SUMMARY V. INDICTABLE: CHOICES IN THE DISPOSAL OF CRIMINAL CASES

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INTRODUCTION

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

In *Conroy v. Attorney General*[1] Walsh J. stated:

> The Constitution does not give an accused person the right to a trial by jury for a minor offence or a right to trial in a court of summary jurisdiction for a minor offence. The provisions of section 2 in relation to minor offences are permissive. The Oireachtas may determine that minor offences may be tried with a jury or without a jury.

In accordance with s. 4(5) of the Interpretation Act 1923, the expression "court of summary jurisdiction" means the District Court. Jurisdiction to hear and determine criminal cases will depend on the nature of the offence. The statute conferring jurisdiction will prescribe the maximum penalty which may be imposed upon conviction.

The phrase "minor offence" is not defined in the Constitution or by any Statute and is therefore a matter of legal interpretation.

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[1] [1965] I.R. 411 at 434 (S.C.).

The essence of a summary trial in the District Court has been aptly described by Gannon J. in *Clune v. DPP and Clifford*[2] as follows:

> 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 charged and 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 that there should be minimal delay in the disposal of the work load of minor offences.[3]

In effect summary trial means primarily the right to hear and determine a criminal charge in a summary way; that is without a jury.

I. JURISDICTION OF THE DISTRICT COURT

The present District Court came into existence by virtue of s.5 of the Courts (Establishment and Constitution) Act 1961. The District Court is a court of local and limited jurisdiction. It has jurisdiction to try persons charged with offences which can be categorised as follows:

A. Offences triable summarily only

Offences triable summarily only include:

- Road Traffic Acts 1961-2004
  s. 47: Speeding Offences
  s. 52: Careless Driving

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[2] [1981] I.L.R.M. 17 (H.C.).
[3] [1981] I.L.R.M. 17 at 19 (H.C.).

s. 56: No Insurance

- Non-Fatal Offences Against the Person Act 1997
  s. 2: Assault

- Misuse of Drugs Act 1977
  s. 3: Possession of drugs

- Criminal Justice (Public Order) Act 1994
  s. 4: Intoxication
  s. 6: Threatening and Abusive Behaviour
  s. 8: Failure to comply with or obstruction of a Garda

Fines and/or imprisonment terms can vary according to the statute invoked. It is to be noted also that when the Oireachtas provides for summary trial only for an offence a District Court Judge is obliged to treat the offence as a minor offence and to try it summarily by reason of the prohibition on the District Court challenging the constitutionality of a statutory provision. Furthermore a District Judge cannot seek the opinion of the High Court by way of a consultative case stated as to whether an offence triable summarily only is not a minor offence.[4]

B. 'Either-way' offences

So-called 'either-way' offences are indictable offences dealt with summarily subject to the following conditions:

(i) The District Court judge is of the opinion that the facts, alleged or proved, constitute a minor offence fit to be tried summarily.
(ii) The DPP consents to summary disposal.
(iii) The accused, on being informed by the judge of his right to be tried by a judge and jury, does not object to being tried summarily.

Examples of such offences would be:

[4] See *People v. Dougan* [1996] 1 I.R. 544 (H.C.).

- Simple larceny (s. 4 Theft and Fraud Offences Act 2001)
- Handling stolen goods (s. 17 Theft and Fraud Offences Act 2001)
- Offences listed in the 1st Schedule of the Criminal Justice Act 1951.

In some of the older statutes some of the offences were classified as felonies or misdemeanours; however this distinction has been abolished by virtue of s. 3 of the Criminal Law Act 1997.

C. Hybrid offences

Hybrid offences are offences triable summarily or on indictment at the discretion of the DPP, but subject to the right of the District Judge to decline jurisdiction:

The principle characteristics of these type of offences is that the accused has no say as to whether he gets a trial in the District Court or before a Judge and jury. This discretion rests with the DPP subject to the veto of the District Judge.

It is in relation to these types of cases that most difficulty arises in the District Court. This aspect will be referred to later in this paper.

D. Certain offences dealt with on a plea of guilty

S. 13 of the Criminal Procedure Act 1967 (as amended) provides, with certain exceptions, if at any time the District Court ascertains that the person charged with an indictable offence wishes to plead guilty and the Court is satisfied that he understands the nature of the offence and the facts alleged, the Court, with the consent of the DPP, deals with the case summarily, in which case the accused shall be liable to a fine not exceeding €1,269.74 or at the discretion of the Court, to a term of imprisonment not exceeding 12 months or both.

Common examples of this would be:

- Dangerous driving causing death or serious bodily harm.[5] (s. 53 RTA 1961 as amended).
- Hijacking of an M.P.V. which carries a possible penalty of 15 years on indictment. (s. 10 Criminal Law (Jurisdiction) Act 1976).
- Offences regarding casual trading permits. (s. 6 Casual Trading Act 1980).
- Sexual Assault. (s. 2 Criminal Law (Rape) Act 1990)

II. EXERCISE OF JURISDICTION

In the case of summary offences, Order 13 of the District Court Rules 1997 provides that proceedings shall be brought, heard and determined:

(a) In the Court area wherein the offence charged, has been committed or
(b) In the Court area where the accused has been arrested or
(c) In the Court area where the accused resides.

In the case of indictable offences, proceedings may be dealt with in any Court area within the Judge's district.

III. STATISTICS

To give some idea of the volume of cases dealt with summarily in the District Court, the following details extracted from the Court Services Reports over the last 4 years are informative.

	2001	**2002**	**2003**	**2004**
Summary Offences	386,075	363,756	327,677	312,152
Indictable Offences dealt with summarily	50,431	43,100	47,264	45,645
Total	436,506	406,856	374,941	357,797

[5] See however *DPP v. O'Buachalla* [1999] 1 I.L.R. M 362 (H.C.).

It is to be noted that when launching the 2004 Court Services Report, it was acknowledged that while there has been some decrease in the number of criminal matters coming before the District Court, the complexity of cases and the length of trial times has increased.

IV. HYBRID OFFENCES

As already stated, the summary trial of an offence in the District Court is characterised by the speed and informality compared with a trial on indictment. This is subject of course to the overriding obligation on every District Judge to ensure that an accused's constitutional rights to a fair hearing are observed at all times.[6]

In comparing summary trial and trial on indictment, Professor Dermot Walsh opined:

> Although the formal rules governing trial procedure may not differ radically, it must be said that the perception and experience of summary trial are quite different. The former, almost invariably, is much quicker and conducted in a less formal atmosphere than the latter. The predominance of counsel in their wigs and gowns and, of course, the presence of the jury, in the Circuit Court and the Central Criminal Court give proceedings on indictment an air of formality that is noticeably missing from the District Court. This is compounded by the fact that the charges being tried on indictment are likely to be much more serious than those dealt with summarily. The fact that there is normally a jury in trials on indictment also means that questions of admissibility of evidence are often dealt with on a *voir dire*. The summary trial is spared the inevitable delay which this causes as evidential matters can be dealt with

[6] See, e.g., *Nevin v. Judge Crowley* [2001] 1 I.R. 113 (S.C.).

> by the judge as they arise. Since the judge is the tribunal of fact in the District Court, he or she will decide whether the accused is guilty or not guilty of the charges. This decision is normally handed down on completion of the case for both sides.[7]

Again as already stated it is this category of offences, the hybrid offences, which present a District Judge with most difficulty. Examples of the types of offences that are covered would be as follows:

- Non-fatal Offences Against the Person Act 1997
  s. 3: Assault causing harm
  s. 5: Threat to Kill
  s. 6: Syringe Attack
  s. 9: Coercion
  s. 13: Reckless endangerment

- Firearms and Offensive Weapons Act 1990
  s. 8: Reckless discharge of a firearm
  s. 9(4): Possession of a flick knife or an adapted article
  s. 9(5): Possession of an article intended to cause injury

- Criminal Justice (Public Order) Act 1994
  s. 14: Riot
  s. 15: Violent Disorder
  s. 16: Affray
  s. 17: Blackmail
  s. 19: Assault or obstruction of a peace officer

- Road Traffic Act 1961
  s. 112: Unlawful taking of an M.P.V.

- Misuse of Drugs Act 1977
  s. 15: Sale and or Supply

[7] Dermot Walsh, *Criminal Procedure* (Dublin: Roundhall, 2002) p. 673.

In determining whether or not an offence is minor, the two cases of *Melling v. Mathghamhna*[8] and *Conroy v. Attorney General*[9] decided that the following matters should be considered:

(a) The severity of the punishment prescribed for the offence
(b) The moral quality of the act constituting the offence.

In the guidelines issued by the DPP's office he stated as follows:

> In deciding whether to elect for or consent to summary disposal, whether on a plea of guilty or otherwise, 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. In this regard the Director has in relation to certain types of offence given to the members of an Garda Síochána and other prosecuting agencies a general consent or election to have such offences dealt with in the District Court without the necessity of first contacting his Office or submitting a completed investigation file. Examples of cases falling into this category are burglary in an unoccupied dwelling house or possession of controlled drugs for personal use. Even in those types of cases however, the Garda Síochána should seek directions where the particular facts of the case, such as the multiplicity of such offences or the previous record of an accused or other aggravating circumstances might suggest that the sentencing

[8] [1962] I.R. 1 (S.C.).
[9] [1965] I.R. 411 (S.C.).

> option available in the District Court would be inadequate.[10]

By way of contrast, The Association of District Judges, in their submission to the working group on the Courts, stated as follows:

> …the DPP is independent in his role and the rationale for assigning cases to either the District Court or the Circuit Court is not always clear, nor is the DPP obliged to give such reasons to the court or the accused…However it is the view of many Judges of the District Court that the DPP has increasingly decided to proceed with cases in the District Court, cases which ten or fifteen years ago would never have remained in the District Court, but would have automatically have gone before a Judge and Jury in the Circuit Court. This pattern is particularly so in cases where the accused has no right of election and the DPP has the discretion to proceed either in a summary matter or on indictment. Some District Judges regard this trend as a dumbing down of the charges for a quick disposal in the District Court.[11]

The working group in it own report pointed out that in respect of hybrid offences, it was curious that the accused, whose liberty might be at stake, has no say on the issue of trial venue. If the DPP considers the matter is fit for summary disposal, and the Judge accepts this, then the matter is dealt with in the District Court. If the Judge does not accept that it is a minor offence, then the matter proceeds on indictment. Conversely, if the DPP directs trial on indictment, the District Judge and the accused have no say at all.

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[10] *Statement of General Guidelines for Prosecutions*, Director of Public Prosecutors, Dublin, 2001, para. 12.13.

[11] Para 297, *Report of the Working Group on the Jurisdiction of the Courts* [2003].

Another interesting observation of the working group was that in their opinion if a Judge of the District is faced with the question of deciding whether an offence fit to be tried summarily, then if having heard arguments from both sides, that it might be more appropriate for a different Judge to hear the substantive case.[12] This may be a possibility in an area such as the Dublin Metropolitan District Court, where there are at least 14 District Judges sitting on any one day. It is however not a realistic option on a day-to-day basis in the outlying 23 District Court areas presided over by single Judges.

By way of practical illustration consider the following example: an accused is charged with a section 3 assault under the Non Fatal Offences against the Person Act 1997. The injury suffered by the victim required 45 stitches and left him with a permanent and visible scar to his face. Having had sight of the medical report and having heard the submission of both prosecution and the defence it was quite clear that the injury was very serious but the evidence appeared weak due in large part to the amount of alcohol consumed. After somewhat of a struggle with the prosecution persuading them that it could not be considered a minor offence, reluctantly they served a book of evidence and the matter proceeded on indictment.

More recently, an accused was before the District Court on a section 2 assault. The injured party gave evidence of being hit on the jaw with a plank of wood. He suffered a broken jaw, lost five teeth, was hospitalized for two weeks and had a wired jaw for two months. When the prosecution were asked if there was a medical report available, the response was, one could not be obtained, hence the decision was taken to proceed on the lesser charge. The defence took issue and argued that because of the absence of any medical evidence the case should proceed. The file was referred back to the DPP.[13]

V. PUBLIC ORDER OFFENCES:

[12] Para 303, *Report of the Working Group on the Jurisdiction of the Courts* [2003].
[13] See *State (McEvitt) v. Delap* [1981] I.R. 125 (S.C.).

Offences under the Criminal Justice (Public Order) Act 1994 are extremely common in any District Court and probably make up about one half of the work load. In the main, an accused may find himself charged under the provisions of s.4 (intoxication in a public place), s.6 (threatening, abusive or insulting behaviour in a public place) or s.8 (failure to comply with the direction of a member of the Garda Síochána). All these offences are triable summarily and are punishable by fine only or by fine and/or imprisonment.

Section 19, which deals with assault or obstruction of a peace officer, is in certain circumstances triable on indictment. Under the provision of s.19 (2), the matter can only proceed in the District Court, if the accused elects for summary disposal.

In reality, it is very rare that a section 19 charge ever proceeds on indictment and it is quite common that the charge is withdrawn or a plea is entered to a lesser charge.

A recent illustration of same was a case where eleven defendants were arrested following a very serious public order incident. Some of the accused were before the Court by way of charge sheet, charged with the usual matters under sections 4, 6 and 8. They were also charged with a breach of s.16 (affray) and s.19 (assault and obstruction of a peace officer). On the strength of the section 16 and section 19 charges, bail was opposed. The State, in their objection to bail, were very keen to point out the penalty on conviction on indictment on either of these offences was five years.

The other accused were dealt with by way of summons, and as a result it took a considerable length of time to co-ordinate all the accused together. The DPP, having considered the file, directed that he was satisfied that the entire matter was suitable for summary disposal. When an enquiry was made about the affray charges, the Court was advised that all these were being withdrawn! This was despite the fact that the existence of the affray charges was the central plank in the objection to bail.

The net effect was that the case had to be dealt with in the District Court as those charged with the section 19 charge consented to having their cases dealt with summarily.

Even if jurisdiction were declined, this would have the knock-on effect of splitting the case again, as only some of the

accused were charged with a breach of section 19. The others were charged with summary matters only. The indictable case would have to be adjourned for preparation of a book of evidence, and return for trial to the Circuit Court. This in effect meant that it could be up to another eighteen months before their cases were dealt with. As for the other accused, on the minor matters only, their cases would to have been adjourned behind the Circuit Court matters, which would in itself be very unsatisfactory. One gets the impression, given the way this case developed, that a conscious decision was made by the prosecution that this case was going to be tried in the District Court only, if at all.

Interestingly, in the course of researching articles for this paper, the author came across an article published in the Irish Law Times, which quoted from the 1993 Dáil debates on the Criminal Justice (Public Order) Bill.[14] The author quoted from a Deputy as follows:

> …that [District Judges] *are not the most appropriate persons to deal with such cases.* [15]

In particular in relation to section 8 Failure to comply with a Garda's directions and section 19, Obstruction of a Garda, the Deputy stated;

> …there is a natural tendency…not to disbelieve a policeman in his account of an altercation with a civilian. (…) After many years on the bench dealing with local Gardaí on a day-to-day basis, the judges are incapable of being sufficiently objective to conduct a trial where people they know, with whom they have regular dealings, are swearing the details of a violent incident with an ordinary member of the public.[16]

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[14] See Gearóid Carey, "Summary Trials and Judicial Criticism – An Educational Response". [1999] 18 *Irish Law Times* 278.
[15] Vol. 433 Dáil Debates (2 July 1993) 1047.
[16] Vol. 433 Dáil Debates (2 July 1993) 1046.

In fairness the Deputy felt that all persons charged with section 19, should be entitled to a trial by judge and jury.

VI. CHARGE SHEET VERSUS SUMMONS:

Further difficulties are encountered in the methodology employed by the prosecution. Again take the example of a section 3 Assault charge.

If the accused is dealt with by way of charge sheet, he is usually brought before the District Court in a matter of days. The prosecution normally look for a remand for a period of time for the purposes of submitting a file to the DPP for directions. This also enables them to get a medical report. It can take anywhere from 2 - 4 months before the DPP's directions are available. If the DPP is satisfied that the matter can be dealt with in the District Court, and the District Judge is satisfied that it is a minor offence, a statements order is made, so that the defence has the chance to assess the evidence against the accused.[17]

In a lot of these cases the issue of CCTV can be a feature and it is possible to flag this at an early stage where the accused is before the court on a charge sheet. If, however, the case is proceeded with by way of summons, it can be a considerable number of months before the case gets to the District Court. This may be the first time that an accused and his legal representative get to meet or more often than not it is a legal aid matter. Again a statements order is usually made and a direction given by the Court, if the Judge is advised that there is CCTV, that a copy of same should be handed over. A hearing date is then set if the judge is satisfied to deal with the case summarily.

It sometimes happens however that there is a problem with the CCTV evidence. This makes matters all the more complex as the focus of the case is then shifted from the actual incident itself onto the whereabouts of the CCTV footage. Effectively an enquiry has to be held and evidence has to be heard as to (i) whether a CCTV tape existed at all; (ii) what happened to it; (iii) if the area was covered by CCTV at the relevant time; (iv) what

[17] Often referred to as a Gary Doyle order; See *DPP v Doyle* [1994] 2 I.R. 286 (S.C.).

steps were taken by the prosecution to seek out and preserve the CCTV; (v) whether the CCTV had any probative value; (vi) what steps, if any, were taken by the defence in obtaining the CCTV.

The whole area of CCTV is a very complex area and this is clearly evidenced by the number of judicial reviews coming before the High Court, the Supreme Court and the Court of Criminal Appeal.[18] It is clear from these judgments that there is a clear divergence of approach amongst the Supreme Court. However the common thread appears to be that each case must be examined on its own facts.

Bear in mind, that in judicial review proceedings the higher courts have the facility and time to consider the sole issue as to whether a trial should proceed, given presence or absence of the CCTV. In the District Court the judge is often faced with this issue and also dealing with the substantive issue at the same time.

VII. THE LAW REFORM COMMISSION

In 2003 the Law Reform Commission published its report on penalties for minor offences.[19] In the course of that report the issue of sentencing was thoroughly discussed and dissected. The general consensus was that any sentence imposed for an offence dealt with on a summary basis, in excess of six months should not be regarded as a minor offence. The Commission was of the view that any sentence in excess of six months should only be imposed on an accused, in the appropriate circumstances, upon conviction following a jury trial.

While not making a firm recommendation for legislative change, the Law Reform Commission were of the opinion that District Judges should voluntarily limit themselves to sentences

[18] See for example the following cases: *Murphy v. DPP* [1989] I.L.R.M. 71; *Dunne v. DPP* [2002] 2 I.L.R.M. 241 (S.C.); *Braddish v. DPP* [2001] 3 I.R. 127 (S.C.); *Bowes and McGrath v. DPP,* Supreme Court, unreported, 6 Feb, 2003; *McKeown v. DPP*, Supreme Court, unreported, 9 April, 2003; *Scully v. DPP,* High Court, unreported, 21 November, 2003; *O'Callaghan v. The Judges of the Dublin Metropolitan District Court*; [2004] 91, I.C.L.M.D. 13, *DPP v. Christo,* Court of Criminal Appeal, unreported, 31 January, 2005.

[19] Para 2.32, *Report on Penalties for Minor Offences* (LRC 69 – 2003).

of six months or less for minor offences. A minority felt that there should be legislative change.

This, if it were to become a reality, would have a profound effect on the whole system of criminal justice. For a start it would call for a complete reappraisal by the DPP as to how he considers an offence should be regarded as a minor offence. For their part, District Judges would also have to readjust their views as to what they consider to be minor matters fit to be tried summarily in the light of available sentences.

There would also be a need for wholesale legislative change. One of the immediate knock-on effects would be the enormous increase in the number of cases being sent forward for trial at the behest of the DPP or because jurisdiction had been declined by the District Judge.

It is interesting to note that the Working Group have taken the more pragmatic course and suggested no change.

CONCLUSIONS

There is no doubt that the facility to deal with serious matters, which could be dealt with by trial on indictment, in the District Court is a very useful facility. Indeed it is fair to say that if the facility were not available, life in the Circuit Court would be a very different proposition.

There is no doubt that trial in the District Court is both expeditious and efficient and does not suffer from the difficulties that often arise during the course of a jury trial.

There is no doubt that there has been a huge increase in the type of cases dealt with in the District Court and that the landscape has changed dramatically since the Courts (Establishment & Constitution) Act 1961. Not a year goes by without the introduction of new legislation creating some new type of offence. The demands of society also change on an ongoing basis.

The DPP has gone to great lengths to set out clearly the mind-set in deciding whether to give his consent to having indictable offences dealt with by way of summary trial. However the fault lies within the system. He is not obliged to explain the rationale behind his decision in any particular case and this can

often lead to wrong assumptions being made. A judge has no power to enquire on what basis he has arrived at the decision. Equally it can be said, if he decided to proceed on indictment, the Judge and the accused still has no right to enquire as to how the decision was arrived at.

It is quite clear for instance, that there has been a vast increase in the number of section 3 assaults coming before the District Court in the last number of years. As to how the DPP has come to the decision that the injury constitutes a minor offence has led on occasions to a certain amount of puzzlement amongst some District Court Judges. Perhaps if there was some explanation offered, it might explain matters to the satisfaction of all concerned.

There is also a feeling from time to time that the reason for the decision to leave the matter in the District Court is because it can provide a cheaper option in dealing with complicated cases. By way of illustration, the example given already of the case involving 11 defendants, it is the one incident, and if it had gone on indictment there would have been several counsel involved, the possibility of separate trials, the possibility of the same witnesses having to appear time after time to give the same evidence, the possibility of applications for judicial review if separate trials are not granted.

It is clear then the DPP has stated emphatically that financial considerations are never a factor in considering whether an indictable matter is fit for summary disposal. His reasoning in this case may have been sound, but the lack of explanation has led to certain confusion. The fact that the original serious charges were withdrawn without any explanation only adds to the confusion.

By and large, despite its shortcomings it is fair to say that the current system works and this is evidenced by the substantial number of indictable matters dealt with on an annual basis. It is fair to say also that the complexity of cases coming before the District Court has increased and time for dealing with such cases has also extended. It is not possible for a single judge in a District Court area to deal with every case of this nature, and also be expected to deal with all other matters as well. Perhaps one solution would be to appoint extra judges. Indeed this course of

action might be the appropriate way to allay some of the reservations expressed by the Working Group! Only time will tell.