creating the offence lays down a range of penalties from which the judge may select an appropriate sanction in light of the circumstances of the case. Most offences fall into this category, so perhaps it is unsurprising that this question has generated a good deal of apparently conflicting opinion in the superior courts.<sup>21</sup>

In *Haughey's* case, the Supreme Court held that a statute that provided for an unlimited penalty for an offence that was triable summarily (albeit in the High Court), was not constitutional because, among other reasons, the offence was not a minor offence within the meaning of Article 38.2 of the Constitution. The Supreme Court (Ó Dálaigh J.) stated as follows:

Article 38 recognises two categories of offence, namely,

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<sup>20</sup> [1962] I.R. 1 at 34 (S.C.).

<sup>21</sup> See *In re Haughey* [1971] I.R. 217 (H.C. & S.C.) and *cf. The State (Rollinson) v. Kelly* [1984] I.R. 248 (S.C.).

minor offences and offences which are not minor offences and which, for brevity, may be called non-minor offences. How is it to be determined into which category an offence falls? Of the relevant criteria, the most important is the severity of the penalty which is authorised to be imposed for commission of the offence. This test was laid down by this Court in *Conroy v. Attorney General*, which has been followed in *The State (Sheerin) v. Kennedy*.<sup>22</sup> The decision in *Conroy's Case* followed the judgment of the former Supreme Court in *Melling v. Ó'Mathghabhna*. Turning back to s. 3, sub-s. 4, of the Act of 1970, the penalty authorised for the offence which is in question in this case is such penalty as can be imposed for contempt of the High Court. Contempt of court is a common-law misdemeanour and, as such, is punishable by both imprisonment and fine at discretion, *i.e.*, without statutory limit. Some English authorities suggest that limits are nevertheless to be imposed – that imprisonment must not be inordinately heavy and the fine not excessive or unreasonable- but the position remains that a common-law misdemeanour can be punished by a penalty entirely outside the range of penalty permissible for a minor offence: see Archbold's *Practice in Criminal Cases*, 36th ed., paras. 659 and 662. On the authority of the decisions of this Court, referred to above, the offence in question here is not a minor offence. Counsel for the Attorney General submitted that the Court should follow the decision of the United States Supreme Court in *Frank v. United States*<sup>23</sup> and apply as a test, not the severity of the penalty authorised, but of the penalty actually imposed. Here the sentence imposed by the High Court was six months imprisonment, and this would be within the range of penalty appropriate in the case of a minor offence. This Court sees no reason for departing from the test it laid

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<sup>22</sup> [1966] I.R. 379 (S.C.).

<sup>23</sup> (1969) 395 U.S. 147 (S.C.).

down in *Conroy's* case. *Frank's* case was a case of contempt of court; the present case is not a case of contempt of court but an ordinary criminal prosecution. Moreover, it should be noted that Marshall J., who delivered the opinion of the majority of the court in *Frank's* case, expressly excluded the test of the penalty actually imposed in ordinary criminal prosecutions. At p. 149 of the report his words are: "In ordinary criminal prosecutions, the severity of the penalty authorised, not the penalty actually imposed, is the relevant criterion." To apply the test of the penalty actually imposed would, in effect, be to deny to an accused the substance of the right to trial by jury guaranteed by Article 38, s. 5, of the Constitution. Therefore, the offence which s. 3. sub-s. 4, of the Act of 1970 has created is a non-minor offence.<sup>24</sup>

However, a later Supreme Court took a somewhat different approach in *The State (Rollinson) v. Kelly* where O'Higgins C.J. expressed the Court's view as follows:

I turn now to consider the contention that the offences with which the prosecutor was charged are not minor offences and that the legislation which creates them and which directs summary prosecution is inconsistent with the Constitution. Submissions of this kind have been considered by this Court from time to time. In considering whether an offence is sufficiently serious to take it out of the category of minor offences, it is accepted that regard should be had to the punishment prescribed. This, however, requires a little elaboration. If the punishment prescribed is mandatory, the facts of the particular case and the circumstances under which the offence was committed are irrelevant. The only consideration is whether the mandatory punishment is sufficiently serious or heavy to take the offence out of the category of minor offences. If it is and if the

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<sup>24</sup> [1971] I.R. 217 at 247 (H.C. & S.C.).

legislation creating the offence provides only for summary prosecution, the invalidity or inconsistency with the Constitution is established. If, in such circumstances, the sentence is not mandatory, it may be that the legislation is effective for minor offences as manifested by the particular facts and circumstances. However, it is not necessary to consider this aspect of the matter. Here the offence is an absolute one and the punishment is mandatory.<sup>25</sup>

In the view of Henchy J. (with whom Griffin J. agreed):

In some of the decisions of this Court it has been stated that the primary criterion in ruling whether an offence is minor or major is the penalty authorised for the nominated offence rather than the penalty actually imposed on conviction. With great respect, if I am free to do so, I would disagree. If it were so, many of the offences now tried summarily in the District Court would have to be tried on indictment. To take one example, the offence of larceny carries a penalty of up to five years penal servitude or up to two years imprisonment. In a given case it may be an offence of considerable gravity, whereas in another context it may be only an offence of a mildly reprehensible nature. In other words, the offence will be major or minor depending on the circumstances. For that reason it would be illogical to suggest that all charges of larceny should be tried on indictment merely because the maximum penalty provided by the law indicates that the graver forms of larceny are major offences. The constitutional guarantee of trial by jury is reserved for offences which, because of their general inherent gravity by nature of their particular gravity in the circumstances, qualify for the special mode of trial deemed constitutionally necessary for major offences, namely, trial with a jury.<sup>26</sup>

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<sup>25</sup> [1984] I.R. 248 at 256 (S.C.).

<sup>26</sup> [1984] I.R. 248 at 260 (S.C.).

As to how these different decisions are to be reconciled; it seems to me that in part the apparent contradictions between them arise from the fact that the issues under discussion in the passages quoted above, though related, were not the same. *Melling's* case related to the constitutionality of a statute. In *Conroy's* case the issue was the constitutionality of the Road Traffic Act, 1961. In *Haughey's* case the issue again was the constitutionality of a statutory provision, which allowed a court (albeit the High Court) to impose an unlimited penalty following a summary trial. Clearly in all three cases the fact that a penalty, taking the offence out of the minor category, could be imposed had to lead to finding of unconstitutionality even though the penalty in fact imposed or likely to be imposed was within the range of punishment traditionally accepted as minor. However, where one has an offence capable of being tried either summarily (with penalties appropriate to a minor offence) or on indictment (with greater penalties), a different issue arises, whether the choice should be for summary trial or trial on indictment: and the appropriate test, as is generally provided for in the relevant statute, must necessarily relate to the actual facts of the offence being evaluated. The passages quoted above from *Rollinson's* case refer to the situation where the character of an individual offence requires evaluation rather than the issue which arises where the constitutionality of a statute has to be decided.

If the true test in evaluating the minor quality of the individual case was the maximum penalty which could in principle be imposed, rather than the appropriate penalty for the actual offence which was committed, then by definition the District Court would always have to accept jurisdiction since only penalties appropriate to minor offences can be imposed in the District Court. By the same token, if the maximum penalty was more than twelve months (or whatever penalty is regarded as the maximum permissible for a minor offence) then the District Court could not try the case no matter what penalty the Court thought was appropriate. That way would lie a pointless and circular argument. It is suggested, therefore, that the proper tests for the District Court judge to apply in deciding whether to accept jurisdiction is that set out both in the relevant statutes and in the passages from *Rollinson's* case referred to above.

It may be argued that the *Rollinson* test is open to the objection that it cannot be applied until after the trial of the accused, for prior to conviction and the hearing of evidence relating to sentence there is no way to determine what the appropriate penalty should be. That argument is to some extent answered by the power of the District Court to reverse a decision to accept jurisdiction at any stage before conviction, but it remains a weakness that the Court can no longer do so where facts emerge at the sentencing stage. There therefore remains the risk that the trial may be deemed, by the subsequent judgment of a superior court, to have been unconstitutional. Perhaps the decision in *Feeney v. District Justice Clifford*<sup>27</sup> needs to be revisited.

#### X. MULTIPLE OFFENCES

Again, differing opinions have emanated from the superior courts as to the greater penalties that multiple offences accrue through aggregation. In situations where each of the offences, and each of the penalties, would be safely considered minor should they be considered alone, combined they comprise a set of offences which, due to their added gravity and potential consequences might no longer be considered minor. The authoritative statement in Ireland is that of Hederman J. in *The State (Rollinson) v. Kelly* where he argued that:

The fact that when [several] offences are added together the total amount of the penalties is a considerable amount of money which, if it were the penalty imposed for one of these convictions, would be sufficient to carry it out of the minor category does not, in my view, change the essential character of each of the offences whose combined penalties reach such a sum. Each offence must be regarded as a separate offence. They might well have been tried on different days or even different months. The fact that they were all tried on the same day does not alter their individual character.<sup>28</sup>

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<sup>27</sup> [1989] I.R. 668 (H.C. & S.C.).

<sup>28</sup> [1984] I.R. 248 at 267 (S.C.).



This passage was quoted with approval by Carroll J. in *The State (Wilson) v. Neilan*<sup>29</sup> where she reached the same conclusion. However, the decision of the Supreme Court in *O'Sullivan v. Hartnett*<sup>30</sup> seems to hold that, where a number of offences arise from the same transaction, they cannot be treated in isolation from each other. The distinction between the two cases seems to depend on whether the offences are really separate or whether they are so closely linked as to be in reality part of the same transaction.

## XI. ORDERS CONSEQUENTIAL TO CONVICTION

I turn now to consequential orders of the court, which, while they may not amount to “penalties” in a formal sense, impose a detriment on the offender.<sup>31</sup> What account is to be given to these secondary matters when weighing the penalty? In *Conroy v. Attorney General*<sup>32</sup> (which concerned drunken driving), the Supreme Court held that primary punishment:

... is the type of punishment which is regarded as punishment in the ordinary sense and, where crime is concerned, is either the loss of liberty or the intentional penal deprivation of property whether by means of fine or other direct method of deprivation. Any conviction may result in many other unpleasant and even punitive consequences for the convicted person.<sup>33</sup>

and that disqualification from holding a driving licence, or suspension from a professional or trade association and the like are “unfortunate consequences [which] are too remote in character to be taken into account in weighing the seriousness of an offence by the punishment it may attract”.<sup>34</sup> However, the courts have adopted a

<sup>29</sup> *The State (Wilson) v. Neilan* [1985] I.R. 89 (H.C.).

<sup>30</sup> *O'Sullivan v. Hartnett* [1983] I.L.R.M. 79 (S.C.).

<sup>31</sup> For example several driving offences carry the penalty of imprisonment or a fine; and in addition the offender may also be banned from driving for a prescribed period. Several offences involving licensed establishments carry, not only the usual penalties, but the license may be endorsed and even forfeited. Additionally, persons convicted of fraud and related offences are disqualified from acting as company auditors and may even be prohibited by the court from taking part in the management of any company.

<sup>32</sup> [1965] I.R. 411 (H.C. & S.C.).

<sup>33</sup> [1965] I.R. 411at 441 (H.C. & S.C.).

<sup>34</sup> See *The State (Pheasantry Ltd.) v. Donnelly* [1982] I.L.R.M. 512 (H.C.). Carroll J., in determining that the automatic forfeiture of a liquor license pursuant to section 28 of the Intoxicating Liquor Act, 1927, was not “primary punishment”, applied the reasoning of the Supreme Court in *Conroy v. Attorney General* [1965] I.R. 411 (H.C. & S.C.).

different view in relation to the forfeiture of property consequent on conviction.

## XII. FORFEITURE

In some cases orders may be made, following conviction, for the forfeiture of property. Examples include unlawfully held drugs or firearms, vehicles used in smuggling, intoxicating liquor licences, or fishing gear used to commit fisheries offences. The question then arises whether the forfeiture is part of the penalty. If so, it may take the offence out of the minor category. In *Kostan v. Ireland*<sup>35</sup> McWilliam J. expressed no reservations about concluding that the forfeiture of fishing gear worth £102,040 was a penalty and that the offence fell outside the category of a minor offence when it carried such a severe punishment.<sup>36</sup> This is in stark contrast to the later cases of *The State (Pheasantry Ltd.) v. Donnelly*<sup>37</sup> and *Cartmill v. Ireland*<sup>38</sup> where the High Court decided that the forfeiture of a liquor license, and £120,000 worth of gaming machines (respectively), did not constitute primary punishment, and so did not bring the offence out of the minor category. This despite the integral link between the offences of which the defendants were convicted and the forfeiture suffered, e.g. in the *Pheasantry* case the forfeiture of the license was an automatic consequence of the third summary conviction.

However, it seems that different considerations were contemplated by McWilliam J. in a case where property not lawfully in a defendant's possession was forfeited. In *O'Sullivan v. Hartnett*<sup>39</sup> where the accused was convicted of being in possession of 900 unlawfully captured salmon and where the penalty included forfeiture of the catch, McWilliam J. rejected the contention that the offence was a non-minor one on the grounds that, since the accused was never lawfully in the possession of the fish, forfeiture was not in reality a penalty. However, the Supreme Court held that the offence was a non-minor one because the potential fines that could have been levied amounted to around £10,000, the accused could be

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<sup>35</sup> *Kostan v. Ireland* [1978] I.L.R.M. 12 (H.C.). Here the case concerned an offence under the Fisheries Acts, and in respect of which the penalty imposed was forfeiture of fishing gear having a value of £102,040.

<sup>36</sup> See also the decision of the Supreme Court in *O'Sullivan v. Hartnett* [1983] I.L.R.M. 79 (S.C.).

<sup>37</sup> [1982] I.L.R.M. 512 (H.C.).

<sup>38</sup> *Cartmill v. Ireland* [1987] I.R. 192 (H.C.).

<sup>39</sup> *O'Sullivan v. Hartnett* [1981] I.L.R.M. 469 (H.C.).

deprived of a vast quantity of valuable fish, and moreover, the accused would have received a sentence of imprisonment for up to six months. Insofar as the Supreme Court took the value of the fish into account, the judgment is somewhat unsatisfactory since the court gave no reason for disagreeing with McWilliam J.'s finding that the value of the fish was irrelevant since they were not the defendant's property.

### XIII. THE MORAL QUALITY OF THE ACT

With regard to the moral guilt or the nature of the wrong, apart from decisions that certain offences, such as murder or rape, could never be considered minor no matter what the penalty that was attached to them there is little judicial guidance as to what moral aspects of a criminal matter distinguish it as a minor or a non-minor crime. In *Conroy v. Attorney General* Walsh J. stated that, when dealing with the offence of drunk driving:

The moral aspect of an offence can only be judged or stated in relation to the minimum legal requirements necessary to establish that offence in law as distinct from pronouncing upon the facts of any particular instance of that offence ... [and] the fact that in many or even most cases the circumstances under which the offence is committed are of a character to create a considerable moral guilt is not relevant when those aggravating circumstances are not the necessary ingredients of the offence. But the moral quality of the acts necessary to constitute the offence as defined by law is a relevant consideration.<sup>40</sup>

In *O'Sullivan v. Hartnett* McWilliam J. also discussed the moral quality of the offence of unlawful fishing. Having referred to the passages from Walsh J.'s decision in *Conroy's case* just cited, he said:

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<sup>40</sup> [1965] I.R. 411 at 435-436 (H.C. & S.C.).

Here the offence is committed whether catching one salmon or 900 salmon illegally. The moral guilt in catching one salmon when fishing for trout with trout tackle is negligible, whereas most people would agree that the moral guilt in catching 900 salmon illegally by means of a net or other engine constructed for the purpose of catching large numbers is very considerable. The difference between the present case and *Conroy's Case* is that, in *Conroy's Case* the prescribed punishment was the same no matter what the circumstances of the offence, whereas in the present case the penalty was increased under the Act according to the enormity of the offence.<sup>41</sup>

He went on to quote, with approval,<sup>42</sup> a passage from Kingsmill-Moore J.'s judgment in *Melling v. Ó'Mathghabhna*, where he said:

From a moral point of view the offence of smuggling varies enormously. The importation of a pair of silk stockings for personal use would not be too sternly reprobated even by strict moralists: but large-scale smuggling of valuable articles, organised and conducted as a profitable business, has not only been reprobated in severe terms by judges but would be regarded by most people as involving moral delinquency.<sup>43</sup>

McWilliam J., however, notes that, unfortunately at this juncture: "he did not develop the moral aspect but turned to a consideration of the severity of the penalty".<sup>44</sup>

The moral aspect of offences appears to be hinted at in Henchy J.'s judgment in *O'Sullivan v. Hartnett*. Discussing the offence of simple larceny, where the accused was entitled to trial on indictment for larceny even where the amount stolen, and therefore the likely penalty would have been small, he says the following.

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<sup>41</sup> [1981] I.L.R.M. 469 at 471 (H.C.).

<sup>42</sup> [1981] I.L.R.M. 469 at 471 (H.C.).

<sup>43</sup> [1962] I.R. 1 at 34 (S.C.).

<sup>44</sup> [1981] I.L.R.M. 469 at 472 (H.C.).

It may be necessary in an appropriate case to review the criteria laid down in the decided cases for deciding whether an offence is minor or not. For example, the penalty laid down by the statute can scarcely be held to be a primary consideration in all cases. Thus, while the maximum penalty provided by statute for simple larceny is penal servitude for five years, it could not be held that a charge of stealing one penny must be tried on indictment, or that a charge of stealing £1m could be held to be a minor offence triable summarily.<sup>45</sup>

It is not clear whether, in this passage, Henchy J. is merely saying that the relevant criterion is not necessarily the maximum penalty of 5 years which could in theory be imposed but the actual sentence likely to be imposed, or whether he is seeking to make some point about the moral quality of the offence of stealing, even where the amount stolen is trivial. In any event, it would seem that some consideration relating to the perceived moral quality of the offence may underlie the decision of the Oireachtas to provide a right to jury trial in all cases of larceny or theft, even when the amount stolen is only one penny.

It is important to note that there is not necessarily a direct connection between the moral quality of an act and its consequences. In *The State (Clancy) v. Wine*<sup>46</sup> Finlay P. stated:

... I would accept the principle accepted by Mr. Justice Kenny in *Conroy v. The Attorney General*<sup>47</sup> that, according to the natural moral law, it is the nature and quality of an act and not its consequences which bring it within or without the category of a morally culpable act. Therefore, I reject the general submission that an assault which causes a significant injury is, for that reason, a morally reprehensible act which could not constitute a minor offence. It is quite easy to conceive of examples where an offence of assault contrary to common law

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<sup>45</sup> [1983] I.L.R.M. 79 at 80 (S.C.).

<sup>46</sup> [1980] I.R. 228 at 235 (H.C.).

<sup>47</sup> [1965] I.R. 411 (H.C. & S.C.).

might be substantially excused, from the moral point of view, by reason of provocation or other circumstances, even though the assault caused serious bodily injury because of the particular physical condition of the injured party or the unintended consequences of a blow.

The converse may also be true, that is, that an act with relatively minor consequences may nonetheless not be considered a minor offence by virtue of its moral quality. For example, in *O'Leary v. Cunningham*<sup>48</sup> Griffin J. made the following comment about a decision to treat an offence as minor:

During the argument a discussion arose as to how the offence charged in this case came to be treated as "a minor offence" which was fit to be tried summarily. Here three men, late at night, attacked and robbed the person in charge of a petrol station and took by force whatever money was available to them. It so happened that the amount taken was £47.30 – but that was purely fortuitous. In such circumstances, it escapes me how such an offence could be regarded as a minor offence.

#### XIV. THE PROSECUTOR'S SPECIAL KNOWLEDGE

An aspect of the question of whether an offence is minor is that there may be material available to the prosecutor when taking a view on whether an offence is a minor offence which may not be available to the District Court judge when making that decision on the matter. Obvious examples are previous convictions or occasionally even surrounding mitigating circumstances. In some cases the prosecutor may be aware of material, which is not, however, admissible in court. An example is where only one offence is charged, but where the prosecutor is aware of other offences, which cannot be charged due to delay or the fact that key witnesses are no longer available. In such a case the prosecutor is likely to take a more serious view of the

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<sup>48</sup> *O'Leary v. Cunningham* [1980] I.R. 367 at 373 (S.C.).

case than would otherwise be the case but the reason for this may not be apparent to the judge. However, in all cases, while there may be scope for different views as to whether the offence is a minor one fit to be tried summarily, the District Court judge is the final arbiter of the matter.

#### XV. HEALTH AND SAFETY OFFENCES

Health and safety offences are often among the most difficult to evaluate and can prove controversial. They also serve as an excellent medium through which to examine the relevance of the moral quality of an act and its status as an offence.

Under the Safety, Health and Welfare at Work Act, 1989, a number of offences are deemed to be purely summary offences, with a more limited number of offences being prosecutable either summarily or on indictment. Whether the offence is to be prosecuted summarily or on indictment depends on the particular regulation or duty that has been breached and the seriousness of the breach.

It is important to note that, as with many other offences, and in particular fatal road traffic accidents, there is not necessarily a connection between the moral guilt that attaches to an offence and the consequences of the offence. The comments of Finlay P. in the *State (Clancy) v. Wine*<sup>49</sup> have already been noted. A relatively minor breach of either the health and safety or the road traffic codes can be part of a chain of events leading to a fatality or to serious injury, just as, for that matter, a fatal accident can occur without any culpability on the part of anybody. On the other hand, a gross breach of either code, with potentially catastrophic consequences, may not result in any injury at all. This is not to say that death or serious injury is to be disregarded, merely that such an occurrence should not be the sole determining factor in deciding whether an offence is minor or not, and in some cases it ought not be a factor at all. A further, and related problem, is that the causative link between the breach of the law and the death or injury may be tentative, or absent, or the breach may be merely one of a number of causes. For these reasons

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<sup>49</sup> [1980] I.R. 228 at 235 (H.C.).

it is not helpful to assume in cases where there has been a death or serious injury:

- (a) that there must necessarily have been a criminal offence committed,
- (b) that if there has been, the offence is necessarily a non-minor offence, or
- (c) that in a case of death any offence charged should be treated as though, from the point of view of seriousness or moral culpability, it equates to manslaughter.

It has been the experience of my Office, that some District Court judges are unwilling ever to accept jurisdiction in a case where there has been a fatality. Such unwillingness, while understandable, is not always justified. While a judge rightly approaches any case in which there has been a death or serious injury with particular care, it would not, for the reasons already stated, be correct to assume that no offence committed is capable of being regarded as minor solely by reason of the severe consequences. In other words, the fact that a death has occurred should not, in and of itself, determine that an offence cannot be a minor one.

Lest there be any misunderstanding, however, it should be made clear that where the evidence warrants my doing so, it is the policy of my Office to charge serious offences against employers arising out of fatalities in the workplace. A recent case, brought in relation to construction site deaths, resulted in fines of almost a quarter of a million pounds being imposed on a company. The sub-contractor with the company received an 18 month suspended prison sentence after he pleaded guilty to a charge of reckless endangerment under the Non-Fatal Offences Against the Person Act, 1997. It should be noted that he was not charged with any offences under the Safety, Health and Welfare at Work Act, 1989, but instead was charged with these more serious offences under the 1997 Act.

The offences prescribed by The Safety, Health and Welfare at Work Act, 1989, are set out in section 48 of the Act,<sup>50</sup> and the

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<sup>50</sup> Section 48(1) makes it an offence to contravene or fail to discharge a duty under various sections of the Act, including those relating to the general duties in sections 6-13, and under regulations made pursuant to the Act.



penalties are set out in section 49.<sup>51</sup> The structure of offences and the penalties under the Act are quite complex.

The offence under section 48(1) of contravening or failing to discharge certain duties imposed under the Act is an “each-way” offence. Other offences under section 48 (except 48(6) and (9), which need not concern us here) are summary offences and are only subject to a maximum fine of £1,000 by virtue of section 49(1). These include the offence under section 48(17), which is committed where a person is killed, dies or suffers any personal injury in consequence of contravention of a duty under sections 6 to 11.

The logic of this provision is somewhat less than obvious. Breaches of sections 6 to 11 are potentially indictable offences under section 48(1), whether or not death or personal injury is caused, (albeit subject only to a fine) but the specific offence under section 48(17), in cases where death or personal injury is caused, is summary only. At first glance, this would seem to be a flawed approach to dealing with safety in the workplace, where offences specifically linked to death or personal injury are limited to summary prosecution. What is of note though, is that the Oireachtas apparently contemplated situations where death and serious injury are caused and where the culpability is such that the moral quality of the offences does not remove them from minor category. This, of course, does not prevent a prosecution for the simple but more serious charge under section 48(1) of breach of duty in a case where death or personal injury occurs. It would appear, however, that the Oireachtas contemplated that minor breaches of the duties imposed under sections 6 to 11 leading to death may in some cases be more appropriately dealt with summarily, pursuant to section 48(17), than on indictment.

It also would appear that charges under the 1989 Act, limited as the penalties are, may not be appropriate where there is a seriously culpable breach of the Act leading to death or serious injury. Charges of a different nature may have to be considered in such circumstances. Possible charges include manslaughter or reckless endangerment contrary to section 13 of the Non-Fatal Offences

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<sup>51</sup> The penalties provided for by section 49(1) are a fine of £1,000 or, following conviction on indictment, an unlimited fine.

Against the Person Act, 1997.

In summary, workplace and road accidents may or may not involve moral fault. The consequences of an accident are not necessarily related to the degree of fault involved. An accident may occur in circumstances where the surviving driver or employer is entirely blameless or may involve such a degree of fault on their part as to render them liable to a prosecution for manslaughter. My office has prosecuted cases of very bad driving, where there has been no injury at all, as reckless endangerment. Similarly we are prepared to proceed on indictment in health and safety cases where the risks were obvious and the potential for injury great, even in cases where no injury in fact occurred.

#### XVI. GENERAL CONSENT TO SUMMARY DISPOSAL

By means of a Garda Circular, I have issued directions to An Garda Síochána and to my staff in respect of procedures to be followed in the District Court in respect of a number of offences.<sup>52</sup>

I have issued a general consent to summary disposal in respect of certain offences. These include theft, making off without payment, burglary of an unoccupied dwelling, handling stolen property, forgery and counterfeiting or criminal damage where the value of property does not exceed €7,000. The general consent does not extend to burglary from an occupied dwelling.

However, this general consent is subject to a number of exceptions designed to take account of the fact, discussed elsewhere in this paper, that the value of property stolen or affected is only one element in evaluating the seriousness of an offence. In particular, where the multiplicity of charges or the previous record of the accused or other aggravating circumstances suggests that summary disposal would be inappropriate, or where the sentencing powers of the District Court would be inadequate, the case is to be referred to me for a specific decision on election.

Section 3 of the Non-Fatal Offences Against the Person Act, 1997, is included in the general consent, subject to the exceptions

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<sup>52</sup> HQ Directive No. 220/00, Updated in November 2000 and amended the 30 August 2002.

referred to. In addition, it is provided that where the minor nature of the injuries suffered was fortuitous in the light of the nature of the assault, i.e. the weapon used or the intensity of the assault, the case should be referred to me for a specific direction.

In addition, the Garda Síochána have been instructed to refer any cases to me where there is any doubt whether the general consent applies. They are also encouraged to refer cases where novel legal issues arise, or where the facts alleged did not amount to an offence prior to the passing of the Criminal Justice (Theft and Fraud Offences) Act, 2001. Certain new offences created for the first time in the Act require a specific direction from me before charges are brought.

The directive also gives guidance as to when section 3 or section 2 of the 1997 Act should be charged in the following terms:

#### Assault causing harm

The 1997 Act defines “harm to body or mind and includes pain and unconsciousness”. Most minor assaults cause pain at the very least and could therefore be the subject of a section 3 charge. However, as a rule of thumb it is suggested that assaults which leave no visible bruise or laceration or result in no lasting pain other long term consequences (including psychological damage or trauma) should be dealt with as a section 2 assault. All other assaults causing harm which is easily proved but which is not serious harm should be dealt with under section 3.<sup>53</sup>

Obviously consent under this directive is to be indicated to the court as part of the procedure to be adopted in respect of the given offence, as set out above, and accordingly the District Court judge also has to be satisfied that the offence alleged or proved is a minor offence fit to be tried summarily.

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<sup>53</sup> HQ Directive No. 220/00, Updated in November 2000 and amended the 30 August 2002, p. 2.

## XVII GENERAL COMMENTS AND CONCLUSIONS

The criterion that has been adopted by me, and my Office, in deciding whether to elect for, or consent to, the summary disposal of indictable offences, is whether or not the offence can be regarded as a minor one fit to be tried summarily.

In arriving at a view on this question, as paragraph 12.13 of the General Guidelines for Prosecutors<sup>54</sup> makes clear, “the main factor to be taken into account is whether the sentencing options open to the District Court would be adequate to deal with the alleged conduct complained of having regard to all the circumstances of the case and in particular the seriousness of the offence”.

It is submitted that this view is consistent with the case law. “Moral culpability” is a factor, although the case law does not greatly assist in assessing it. However, since in sentencing a judge will always have regard to the convicted person’s moral culpability, in practice approaching a case by asking what sentence the judge will impose if he or she finds the accused guilty also encompasses this aspect of the case, even though it may seem to put the cart before the horse to ask what the sentence is likely to be before asking what the degree of moral blame is.

If I or the officer dealing with a case form the view that the sentencing options open to the judge in the District Court in the event of a conviction would not be adequate we elect for trial on indictment. If the sentencing options appear adequate, then the likelihood is that I will opt for summary disposal, subject, of course, to taking into account any other serious aspect of the case which would tend to take it out of the minor category. While a decision to opt for trial on indictment necessarily increases the cost to the State, this has never been a factor which my Office would take into account in arriving at a decision where trial on indictment is considered appropriate. Finally, I emphasise yet again that while my decision to elect for trial on indictment cannot be questioned by the judge, my decision to elect for summary disposal is always subject to being overridden if the judge is not persuaded that the offence is a minor one.

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<sup>54</sup> Which I issued in October 2001.